DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-682
Title: Bill Schuette, Attorney General of Michigan, Petitioner
v.
Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), et al.
Docketed: December 4, 2012
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (08-1387, 08-1534, 08-1389, 09-1111)
Decision Date: November 15, 2012
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 28 2012	Petition for a writ of certiorari filed. (Response due January 3, 2013)
Dec 5 2012	Order extending time to file response to petition to and including February 4, 2013, for all respondents.
Dec 19 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Dec 27 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for certain respondents Chase Cantrell, et al.
Dec 28 2012	Waiver of right of respondent Eric Russell to respond filed.
Jan 2 2013	Motion for leave to file amicus brief filed by David Boyle.
Jan 3 2013	Brief amici curiae of Arizona, et al. filed.
Jan 3 2013	Brief amicus curiae of Michigan Republican Party filed.
Jan 3 2013	Brief amici curiae of California Association of Scholars, and Center for Constitutional Jurisprudence filed.
Jan 3 2013	Brief amici curiae of XIV Foundation, et al. filed.
Jan 3 2013	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Jan 3 2013	Brief amici curiae of Former Attorneys of the Department of Justice Civil Rights Division filed.
Jan 8 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Eric Russell.
Jan 10 2013	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for respondents Coalition to Defend Affirmative Action, et al.
Jan 11 2013	Supplemental Appendix of Bill Schuette, Attorney General of Michigan filed.
Jan 14 2013	Waiver of right of respondents Regents of the University of Michigan, et al. to respond filed.

Jan 14 2013	Consent to the filing of amicus curiae briefs, in suport of either party or of neither party, received from counsel for the respondents University of Michigan, and Michigan State University.
Jan 17 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Wayne State University.
Feb 4 2013	Brief of respondents Chase Cantrell, et al. in opposition filed.
Feb 4 2013	Brief of respondents Coalition to Defend Affirmative Action, et al. in opposition filed.
Feb 12 2013	Reply of petitioner Bill Schuette, Attorney General of Michigan filed.
Feb 20 2013	DISTRIBUTED for Conference of March 15, 2013.
Mar 18 2013	DISTRIBUTED for Conference of March 22, 2013.
Mar 25 2013	Motion for leave to file amicus brief filed by David Boyle GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Mar 25 2013	Petition GRANTED. Justice Kagan took no part in the consideration or decision of this petition.
Apr 22 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 24, 2013.
Apr 22 2013	The time to file respondents' briefs on the merits is extended to and including August 23, 2013.
Apr 25 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Coalition to Defend Affirmative Action, et al.
Apr 25 2013	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for respondent Eric Russell.
May 3 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
May 9 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party received from counsel for Chase Cantrell respondents.
May 16 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents University of Michigan, and Michigan State University.
Jun 10 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Wayne State University.
Jun 24 2013	Brief of respondent Eric Russell in support of petitioner filed.
Jun 24 2013	Brief amici curiae of Professor Carl Cohen, et al. filed.
Jun 24 2013	Joint appendix filed. (Statement of costs filed)
Jun 24 2013	Brief of petitioner Bill Schuette, Attorney General of Michigan filed.
Jul 1 2013	Brief amici curiae of American Civil Rights Union, et al. filed.
Jul 1 2013	Brief amici curiae of Judicial Watch, Inc., et al. filed.
Jul 1 2013	Brief amicus curiae of Judicial Education Project filed.
Jul 1 2013	Brief amici curiae of California Association of Scholars, et al. filed.
Jul 1 2013	Brief amicus curiae of Richard Sander filed.
Jul 1 2013	Brief amici curiae of XIV Foundation and supporters of civil rights initiatives in Michigan, et al. filed.
Jul 1 2013	Brief amicus curiae of Mountain States Legal Foundation filed.
Jul 1 2013	Brief amici curiae of Pacific Legal Foundation, et al. filed.

Jul 1 2013	Brief amici curiae of Former Attorneys of the Department of Justice Civil Rights Division filed.
Jul 1 2013	Brief amicus curiae of Asian American Legal Foundation filed.
Jul 1 2013	Brief amici curiae of Arizona, et al. filed.
Jul 1 2013	Brief amicus curiae of David Boyle filed.
Jul 22 2013	CIRCULATION.
Jul 23 2013	SET FOR ARGUMENT on Tuesday October 15, 2013.
Aug 8 2013	Record from U.S.C.A. for 6th Circuit is electronic .
Aug 21 2013	The time to file the brief of only the respondents Coalition to Defend Affirmative Action, et al. is extended to and including August 30, 2013. NOTE: Amiucs curiae briefs in support of any and all respondents are due within 7 days of the August 23, 2013, filing deadline for all other respondents briefs.
Aug 21 2013	Brief of respondents Regents of the University of Michigan, et al. filed. (Distributed)
Aug 22 2013	Brief of respondents Board of Governors of Wayne State University and Irvin Reid filed. (Distributed)
Aug 23 2013	Brief of respondents Chase Cantrell, et al. filed. (Distributed)
Aug 27 2013	Brief amici curiae of Committee of Law Professors filed. (Distributed)
Aug 28 2013	Brief amicus curiae of San Francisco Bay Area Rapid Transit District filed. (Distributed)
Aug 30 2013	Brief amici curiae of Political Scientists Gary Segura, et al. filed. (Distributed)
Aug 30 2013	Brief amici curiae of Paul Finkelman and 75 Other Historians and Scholars filed. (Distributed)
Aug 30 2013	Brief amici curiae of American Council on Education and 48 Other Higher Education Organizations filed. (Distributed)
Aug 30 2013	Brief amici curiae of California Social Science Researchers and Admissions Experts filed. (Distributed)
Aug 30 2013	Brief amici curiae of Political Scientists Donald R. Kinder, et al. filed. (Distributed)
Aug 30 2013	Brief amicus curiae of Civil Rights Project/Proyecto Derechos Civiles filed. (Distributed)
Aug 30 2013	Brief of respondents Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), et al. filed. (Distributed)
Aug 30 2013	Brief amici curiae of States of California, et al. filed. (Distributed)
Aug 30 2013	Brief amicus curiae of Society of American Law Teachers filed. (Distributed)
Aug 30 2013	Brief amicus curiae of Anti-Defamation League filed. (Distributed)
Aug 30 2013	Brief amici curiae of San Francisco Unified School District, et al. filed. (Distributed)
Aug 30 2013	Brief amici curiae of Constitutional and Local Government Law Scholars Michelle Wilde Anderson, et al. filed. (Distributed)
Aug 30 2013	Brief amici curiae of National Education Association, et al. filed. (Distributed)
Aug 30 2013	Brief amici curiae of National School Boards Association, et al. filed. (Distributed)
Aug 30 2013	Brief amicus curiae of Michigan Civil Rights Commission filed. (Distributed)
Aug 30 2013	Brief amici curiae of The Leadership Conference on Civil and Human Rights

	and The Leadership Conference Education Fund, et al. filed. (Distributed)
Aug 30 2013	Brief amici curiae of President and Chancellors of the University of California filed. (Distributed)
Sep 6 2013	Motion for divided argument filed by respondents Chase Cantrell, et al.
Sep 6 2013	Motion for divided argument and enlargement of time for oral argument filed by respondents Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), et al.
Sep 23 2013	Reply of petitioner Bill Schuette, Attorney General of Michigan filed. (Distributed)
Oct 1 2013	Motions of respondents for divided argument are granted, and the time is to be divided as follows: 15 minutes for respondents Chase Cantrell, et al. and 15 minutes for respondents Coalition to Defend Affirmative Action, et al. Justice Kagan took no part in the consideration or decision of these motions.
Oct 1 2013	Record from U.S.D.C. for Eastern District of Michigan is electronic.
Oct 15 2013	Argued. For petitioner: John J. Bursch, Solicitor General, Lansing, Mich. For Cantrell respondents: Mark D. Rosenbaum, Los Angeles, Cal. For Coalition to Defend Affirmative Action respondents: Shanta Driver, Detroit, Mich.
Oct 17 2013	Proposal of petitioner to lodge copies of University of Michigan statistics.
Oct 21 2013	Response of Cantrell respondents in opposition to lodging proposal.
Oct 21 2013	Response of Wayne State University, et al. in opposition to lodging proposal.
Oct 21 2013	Response of University of Michigan, et al. in opposition to lodging proposal.
Oct 22 2013	Response of Coalition to Defend Affirmative Action, et al. in opposition to lodging proposal.

PETITION FOR WRIT OF CERTIORARI

12 682

No. _____

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION,
INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR
EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

PARTIES TO THE PROCEEDING

Petitioner is Bill Schuette, Michigan Attorney General. Respondents are Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), United for Equality and Affirmative Action Legal Defense Fund, Rainbow Push Coalition, Calvin Jevon Cochran, Lashelle Benjamin, Beautie Mitchell, Denesha Richey, Stasia Brown, Michael Gibson, Christopher Sutton, Laquay Johnson, Turqoise Wiseking, Brandon Flannigan, Josie Human, Issamar Camacho, Kahleif Henry, Shanae Tatum, Maricruz Lopez, Alejandra Cruz, Adarene Hoag, Candice Young Tristan Taylor, Williams Frazier, Jerell Erves, Matthew Griffith, Lacrissa Beverly, D'Shawnm Featherstone, Danielle Nelson, Julius Carter, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Dante Dixon, Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 386, AFSCME Local 1642, AFSCME Local 2920, and the Defend Affirmative Action Party. Additional plaintiffs below are Chase Cantrell, Karen Nestor, Paula Uche, Joshua Kay, Sheldon Johnson, Matthew Countryman, Brenda Foster, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, Cathy Alfaro, Michael Weisberg, Casey Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, Edward Kim, M.C.C. II, Carolyn Carter, and Matthew Robinson. Additional defendants below are the Regents of the University of Michigan, the Board of Trustees of Michigan State University, the Board of Governors of Wayne State University, Mary Sue Coleman, Irvin D. Reid, Lou Anna K. Simon, and Eric Russell.

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OPINIONS BELOW

The en banc opinion of the Sixth Circuit court of appeals, App. 1a–100a, is reported at __ F.3d __, 2012 WL 3326596. The panel opinion of the Sixth Circuit court of appeals, App. 101a–183a, is reported at 652 F.3d 607. The opinion of the district court, App. 197a–223a, is reported at 719 F. Supp. 2d 795.

JURISDICTION

The en banc judgment of the Sixth Circuit was entered on November 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 1, § 26(1) of Michigan's 1963 Constitution provides, in relevant part:

> The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

INTRODUCTION

In the November 2006 election, 58% of Michigan's voters adopted a proposal that amended Michigan's Constitution to prohibit discrimination, or the granting of preferential treatment, in public education, government contracting, and public employment based on race, sex, ethnicity, or national origin. Mich. Const. art. I, § 26. Now, in an 8-7 decision, the en banc Sixth Circuit has struck down § 26 as to public education, holding that it violates the Equal Protection Clause for a state constitutional provision to require equal treatment.

It is exceedingly odd to say that a statute which bars a state from "discriminat[ing] . . . on the basis of race" violates the Equal Protection Clause because it discriminates on the basis of race and sex. Yet that is precisely what the en banc majority held here, in conflict with the Ninth Circuit's decision in *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692 (9th Cir. 1997), and the California Supreme Court's decision in *Coral Construction, Inc.* v. *San Francisco*, 235 P.3d 947 (Cal. 2010). Michigan recognizes that affirmative action has long been controversial; some state entities use it for some programs, some do not. But until now, no court has ever held that, apart from remedying specific past discrimination, a government *must* engage in affirmative action. This Court has said just the opposite, holding that all racial classification by government entities are presumptively invalid and subject to the strictest scrutiny. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

In the face of that exacting standard, the Sixth Circuit held that § 26 violates the Equal Protection Clause by denying minorities a "fair political process." In reaching that conclusion, the court of appeals did not say that the process through which Michigan voters adopted the measure was unfair. Rather, what is "unfair" (according to the en banc majority) is that supporters of affirmative action can no longer obtain affirmative-action programs on a university-by-university basis. That conclusion cannot possibly be right.

The question presented is of immense importance. In *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), this Court suggested a 25-year window allowing race-conscious admissions programs in higher education, and it invited states to experiment with race-neutral alternatives for achieving classroom diversity. Eight states have accepted that invitation: Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington. But more than two million Michigan voters have now been disenfranchised of their choice to eliminate considerations of race in education by a one-vote-margin en banc decision that misapplies this Court's equal-protection precedents in several ways. Michigan respectfully requests that the Court grant the petition and consider whether a state's decision to require equal treatment in higher-education admissions violates equal protection.

STATEMENT OF THE CASE

A. Article 1, § 26

In 2003, this Court invalidated the University of Michigan's race-based admissions preferences in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), but upheld the University of Michigan Law School's race-based admissions preferences in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). In response, the Michigan Civil Rights Initiative began a state ballot process to amend the Michigan Constitution and prohibit all race- and sex-based discrimination, including preferences, in public employment, education, and contracting. On November 7, 2006, Michigan voters adopted § 26 by a 58% to 42% margin.

B. Proceedings below

Almost immediately following the election, a group of plaintiffs led by Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) filed suit in the United States District Court for the Eastern District of Michigan, challenging § 26's constitutionality as to public education. The District Court entered a stipulated order postponing § 26's implementation until after the next university-admissions cycle. App. 255a–259a. The Sixth Circuit, however, granted an emergency motion for a stay pending appeal, concluding there was a "strong likelihood" the preliminary injunction would be reversed on the merits. App. 235a–251a. The Sixth Circuit rejected plaintiffs' political-restructuring claim and followed the Ninth Circuit's *Wilson* decision. App. 247a.

On remand, the District Court upheld § 26 on the merits, App. 197a–223a. But a different Sixth Circuit panel reversed, in a 2-1 vote, App. 101a–183a, and the Sixth Circuit then granted en banc review, App. 265a.

The en banc Sixth Circuit invalidated § 26 in an 8-7 decision.[1] Relying on the political-restructuring theory of equal protection outlined in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), the majority held that a political enactment deprives minority groups of equal protection when the enactment "(1) has a racial focus, targeting a policy or program that 'inures primarily to the benefit of the minority'; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process." App. 21a–22a (citations omitted).

The majority concluded that § 26 has a racial focus, because the targeted program—race- and sex-based admissions preferences—"at bottom inures primarily to the benefit of the minority, and is designed for that purpose." App. 22a. In addition, said the majority, § 26 reordered the political process. App. 26a–38a. Whereas a Michigan citizen may "use any number of avenues to change the admissions policies on an issue outside" § 26's scope, a future amendment to the Michigan constitution is the only available recourse for a citizen seeking the adoption of race- or sex-based preferences. App. 35a–36a. Thus, while admissions committees,

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[1] Judges McKeague and Kethledge recused themselves because they sit on university boards. Senior Judge Daughtrey sat en banc because she had also participated in the panel decision.

university presidents and provosts, and university boards are all "free to repeal" race- or sex-based preference programs "without any infringement on the right to equal protection in the political process," Michigan voters cannot do the same by state constitutional amendment. App. 44a.

Chief Judge Batchelder and Judges Boggs, Cook, Gibbons, Griffin, Rogers, and Sutton dissented. App. 51a–100a. Judge Gibbons wrote the primary dissent and began by noting the jurisprudential significance of the majority's conclusion: "Although it has convinced a majority of this court, plaintiffs' argument must be understood for the marked departure it represents—for the first time, the presumptively invalid policy of racial and gender preference has been judicially entrenched as beyond the political process." App. 56a–57a (Gibbons, J., dissenting). Judge Gibbons then explained how neither *Hunter* nor *Seattle School District* supported the majority's result. App. 58a–64a (Gibbons, J., dissenting). "*Hunter* considered only the political-process implications of repealing a law that required *equal* treatment[;] it cannot be read broadly to apply to the repeal of a law requiring *preferential* treatment." App. 59a (Gibbons, J., dissenting). And § 26 "is quite unlike the narrow anti-busing measure struck down in *Seattle*; it represents 'a sea change in state policy, of a kind not present in *Seattle* or any other 'political structure' case." App. 60a (Gibbons, J. dissenting).

Judge Gibbons also concluded that § 26 did not reallocate political power. App. 66a–78a (Gibbons, J., dissenting). "[T]he people of Michigan have not restructured the state's lawmaking process in the manner

prohibited by *Hunter* and *Seattle*." App. 67a (Gibbons, J., dissenting). Rather, "their vote removed admissions policy from the hands of decisionmakers [university admissions personnel] who were unelected and unaccountable to either minority or majority interests and placed it squarely in an electoral process in which all voters, both minority and majority, have a vote." *Ibid.*

Other dissenting judges raised complementary points. Judges Boggs and Sutton both observed that race- and sex-conscious programs will sometimes have the effect of discriminating against members of groups that such programs purportedly protect by effectively creating ceilings and not just floors for minorities. App. 54a–55a (Boggs, J., dissenting); App. 92a (Sutton, J., dissenting). Judge Sutton also noted that, because § 26's prohibition includes sex-based discrimination, it actually affects groups "that together account for a *majority* of Michigan's population." App. 92a (Sutton, J., dissenting) (emphasis added). He recognized that "a State does not deny equal treatment by mandating it." App. 82a. Judge Griffin urged this Court to "consign this misguided doctrine to the annals of judicial history." App. 95a (Griffin, J., dissenting). And Judge Rogers observed that "[u]nder the majority opinion, it is hard to see how any level of state government that has a subordinate level pass can pass a no-race-preference regulation, ordinance, or law. . . . Whatever *Hunter* and *Seattle* hold, the Supreme Court cannot have intended such a ban." App. 79a–80a (Rogers, J., dissenting).

The State of Michigan now seeks this Court's review.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for at least three reasons.

First, the decision below created a circuit split. In *Wilson*, the en banc Ninth Circuit vacated an order enjoining Proposition 209, a proposal leading to a nearly identical constitutional amendment in California. In so ruling, the Ninth Circuit rejected the very argument the Sixth Circuit accepted here, holding that it "would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." 122 F.3d at 709 (quoting *Crawford* v. *Bd. of Ed. of the City of Los Angeles*, 458 U.S. 527, 535 (1982)). The Ninth Circuit recently affirmed its commitment to *Wilson* at the merits stage of a challenge brought by the same plaintiff here. *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by any Means Necessary* v. *Brown*, 674 F.3d 1128 (9th Cir. 2012); accord *Coral Construction, Inc.* v. *San Francisco*, 235 P.3d 947, 960 (Cal. 2010) (California Supreme Court upheld Proposition 209 on the merits). It is intolerable that California voters can pass laws guaranteeing the protection of equal treatment in higher education but Michigan voters cannot.

Second, the Sixth Circuit invalidated a state constitutional provision that 58% of Michigan voters ratified. That result turns the democratic process on its head. App. 80a–81a (Sutton, J., dissenting). The en banc majority concludes that it is impossible for the State of Michigan to do anything about a university faculty committee's decision to adopt race-based

admissions criteria. But it is "surely the case that the Fourteenth Amendment does not dictate the level of government at which a State must enact a statewide ban on race discrimination." App. 86a (Sutton, J., dissenting). Nothing in the federal Constitution "suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications—race and sex—must be readily available at the lowest level of government." *Wilson*, 122 F.3d at 708.

Third, the Sixth Circuit's decision is wrong and conflicts with *Grutter* v. *Bollinger*, 539 U.S. 306. *Grutter*, called for a "logical end point" to "all governmental use of race" and referred approvingly to race-neutral alternative approaches to university admissions. 539 U.S. at 342. Yet the Sixth Circuit held Michigan's race-neutral proposal unconstitutional under the political-restructuring theory of the Equal Protection Clause. The political-restructuring theory applies only when a political enactment targets a policy that "inures primarily to the benefit of the minority." App. 22a. This requirement makes it a poor fit for Michigan's amendment under *Grutter*, which held that it is unconstitutional for a university to pursue a race-based admissions program that inures primarily to the benefit of minorities. 539 U.S. at 323–24.

Hunter and *Seattle School District* are distinguishable. There is a fundamental difference between overturning policies that prohibit discrimination and ending policies that require preferences. Insofar as these decisions shield preferences or unequal treatment, they should be overruled.

The en banc majority's reliance on this Court's decision in *Seattle School District* is unfounded for additional reasons. In response to Justice Powell's dissent, the majority opinion in *Seattle School* specifically disclaimed that its reasoning would have the result of barring a state law like § 26. And unlike the busing involved in *Seattle School*, § 26 eliminated preferences that purportedly "advantage" a majority of the population. Moreover, § 26 did this in an area—university admissions—that is not even part of the political process. This Court should grant the petition and reverse.

I. The Sixth Circuit's en banc decision conflicts with the Ninth Circuit and the California Supreme Court.

In holding § 26 unconstitutional, the en banc majority admittedly broke with precedent in other jurisdictions. App. 40a n.8 ("we decline to follow *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692 (9th Cir. 1997)"). The first of those decisions was the Ninth Circuit's opinion in *Wilson*, which rejected the exact political-restructuring claim presented here.

In *Wilson*, the Ninth Circuit held that California's Proposition 209 did not reallocate political authority in a discriminatory manner. When a state prohibits race- and sex-based discrimination and preferences, it "does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity." 122 F.3d at 707. Rather, the state has "promulgated a law that addresses in neutral-fashion race-related and gender-related matters." *Id.*

The Ninth Circuit further recognized that Proposition 209 did not burden any individual's right to equal treatment. The plaintiffs challenged Proposition 209 "not as an impediment to protection against unequal treatment[,] but as an impediment to *receiving preferential treatment*." *Id.* at 708 (emphasis added). "While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms." *Id.*

The *Wilson* case was decided at the preliminary-injunction stage. But the Ninth Circuit recognizes the decision is binding on the merits question as well. In a recent case filed by the same plaintiff here, the court held that *Wilson* precluded an equal-protection challenge to Proposition 209 on the merits. *Coalition to Defend Affirmative Action* v. *Brown*, 674 F.3d 1128, 1131 (9th Cir. 2012); accord *id.* at 1136 (Tashima, J., concurring in part) ("although I continue to believe now, as I did when the case was decided, that *Wilson II* was wrongly decided," "Plaintiffs' challenge to Proposition 209 is foreclosed.").

The en banc majority's decision separately conflicts with the 2010 decision of the California Supreme Court in *Coral Construction*. Although that case involved public contracting, rather than university admissions, the result was the same as in *Wilson*: "Nothing in *Hunter* or *Seattle* supports extending the political structure doctrine to protect race- or gender-based preferences that equal protection does not require." 235 P.3d at 959. "Instead of burdening the right to equal treatment, [Proposition 209] directly serves the principle that 'all governmental use of race must have a logical end point.'" *Id.* at 960.

The end result of these conflicting decisions is that citizens in California and six other states can demand equal treatment in their state constitutions while Michigan voters cannot. And allowing the split to percolate is untenable; delay either disenfranchises millions of Michigan citizens, or it violates the equal-protection rights of millions of citizens in seven other states. This Court's intervention is necessary to remedy this anomaly.

II. The public importance of the question presented counsels in favor of review.

The Sixth Circuit's 8-7 decision to invalidate § 26 implicates three principles of jurisprudential significance: equal opportunity in education, the importance of citizen initiatives (especially amendments to state constitutions), and the structuring of political processes.

First, education is the bedrock of equal opportunity. That is why the "diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity." *Grutter*, 539 U.S. at 331; accord *id.* at 331–32 (it is a "paramount government objective" to ensure equal access to schools) (quoting Br. for United States as *Amicus Curiae* 13). Public universities in seven other states have successfully pursued the goal of equal access without resorting to racial preferences, and both federal and state courts have upheld that policy choice;

there is no reason why Michigan voters should be denied the same privilege.[2]

Second, this case involves a constitutional amendment enacted by public initiative. As the Ninth Circuit explained, if a court "relies on an erroneous legal premise [to strike down a public initiative], the decision operates to thwart the will of the people in the most literal sense." *Wilson*, 122 F.3d at 699. What the people of the state "willed to do is frustrated on the basis of principles that the people of the United States neither ordained nor established." *Id.* "A system which permits [the courts] to block with the stroke of a pen what [millions of] residents voted to enact as law tests the integrity of our constitutional democracy." *Id.*

The same is true here. Using an equal-protection theory rejected by every federal and state court to consider it, the Sixth Circuit en banc majority struck down a constitutional amendment approved by more than two Michigan million voters. Within our federalist system, it is no small matter for a federal court to strike down a properly enacted state constitutional provision. See *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism . . . allows States to respond,

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[2] This Court's recent grant of the petition in *Fisher* v. *University of Texas at Austin*, No. 11-345, does not diminish the need for review here. In briefing and again at oral argument, the parties in *Fisher* expressly disclaimed the position that the Court should overturn *Grutter* and eliminate all race-based preferences in public-university admissions. Rather, the parties in *Fisher* have framed that case as one involving *Grutter*'s application to the University of Texas at Austin's admissions program. This case presents the different issue whether a state has the right to accept this Court's invitation in *Grutter* to bring an end to all race-based preferences.

through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."). That is why the United States Constitution generally does not meddle in the way that states choose to structure their government. See *Sailors* v. *Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 109 (1967). Given the special respect that should be accorded to state constitutional provisions, certiorari is appropriate to review their annulment.

Third, the en banc majority's political-restructuring theory has the effect of elevating local authority over state authority. There is no question that Michigan's public universities could themselves do away with race-based admissions criteria in favor of race-neutral criteria; the majority says as much. App. 44a. But once universities adopt race-based criteria, the en banc majority says it is impossible for the State of Michigan to do anything about it. It is "surely the case that the Fourteenth Amendment does not dictate the level of government at which a State must enact a statewide ban on race discrimination." App. 86a (Sutton, J., dissenting). This case presents an ideal vehicle for the Court to revisit the political-restructuring theory of equal protection and its application to state constitutional amendments.

III. The Sixth Circuit en banc majority erred in holding § 26 unconstitutional.

A. *Hunter* and *Seattle School District* do not prohibit a state from requiring equal treatment in university admissions.

This Court has applied the political-restructuring doctrine only to laws or policies that condone discrimination against minorities. E.g., *Hunter*; *Seattle School District*. The Court has never applied the doctrine to laws that *prohibit* discrimination by precluding unconstitutional, preferential treatment. There are two fundamental reasons why. (Although the reasons apply to any government action, they will be discussed in the context of university admissions.)

First, if a college or university's student population is the product of historic discrimination, then a minority applicant already has an equal-protection right to remedial relief. In fact, § 26 even preserves existing state remedies for discrimination. Mich. Const. art. I, § 26(6) ("The remedies available for violations of this section shall be the same . . . as are otherwise available for violations of Michigan anti-discrimination law."). Thus, there is no need for a political-restructuring-based right to preferential treatment to remedy historic discrimination.

Second, except where necessary to remedy the effects from historic discrimination, making race-based admissions decisions is presumptively unconstitutional. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). A *Grutter* plan is supposed to be an optional, transient response to

anemic academic diversity, available only until there are feasible race-neutral alternatives that would achieve diversity interests "about as well." *Grutter*, 539 U.S. at 339 (quoting *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)). Plaintiffs do not allege any lingering effects from historic discrimination at Michigan's public universities. And they conceded below that race-neutral programs like the top "ten percent" plan in place at the University of Texas actually result in *improved* minority achievement. (Coalition Sixth Cir. Supp. Br 11.) Accordingly, there is no basis to strike down § 26 under a political-restructuring theory.

Viewed through the *Grutter* analytical prism, it is easy to see why § 26 is fundamentally different from the laws this Court struck down in *Hunter* and *Seattle School District*. In *Hunter*, an Akron, Ohio realtor refused to show homes to an African-American buyer, and the buyer sued the city to compel enforcement of its fair-housing ordinance, 393 U.S. at 387. But the city's voters had repealed the ordinance and amended the city charter to require a referendum before adopting any new fair-housing ordinance. *Id.* In other words, the *Hunter* referendum expressly barred laws that themselves prohibited discrimination.

Similarly, in *Seattle School District*, a Washington public-school board adopted a busing plan to end *de facto* racial segregation. 458 U.S. at 461. The state's voters then amended the state's constitution to allow school busing for most any reason, but to prohibit busing if used to desegregate the schools. *Id.*, at 461-64. The *Seattle School District* referendum barred the use of busing, but only if used to combat the effects of

historic discrimination. So the challenged enactments in both *Hunter* and *Seattle School District* made it more difficult for minorities to lobby for *protection* from discrimination; here, § 26 makes it more difficult to lobby for racial *preferences*. These are very different concepts. *Wilson*, 122 F.3d at 708 ("It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights under political obstructions to preferential treatment.").

If there is any doubt that *Seattle School District* should not apply here, it is answered by an exchange between the majority and dissenting opinions in that case. Justice Powell warned in dissent that the *Seattle* majority opinion could be read to mean "that, 'if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies.'" 458 U.S. at 499 n.14 (Powell, J., dissenting). The *Seattle* majority rejected Justice Powell's concern as "'entirely unrelated to this case' because [admissions policies] had 'nothing to do with the ability of minorities to participate in the process of self-government.'" *Id.* at 480 n.23.

In sum, *Seattle School District* Court expressly disclaimed that the political-restructuring theory would apply in this context. And *Grutter* recognizes that racial-preference programs deviate from the equal treatment mandated by the Equal Protection Clause, 539 U.S. at 342 ("[R]ace-conscious admission programs . . . [are a] deviation from the norm of equal treatment

of all racial and ethnic groups."). Given those premises, it makes little sense to extend the political-restructuring doctrine to the circumstances presented here, where Michigan voters adopted an equal-treatment requirement.

Grutter provides two additional reasons for rejecting the en banc majority's analysis. To begin, and as noted above, a key component of *Grutter*'s holding was that a narrowly tailored, race-conscious admissions policy "must be limited in time." 539 U.S. at 342. After all, a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Id.* at 341–42 (quoting *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984)).

In discussing this concept, the Court noted that universities in California, Florida, and Washington State, "where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches." *Id.* at 342. Accordingly, the Court encouraged universities in other states to draw on the most promising aspects of such "race-neutral alternatives." *Id.* The Court emphasized its expectation that "25 years from now [2028], the use of racial preferences will no longer be necessary to further the [diversity-in-education] interest approved today." *Id.* at 343. Yet the Sixth Circuit en banc majority has now held unconstitutional precisely what this Court described as salutary. What was merely permitted is now required.

Equally problematic, the en banc majority's reasoning cannot be reconciled with *Grutter*'s core holding. The *Grutter* majority made clear that a

narrowly tailored, race-conscious admissions policy could be implemented for one and only one compelling interest: "obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. This is not a policy that benefits primarily a minority group; it is a policy that benefits *all* students. *Id.* at 330–33 (describing the "substantial" educational benefits to all students brought about by a diverse student body). And that fact is fatal to plaintiffs' political-restructuring claim. As even the en banc majority acknowledges, to prove a *prima facie* political-restructuring claim, a plaintiff must show that an enactment targets "a policy or program that 'inures *primarily to the benefit of the minority*.'" App. 22a (emphasis added). Accord *Seattle Sch. Dist.*, 458 U.S. at 472.

So if § 26 targets a policy that benefits primarily a minority group, the policy violates *Grutter*, making it unnecessary to reach the political-restructuring issue. Conversely, if § 26 targets a policy that benefits all students, plaintiffs cannot assert a political-restructuring claim. Either way, § 26 is constitutional.

B. If the en banc majority is right that *Seattle School District* shields policies requiring unequal treatment, it should be overruled.

To the extent that this Court reads *Seattle School District* to prohibit state constitutional amendments like those in California, Florida, Michigan, and other states, that case should be overruled. The people and the states should have the option of eliminating the use of race-based preferences in higher education.

When *Seattle School District* was decided in 1982, this Court sanctioned busing as a necessary means to eliminate racially segregated schools. *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971). But more recently, in *Parents Involved*, this Court held that such busing programs employ presumptively unconstitutional racial classifications and are subject to strict scrutiny. 551 U.S. at 720. "[T]he circumstance that racially conscious admissions policies are subject to the most exacting judicial scrutiny and limited in time—legal realities that the *Seattle* Court neither confronted nor factored into its decision—counsels heavily against applying the political restructuring doctrine to" Michigan's enactment of § 26. App. 63a (Gibbons, J., dissenting).

As post-*Seattle School District* decisions have recognized, it is a gross exaggeration for school officials to assume that a student thinks a certain way, represents certain views, or behaves in a stereotypical fashion due solely to skin color, race, or ethnic heritage. The people may reasonably believe that an individual is not a "representative" of his or her racial or ethnic group and embrace the principle that we should all be judged by the content of our character rather than the color of our skin. "[O]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000).

Michigan citizens may—consistent with the Equal Protection Clause—no longer wish to measure every person to categorize them into a neat assignment of

race or ethnicity. The time for these kinds of categorizations is passing. In sum, the rationale that motivated the outcome in *Seattle School District* does not apply to a state's attempt to prohibit discrimination in university admissions.

Finally, the en banc majority's position has no logical end point. *All* laws effect political restructuring. Consider the Fair Housing Act of 1968. When Congress adopted that law, it prohibited the State of Michigan from adopting its own laws requiring that African-American home buyers be given preferential treatment. Unlike other discrete and insular groups, African-Americans were unable to lobby for preferential treatment at the state or local level unless they first succeeded in repealing the federal law. The same would be true if it was the state that enacted the fair-housing legislation—the state law would need to be repealed before local legislation creating preferential treatment could be sought. In other words, if the en banc majority is correct, then virtually all laws of general applicability prohibiting discrimination are unconstitutional.

C. Section 26 does not disadvantage groups that account for a minority of Michigan's population, if it can be determined who is "disadvantaged" at all.

Both *Hunter* and *Seattle* involved initiatives targeted solely at minorities: those attempting to buy houses, and those benefitting from a racially integrated public-school system, respectively. But § 26 does not burden minority interests and minority interests alone. Because § 26's prohibits discrimination that is sex- as

well as race-based, "[t]o the extent it disadvantages anyone, it disadvantages groups that together account for a majority of Michigan's population." App. 92a (Sutton, J., dissenting). It "make[s] little sense to apply 'political structure' equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate." *Ibid.* (quoting *Wilson*, 122 F.3d at 704).

Compounding the problem, it is not even clear which discrete group § 26 "helps and hurts, or when each group will be affected." App. 92a (Sutton, J., dissenting). Given the reality that "female high school students increasingly outperform their male classmates," it is entirely possible that a sex-based preference program would favor men, rather than women. *Ibid.* And the overrepresentation of certain minority groups (such as Asian and Jewish students) within higher education institutions necessarily means that preference programs have the perverse effect of benefitting some minority groups at the expense of others. App. 54a–55a (Boggs, J., dissenting).[3]

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[3] This problem is exacerbated by admissions politics. In *Grutter*, Justice Kennedy shed a light on this problem with a shocking admission from the University of Michigan's former Law School Dean. "He testified that faculty members were 'breathtakingly cynical' in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans." 539 U.S. at 393 (Kennedy, J., dissenting).

In sum, it is not at all clear that preference programs accomplish the goals their supporters claim. And to the extent § 26 can be characterized as "disadvantaging" certain defined groups, those groups constitute a majority of Michigan's population.

D. Admissions policies are not part of the political process.

A final problem with the en banc majority's analysis is that "the academic processes at work in state university admissions in Michigan are not 'political processes' in the manner contemplated in *Seattle*." App. 72a (Gibbons, J., dissenting). "Unlike the Seattle School Board and the Akron City Council, the various Michigan university admissions committees and faculty members are unelected." *Ibid.* And although the en banc majority is correct that Michigan universities are generally governed by either an elected or Governor-appointed board of trustees, App. 28a, the majority skirts the record evidence that admissions decisions are made by unaccountable faculty members.

Judge Gibbons summarized that record as follows:

> As they currently stand, the faculty admission committees are islands unto themselves, vested with the full authority to set admissions policy for their respective university programs. . . . [T]he testimony of the law school dean demonstrates that, whatever the formal legal structure, the faculty committees set admissions policies without significant review by the boards—thus insulating them from the political pressures the boards themselves face. [App. 72a (Gibbons, J., dissenting).]

To the extent it is even possible to hold such committees "politically accountable," the political gymnastics involved are far worse than simply achieving a 51% vote in a statewide referendum. As Judge Sutton explained, a Michigan citizen seeking to implement § 26's policy through the "political process" would have to elect a majority of Michigan, Michigan State, and Wayne State's eight-member boards of trustees (which would take an eight-year process spanning at least three statewide election cycles) willing to abolish preference programs, then hope that the trustees would stand up to the faculty committees which believe that they alone have exclusive control over the admissions process. App. 86a–87a (Sutton, J., dissenting). And anyone wishing to change admissions policies at Michigan's other public universities "faces an equally elaborate process." *Ibid.* (citations omitted).

It makes no sense, in terms of state political process, to say that the only way a state can eliminate affirmative action in its universities is to go through an eight-year election process involving the election of at least 15 different board members (just with respect to Michigan's three largest state universities), who might not even control the faculty committees that make admissions policies and who are elected based on many competing educational issues. Nothing in the Constitution suggests that Michigan is constitutionally barred from pursuing a simpler means of addressing the issue. And it is a remarkable intrusion on state processes to say that a state may end affirmative action in higher education only through such a Byzantine route.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 08-1387/1534

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs-Appellants (08-1387)/Cross- Appellees,
v.
REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY; MARY SUE COLEMAN; IRVIN D. REID; LOU ANNA K. SIMON,
Defendants-Appellees/ Cross-Appellants (08- 1534),
BILL SCHUETTE, Michigan Attorney General,
Intervenor-Defendant-Appellee.

Nos. 08-1387/1389 /1534; 09-1111

No. 08-1389

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs,
CHASE CANTRELL, et al.,
Plaintiffs-Appellees,
v.
REGENTS OF THE UNIVERSITY OF MICHIGAN. BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY; MARY SUE COLEMAN; IRVIN D. REID; LOU ANNA K. SIMON,
Defendants,
ERIC RUSSELL,
Intervenor-Defendant-Appellant,
JENNIFER GRATZ,
Proposed Intervenor-Appellant.

No. 09-1111

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs,
CHASE CANTRELL, et al.,
Plaintiffs-Appellants,

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY; MARY SUE COLEMAN; IRVIN D. REID; LOU ANNA K. SIMON,

Defendants,

BILL SCHUETTE, Michigan Attorney General,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 06-15024—David M. Lawson, District Judge.

Argued: March 7, 2012
Decided and Filed: November 15, 2012

Before: BATCHELDER, Chief Judge; MARTIN, BOGGS, DAUGHTREY, MOORE, COLE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, GRIFFIN, WHITE, STRANCH, and DONALD, Circuit Judges.*

COLE, J., delivered the opinion of court in which MARTIN, DAUGHTREY, MOORE, CLAY, WHITE, STRANCH, and DONALD, JJ., joined; and BATCHELDER, C. J., and GIBBONS, ROGERS, SUTTON, COOK, and GRIFFIN, JJ., joined in Part

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* The Honorable David W. McKeague and the Honorable Raymond M. Kethledge, Circuit Judges, did not participate in deciding this case.

II.B and C. BOGGS, J. (pp. 37–40), delivered a separate dissenting opinion, in which BATCHELDER, C. J., joined. GIBBONS (pp. 41–57), delivered a separate dissenting opinion, in which BATCHELDER, C. J., and ROGERS, SUTTON, and COOK, JJ., joined, and GRIFFIN, J., joined with the exception of Part III. ROGERS (pg. 58) delivered a separate dissenting opinion, in which COOK, J., joined. SUTTON (pp. 59–69), delivered a separate dissenting opinion in which BATCHELDER, C. J., and BOGGS and COOK, JJ., joined. GRIFFIN, J. (pp. 70–74), delivered a separate dissenting opinion.

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OPINION

COLE, Circuit Judge. A student seeking to have her family's alumni connections considered in her application to one of Michigan's esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state's constitution. The same cannot be said for a black student seeking the adoption of a constitutionally permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the Michigan Constitution—a lengthy, expensive, and arduous process—to repeal the consequences of Proposal 2. The existence of such a comparative structural burden undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change. We therefore REVERSE the judgment of the district court on this issue and find Proposal 2 unconstitutional. We AFFIRM the denial of the University Defendants' motion to be dismissed as parties, and we AFFIRM the

grant of the Cantrell Plaintiffs' motion for summary judgment as to Russell.

I.

A. Factual Background

These appeals are before us as an epilogue to the long-running battle over the use of race-conscious admissions policies at Michigan's public colleges and universities. The saga began during the 1960s and 1970s, when racial minorities first successfully lobbied for the adoption of such policies. They remained largely in place until challenges in the late 1990s culminated in the Supreme Court's decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), which held that "universities cannot establish quotas for members of certain racial groups" or treat their applications uniquely. *Grutter*, 539 U.S. at 334. But the Court allowed universities to continue "consider[ing] race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration," along with other relevant factors, *id.*, a holding we do not today address or upset.

Following these decisions, Ward Connerly, a former University of California Regent who had championed a similar proposition in California, and Jennifer Gratz, the lead plaintiff in *Gratz*, mobilized to place on Michigan's November 2006 statewide ballot a proposal to amend the Michigan Constitution "to prohibit all sex- and race-based preferences in public education, public employment, and public contracting . . . ." *Operation King's Dream v. Connerly*, 501 F.3d 584, 586 (6th Cir. 2007). The initiative—officially designated Proposal 06-2 but commonly known as "Proposal 2"—

sought "to amend the State Constitution to ban affirmative action programs." *See* Notice of State Proposals for November 7, 2006 General Election, http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf, at 5 (last visited May 22, 2012). Though Proposal 2 "found its way on the ballot through methods that undermine[d] the integrity and fairness of our democratic processes," *Operation King's Dream*, 501 F.3d at 591, once there, it garnered enough support among Michigan voters to pass by a margin of 58% to 42%.

Proposal 2 amended the Michigan Constitution to include the following provisions, entitled "Affirmative action," in Article I:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college,

> university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

Mich. Const. art. I, § 26. Proposal 2 took effect in December 2006 and wrought two significant changes to the admissions policies at Michigan's public colleges and universities. First, it eliminated the consideration of "race, sex, color, ethnicity, or national origin" in individualized admissions decisions, modifying policies in place for nearly a half-century. No other admissions criterion—for example, grades, athletic ability, geographic diversity, or family alumni connections—suffered the same fate. Second, Proposal 2 entrenched this prohibition at the state constitutional level, thus preventing public colleges and universities or their boards from revisiting this issue—and only this issue—without repeal or modification of article I, section 26 of the Michigan Constitution.

B. Procedural History

The litigation surrounding Proposal 2 has been lengthy and complex. On November 8, 2006, the day after Proposal 2 passed, a collection of interest groups and individuals, including the Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary ("Coalition Plaintiffs"), filed suit in the United States District Court for the Eastern District of Michigan. They named as defendants then-Governor Jennifer Granholm, the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State

University ("University Defendants"), and alleged that the provisions of Proposal 2 affecting public colleges and universities violated the United States Constitution and federal statutory law. The Coalition Plaintiffs limited their request for relief to Proposal 2 as it applies to public education, and did not challenge its constitutionality as it applies to public employment or public contracting. About a month later, the Michigan Attorney General ("Attorney General") filed a motion to intervene as a defendant, which the district court granted. Shortly thereafter, Eric Russell, then an applicant to the University of Michigan Law School, and Toward A Fair Michigan ("TAFM"), a non-profit corporation formed to ensure implementation of Proposal 2, also filed a motion to intervene in the litigation.

On December 19, 2006, a group of faculty members and prospective and current students at the University of Michigan ("Cantrell Plaintiffs") filed a separate but similar suit in the United States District Court for the Eastern District of Michigan against Granholm. This lawsuit also limited its challenge to Proposal 2 as it applies to public education.

That same day, the district court issued what was, in effect, a preliminary injunction, postponing the application of Proposal 2 to the universities' admissions and financial-aid policies until July 1, 2007, which was the conclusion of the 2006-2007 admissions and financial-aid cycle. The district court's order stemmed from a stipulation among the University Defendants, Coalition Plaintiffs, Granholm, and the Attorney General consenting to the injunction. *Coal. to Defend Affirmative Action v. Granholm* (*Coal.*

I), No. 06-15024, 2006 WL 3953321 (E.D. Mich. Dec. 19, 2006). While awaiting approval as intervenors, Russell and TAFM opposed the Attorney General's stipulation and sought a stay of the injunction from the district court. When two days passed without a ruling on their motions, Russell and TAFM filed with us an "Emergency Motion for a Stay Pending Appeal," which we granted. *Coal. to Defend Affirmative Action v. Granholm* (*Coal. II*), 473 F.3d 237, 253 (6th Cir. 2006), *application to vacate stay denied*, 549 U.S. 1176 (2007). Meanwhile, we approved the district court's decision to allow only Russell to intervene in the Proposal 2 litigation. *Coal. to Defend Affirmative Action v. Granholm* (*Coal. III*), 501 F.3d 775 (6th Cir. 2007).

On October 5, 2007, the Cantrell Plaintiffs filed a motion for summary judgment as to Russell, arguing that he should be dismissed from the litigation because he no longer represented an interest distinct from that of the Attorney General. On October 17, 2007, the University Defendants filed a motion to dismiss on the ground that they were not necessary parties to the litigation. On November 30, 2007, the Attorney General filed a motion to dismiss for lack of standing or, in the alternative, a motion for summary judgment on the merits as to all Plaintiffs. Russell and the Cantrell Plaintiffs likewise filed motions for summary judgment the same day.

On March 18, 2008, the district court issued two orders addressing these motions. First, the court denied the University Defendants' request to be dismissed as parties and the Cantrell Plaintiffs' motion for summary judgment. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.* (*Coal. IV*), 539 F.

Supp. 2d 924, 941, 950-58 (E.D. Mich. 2008). The court also granted the Attorney General's motion for summary judgment, rejecting the Plaintiffs' arguments that Proposal 2 violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 960. Second, the court granted the Cantrell Plaintiffs' motion for summary judgment, dismissing Russell as an intervenor. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.* (*Coal. V*), 539 F. Supp. 2d 960 (E.D. Mich. 2008). The Cantrell Plaintiffs subsequently moved the court to reconsider the first order, but the court denied the motion. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.* (*Coal. VI*), 592 F. Supp. 2d 948 (E.D. Mich. 2008).

The Plaintiffs, the University Defendants, and Russell appealed these orders to this Court. A panel of this Court reversed the district court's grant of summary judgment in favor of the Attorney General, concluding that the portions of Proposal 2 that affect Michigan's public institutions of higher education impermissibly alter the political process in violation of the Equal Protection Clause. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.* (*Coal. VII*), 652 F.3d 607, 631-32 (6th Cir. 2011). This Court also affirmed the district court's dismissal of Russell and the denial of the University Defendants' motion to be dismissed. The Attorney General then sought en banc review, which we granted, vacating the panel opinion.

II.

A. Constitutionality of Proposal 2

The Equal Protection Clause provides that "[n]o state shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV. The Plaintiffs argue that Proposal 2 violates this provision in two distinct ways. Both Plaintiff groups argue that Proposal 2 violates the Equal Protection Clause by impermissibly restructuring the political process along racial lines (the "political process" argument), and the Coalition Plaintiffs additionally argue that Proposal 2 violates the Equal Protection Clause by impermissibly classifying individuals on the basis of race (the "traditional" argument).

In addressing the Plaintiffs' arguments, we are neither required nor inclined to weigh in on the constitutional status or relative merits of race-conscious admissions policies as such. This case does not present us with a second bite at *Gratz* and *Grutter*—despite the best efforts of the dissenters to take one anyway. This case instead presents us with a challenge to the constitutionality of a state amendment that alters the process by which supporters of permissible race-conscious admissions policies may seek to enact those policies. In other words, the sole issue before us is whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even *consider* using race as a factor in admissions decisions—something they are specifically allowed to do under *Grutter*.

We review de novo a district court's grant of summary judgment and denial of a motion for reconsideration of that decision. *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009); *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1047 (6th Cir. 2001). Whether a state's constitution violates the federal constitution is a question of law, which we also review de novo. *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431 (6th Cir. 2008).

1. Equal Protection Within the Political Process

The Equal Protection Clause "guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute . . . that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982). But the Equal Protection Clause reaches even further, prohibiting "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* (internal quotation marks and citation omitted). "[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter v. Erickson*, 393 U.S. 385, 393 (1969).

The Supreme Court's statements in *Hunter* and *Seattle* emphasize that equal protection of the laws is more than a guarantee of equal treatment under

existing law. It is also a guarantee that minority groups may meaningfully participate in the process of creating these laws and the majority may not manipulate the channels of change so as to place unique burdens on issues of importance to them. In effect, the political-process doctrine hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course. Ensuring the fairness of the political process is particularly important because an electoral minority is disadvantaged by definition in its attempts to pass legislation; this is especially true of "discrete and insular minorities," who face unique additional hurdles. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Ensuring a fair political process is nowhere more important than in education. Education is the bedrock of equal opportunity and "the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Safeguarding the guarantee "that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." *Grutter*, 539 U.S. at 331-32 (internal quotation marks omitted). Moreover, universities "represent the training ground for a large number of our Nation's leaders. . . . [T]o cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332 (citation omitted). Therefore, in the high-stakes context of education, we must apply the political-process doctrine with the utmost rigor.

Of course, the Constitution does not protect minorities from political defeat: Politics necessarily produces winners and losers. We must therefore have some way to differentiate between the constitutional and the impermissible. And *Hunter* and *Seattle* provide just that. They set the benchmark for when the majority has not only won, but has rigged the game to reproduce its success indefinitely.

a. Hunter v. Erickson

In *Hunter*, the citizens of Akron, Ohio, overturned a fair housing ordinance enacted by the City Council. 393 U.S. at 386. But the citizens did more than merely repeal the ordinance; they amended the city charter through a referendum to require the approval of an electoral majority before any ordinance regulating real estate "on the basis of race, color, religion, national origin or ancestry"—past or future—could take effect. *Id.* at 387, 390 n.6. In other words, only ordinances based on those factors required a city-wide majority; ordinances based on any other factor required just a vote by the City Council:

> [T]he amendment changed the requirements for the adoption of one type of local legislation: to enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the City Council *and* of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the City Council.

Seattle, 458 U.S. at 468 (describing *Hunter*). The referendum halted operation of the existing fair housing ordinance, and more importantly for our purposes, erected a barrier to any similar ordinance in the future. *Hunter*, 393 U.S. at 389-90.

The Supreme Court found that the disparity between the process for enacting a future fair housing ordinance and the process for enacting any other housing ordinance "place[d] special burden[s] on racial minorities within the governmental process" by making it "substantially more difficult to secure enactment" of legislation that would be to their benefit. *Id.* at 390-91. While the enactment "treat[ed] Negro and white, Jew and gentile in an identical manner," the Court found that "the reality is that the law's impact falls on the minority." *Id.* at 391. That the law had been enacted via a popular referendum did not save it from working "a real, substantial, and invidious denial of the equal protection of the laws." *Id.* at 393.

b. Washington v. Seattle School District No. 1

In *Seattle*, a case that mirrors the one before us, the Supreme Court applied *Hunter* to strike down a state statute, also enacted via a referendum, that prohibited racially integrative busing. *Seattle*, 458 U.S. at 463. Prior to the referendum, Seattle School District No. 1 ("District") had implemented a school desegregation plan that made extensive use of mandatory reassignments. *Id.* at 460-61. The District was under no obligation to adopt this plan: following *Brown*, school boards had been "charged with the affirmative duty to take whatever steps might be necessary" to integrate schools that were unconstitutionally segregated because of racial

discrimination, *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437 (1968), but there had been no finding that the *de facto* segregation in Seattle's schools was the product of discrimination. Nonetheless, the school board implemented the plan to accelerate its existing program of voluntary busing, which some constituencies saw as insufficiently alleviating racial imbalances.[1] *Seattle*, 458 U.S. at 460.

In response, Seattle residents drafted a statewide measure—known as Initiative 350—providing in relevant part that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . ." *Id.* at 462 (alteration in original) (quoting Wash. Rev. Code § 28A.26.010 (1981)). Though the initiative was framed as a general ban on mandatory busing, its myriad exceptions made its real effect the elimination of school reassignments for racial purposes only, except where a court ordered such reassignments to remedy unconstitutional segregation. *Id.* at 462-63. Initiative 350 made it on the Washington ballot and passed by a substantial margin. *Id.* at 463.

The Court found that Initiative 350, like the Akron city charter amendment, violated the Equal Protection Clause. *Id.* at 487. The Court stated that its prior cases

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[1] It bears repeating that the school board took this step in the absence of a court order or any unconstitutional discrimination whatsoever. The voluntary plan was an ameliorative measure intended to benefit minority students; it was not a protective measure intended to shield minority students from *de jure* discrimination, which no court had found to exist. *See Seattle*, 458 U.S. at 460-61; *see also infra* Part II.A.3.

yielded a "simple but central principle": while "laws structuring political institutions or allocating political power according to neutral principles" do not violate the Fourteenth Amendment, "a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Seattle*, 458 U.S. at 469-70. Echoing *Hunter*, the Court explained that this distinct analysis is necessary because non-neutral allocations of power "place[] *special* burdens on racial minorities within the governmental process, thereby making it *more* difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest." *Id.* at 470 (internal quotation marks, citations, and brackets omitted). The Court dismissed the argument that Initiative 350 was not intended to prevent busing for racially-integrative purposes, and explained why Initiative 350 violated this "simple but central" principle.

As a threshold matter, the Court concluded that the busing program, like the fair housing ordinance in *Hunter*, "at bottom inures primarily to the benefit of the minority, and is designed for that purpose." *Id.* at 472. The Court reasoned that while "white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom," desegregation primarily benefits minority children because these children "can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children for citizenship in our pluralistic society." *Id.* at 472-73 (internal quotation marks

omitted). Because racial minorities had reason to "consider busing for integration to be 'legislation that is in their interest,'" the "racial focus of Initiative 350 . . . suffice[d] to trigger application of the *Hunter* doctrine." *Id.* at 474 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)).

Having concluded that Initiative 350 targeted a busing program that "inures primarily to the benefit of the minority," the Court held that "the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*." *Id.* As the Court explained, Initiative 350 did more than merely repeal the busing program:

> The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. . . . As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.

Id. By removing authority over busing for racial purposes from the school board and placing it at a more remote level of government, Initiative 350 required "those championing school integration to surmount a considerably higher hurdle than persons seeking

comparable legislative action," and disadvantaged "those who would benefit from laws barring *de facto* desegregation as against those who . . . would otherwise regulate student assignment decisions." *Id.* at 474-75 (alteration in original) (internal quotation marks omitted). Accordingly, the Court held that Initiative 350 violated the Equal Protection Clause. *Id.* at 470.

In sum, *Hunter* and *Seattle* require us to examine an enactment that changes the governmental decisionmaking process for legislation with a racial focus to determine if it improperly manipulates the channels for change.[2] *Seattle*, 458 U.S. at 470, 485; *Hunter*, 393 U.S. at 391; *cf. Carolene Prods.*, 304 U.S. at 152 n.4 (noting that more exacting judicial scrutiny is required when the majority curtails "the operation of those political processes ordinarily to be relied upon to protect minorities"). To the extent that it does, we must strike down the enactment absent a compelling state interest.

2. Application of the Hunter/Seattle *Test to Proposal 2*

Hunter and *Seattle* thus expounded the rule that an enactment deprives minority groups of the equal protection of the laws when it: (1) has a racial focus, targeting a policy or program that "inures primarily to

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[2] This holds true for enactments that make it more difficult for minorities to use the political process to obtain *any* sort of legislation that is in their interest—notwithstanding whether one characterizes such legislation as seeking protection against discrimination or, alternatively, preferential treatment. *See infra* Part II.A.3.

the benefit of the minority"; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process. *See Seattle*, 458 U.S. at 467, 472; *Hunter*, 393 U.S. at 391. Applying this rule here, we conclude that Proposal 2 targets a program that "inures primarily to the benefit of the minority" and reorders the political process in Michigan in a way that places special burdens on racial minorities.

a. Racial Focus

The first prong of the *Hunter/Seattle* test requires us to determine whether Proposal 2 has a "racial focus." *Seattle*, 458 U.S. at 474. This inquiry turns on whether the targeted policy or program, here holistic race-conscious admissions policies at public colleges and universities, "at bottom inures primarily to the benefit of the minority, and is designed for that purpose." *Id.* at 472. The targeted policy need not be for the sole benefit of minorities, for "it is enough that minorities may consider [the now burdened policy] to be 'legislation that is in their interest.'" *Id.* at 474 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)).[3]

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[3] The Attorney General contends that *Hunter* and *Seattle* not only require that the targeted legislation has a racial focus, but that the new legislation be enacted with discriminatory intent. This requirement has no basis in law. To the contrary, the Supreme Court has explicitly rejected such an argument. *See Seattle*, 458 U.S. at 485 ("We have not insisted on a particularized inquiry into motivation in all equal protection cases: 'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.' And

Seattle conclusively answers whether a law targeting policies that seek to facilitate classroom diversity, as Proposal 2 does, has a racial focus. In *Seattle*, the Court observed that programs intended to promote school diversity and further the education of minority children enable these students to "achieve their full measure of success." *Id.* at 472-73. Such programs do so through "preparing minority children for citizenship in our pluralistic society, while . . . teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Id.* at 473 (internal quotation marks and citation omitted). Accordingly, the Court noted that "desegregation of the public schools . . . at bottom inures primarily to the benefit of the minority . . . ." *Id.* at 472. Because minorities could "consider busing for integration to be 'legislation that is in their interest,'" the Court concluded that Initiative 350's effective repeal of such programs had a racial focus sufficient to "trigger application of the *Hunter* doctrine." *Id.* at 474.

The logic of the Court's decision in *Seattle* applies with equal force here. Proposal 2 targets race-conscious admissions policies that "promote[] 'cross-racial understanding,' help[] to break down racial stereotypes, and 'enable[] students to better understand persons of different races.'" *Grutter*, 539 U.S. at 330 (alteration omitted) (internal quotation marks and citation omitted). Just as an integrative busing program is designed to improve racial minorities' representation at certain public schools, *see Seattle*, 458 U.S. at 461, race-conscious admissions

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legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category.") (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)).

policies are designed to increase racial minorities' representation at institutions of higher education, *see, e.g.*, *Grutter*, 539 U.S. at 316, 328-33; *Gratz*, 539 U.S. at 253-56. There is no material difference between the enactment in *Seattle* and Proposal 2, as both targeted policies that benefit minorities by enhancing their educational opportunities and promoting classroom diversity. Further, given that racial minorities lobbied for the implementation of the very policies that Proposal 2 permanently eliminates, it is beyond question that Proposal 2 targets policies that "minorities may consider . . . [to be] in their interest." *Seattle*, 458 U.S. at 474. Therefore, Proposal 2 has a racial focus because race-conscious admissions policies at Michigan's public colleges and universities "inure[] primarily to the benefit of the minority, and [are] designed for that purpose." *Id.* at 472.

Seattle not only mandates our conclusion that Proposal 2 is racially focused, but it also dispels any notion that the benefit race-conscious admissions policies may confer on the majority undercuts its "racial focus." Although it is true that increased representation of racial minorities in higher education benefits all students, *see Grutter*, 539 U.S. at 327-33; *Seattle*, 458 U.S. at 472-73, the Supreme Court has made clear that these policies still have a racial focus. In *Seattle*, the Court recognized that it is "clear that white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom." *Seattle*, 458 U.S. at 472 (internal quotation marks omitted). But the *Seattle* Court found that the wider benefits of the busing plan did not serve to distinguish *Hunter*, "for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair

housing ordinance." *Id.* By the same token, the wider benefits of race-conscious admissions policies do not undermine the conclusion that such admissions policies "inure[] primarily to the benefit of the minority . . . ." *Id.*

Nor do policy arguments attacking the wisdom of race-conscious admissions programs preclude our finding that these programs "inure[] primarily to the benefit of the minority." *Id.* Critics of affirmative action maintain that race-conscious admissions policies actually harm minorities by stigmatizing minority students admitted into high-caliber institutions through a perception that they lack sufficient qualifications; by impeding the academic success of minority students admitted to institutions they are not qualified to attend; and by impairing the admissions prospects of traditionally higher-performing minority groups, such as Asian-Americans. But the controversy surrounding the policies that Proposal 2 targets is irrelevant as to whether Proposal 2 itself has a racial focus; rather, this controversy is a "matter[] to be resolved through the political process." *Id.* at 474 ("It is undeniable that busing for integration . . . engenders considerably more controversy than does the sort of fair housing ordinance debated in *Hunter*. But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process."). As in *Seattle*, "it is enough that minorities may consider [the repealed policy] to be 'legislation that is in their interest.'" *Id.* (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)).

We find that the holistic race-conscious admissions policies now barred by Proposal 2 inure primarily to the benefit of racial minorities, and that such groups consider these policies to be in their interest. Indeed, we need not look further than the approved ballot language—characterizing Proposal 2 as an amendment "to ban affirmative action programs"—to confirm that this legislation targets race-conscious admissions policies and, insofar as it prohibits consideration of applicants' race in admissions decisions, that it has a racial focus.[4]

b. A Reordering of the Political Process That Burdens Racial Minorities

The second prong of the *Hunter/Seattle* test asks us to determine whether Proposal 2 reallocates political power or reorders the political process in a way that places special burdens on racial minorities. *See Seattle*, 458 U.S. at 467; *Hunter*, 393 U.S. at 391. We must first resolve (1) whether the affected admissions procedures lie within the "political process," and then (2) whether Proposal 2 works a "reordering" of this political process

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[4] It is of no consequence that Proposal 2, by its terms, purports to also prohibit preferences based on sex, color, ethnicity, and national origin. As the primary dissent concedes in a self-defeating footnote, the challenged amendment in *Hunter* also extended beyond race—covering color, religion, national origin, and ancestry as well. Here, as in *Hunter*, the clear focus of the challenged amendment is race. The history of Proposal 2 and its description on the ballot leave little doubt. Moreover, allowing drafters of racially-focused legislation to evade the protections of the Fourteenth Amendment by nominally including more than one class of individuals would seem to elevate form at the expense of substance.

in a way that imposes "special burdens" on racial minorities.

i. Proposal 2's Effect on a "Political Process"

The breadth of Proposal 2's influence on a "political process" turns on the role the popularly elected governing boards of the universities play in setting admissions procedures. The key question is whether the boards had the power to alter the universities' admissions policies prior to the enactment of Proposal 2. If the boards had that power and could influence the use (or non-use) of race-conscious admissions policies, then Proposal 2's stripping of that power works a reordering of the political process because minorities can no longer seek to enact a type of legislation that is in their interest at the board level. But if board members lacked such power, because policy decisions are actually under the control of politically unaccountable faculty members or admissions committees, then Proposal 2's effect on the political process is negligible.

This issue—whether the admissions policies affected by Proposal 2 are part of a "political process"—was the subject of stark disagreement between the majority and the dissent when this case was originally before a three-judge panel, and it continues to be here. In supplemental briefing, the University Defendants clarified their admissions practices, undercutting the factual and legal basis of the panel dissent's core contention that Proposal 2 falls outside the political process. We examine the administrative structure of Michigan's public universities and their admissions processes in light of this new information, even though the dissenters choose to look the other way.

The Michigan Constitution establishes three public universities--the University of Michigan, Michigan State University, and Wayne State University—and grants control of each to a governing board.[5] Mich. Const. art. VIII, § 5; *see also id.* § 6 (allowing the establishment of other institutions of higher learning, such as Michigan's other public colleges and universities, and affording their governing boards similar control). These boards have the same role: to run, with plenary authority, their respective institutions. *Id.* art. VIII, §§ 5-6; *Glass v. Dudley Paper Co.*, 112 N.W.2d 489, 490 (Mich. 1961). Michigan law has consistently confirmed this absolute authority. *See, e.g.*, *Glass*, 112 N.W.2d at 490; *Att'y Gen. ex rel. Cook v. Burhans*, 7 N.W.2d 370, 371 (Mich. 1942); *Bd. of Regents of Univ. of Mich. v. Auditor Gen.*, 132 N.W. 1037, 1040 (Mich. 1911); 1979-80 Mich. Op. Att'y Gen. 578, 1980 WL 114008, at *1-2 (Mich. A.G. Jan. 31, 1980). Indeed, the boards are described as "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature." *Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ.*, 594 N.W.2d 491, 496 n.8 (Mich. 1999) (quoting *Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*, 132 N.W. 1037, 1040 (Mich. 1911)).

Eight popularly elected individuals sit on these boards, and they hold office for eight years. Mich. Const. art. VIII, § 5; *see also id.* § 6. The boards have

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[5] At each institution, these boards and their members have slightly differing names—for example, "Board of Trustees," "Board of Governors," or "Board of Regents." Mich. Const. art. VIII, § 5.

the "power to enact ordinances, by-laws and regulations for the government of the university." Mich. Comp. Laws § 390.5; *see also id.* §§ 390.3-.6.[6] Exercising this power, the boards have enacted bylaws—which they have complete authority to revise or revoke—detailing admissions procedures. *See* Univ. of Mich., Bylaws of the Bd. of Regents § 8.01, *available at* http://www.regents.umich.edu/bylaws (last visited May 22, 2012) [hereinafter Univ. of Mich. Bylaws]; Mich. State Univ., Bd. of Trs. Bylaws, art. 4, *available at* http://www.trustees.msu.edu/bylaws (last visited May 22, 2012); Wayne State Univ. Statutes §§ 2.34.09, 2.34.12, *available at* http://www.bog.wayne.edu/code (last visited May 22, 2012).

The University of Michigan's bylaws delegate the day-to-day management of undergraduate admissions to the associate vice provost and executive director of undergraduate admissions. *See* Univ. of Mich. Bylaws § 8.01. Although the board delegates this responsibility, it continues to exercise ultimate decisionmaking authority because it directly appoints the associate vice provost and executive director of undergraduate admissions, *id.*, and because it retains the power to revoke or alter the admissions framework, *id.* §§ 14.03, 14.04. Nothing prevents the board from adopting an

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[6] Though the statutes and bylaws cited in this paragraph govern only the University of Michigan, the boards of the other public colleges and universities in Michigan are similarly empowered. *See, e.g.*, Mich. Comp. Laws §§ 390.102-.107 (Michigan State University), 390.641-.645 (Wayne State University). For the sake of clarity, we refer exclusively to the University of Michigan's bylaws and procedures, as they very closely parallel those in place at other Michigan public educational institutions, such as Wayne State University and Michigan State University.

entirely new framework for admissions decisions if it is so inclined. *See* Mich. Const. art. VIII, § 5; Mich. Comp. Laws §§ 390.3-.6; Univ. of Mich. Bylaws § 8.01. Indeed, that the board can revise its bylaws is not a mere theoretical possibility, but a reality that occurs with some frequency. Since 2008, the University of Michigan's Board of Regents has revised more than two dozen of its bylaws, two of which fall within Chapter VIII, the section regulating admissions practices.

Of course power in a large university, a vast and highly complex institution, must be delegated. As such, the board fulfills its general supervisory role by conducting monthly public meetings to remain apprised of all university operations and by exercising its power to amend bylaws or revise delegations of responsibility. *See* Univ. of Mich. Bylaws §§ 1.01, 14.03. At these meetings, the board regularly discusses admissions practices, including the use of race-conscious admissions policies. *See, e.g.*, Univ. of Mich. Bd. of Regents Proceedings, March 2007, 264-65 (report of Provost to Board of Regents regarding new policies to increase the institution's diversity in the wake of Proposal 2); Univ. of Mich. Bd. of Regents Proceedings, June 2004, 301 (report of University President to Board of Regents regarding undergraduate admissions policies in light of *Gratz*, including efforts to encourage minority applicants); Univ. of Mich. Bd. of Regents Proceedings, July 2003, 11 (discussion of the importance of race-conscious admissions policies in light of *Grutter*, including comments in support of the University's efforts in *Grutter* from six Regents and the University President), *available at* http://quod.lib.umich.edu/

cgi/t/text/textidx?page=browse&c=umregproc (last visited May 22, 2012). Thus, the elected boards of Michigan's public universities can, and do, change their respective admissions policies, making the policies themselves part of the political process.[7] But even if they did not, the Attorney General provides no authority to support his contention that an unused power is a power abandoned.

Nevertheless, the Attorney General argues, echoed by the dissenters, that admissions decisions lie outside the political process because the governing boards of the universities have "fully delegated" responsibility for establishing admissions standards to politically unaccountable admissions committees and faculty members. But the Michigan Constitution, state statutes, and the universities' bylaws and current practices directly contradict this argument. Article VIII, section 5 of the Michigan Constitution entrusts the board with "general supervision of its institution." Mich. Const. art. VIII, § 5. Michigan statutes §§ 390.3-.5 vest full governing authority in the board, including the power to enact bylaws and regulations to promote and achieve the university's educational mission. *See* Mich. Comp. Laws §§ 390.3-.5. The University of Michigan bylaws unambiguously retain the power to alter or revoke any bylaw, including any delegation of responsibility. *See* Univ. of Mich. Bylaws § 14.03. This robust legal authority makes the fact of such

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[7] As the Michigan Constitution grants the power to establish other institutions of higher education beyond the three universities named above, *see* Mich. Const. art. VIII, § 6, to the extent the leadership of these institutions are democratically accountable, whether tangentially or directly, their powers are part of the political process.

delegation irrelevant for our purposes, as the board may revoke the delegation at will.

Moreover, to the extent the Attorney General and the dissenters express concern over the degree to which the board has delegated admissions decisions, that delegation does not affect whether admissions decisions should be considered part of the political process. When an elected body delegates power to a non-elected body for the day-to-day implementation of policy, it does not remove the policy from the political process. In the administrative law context, for example, rule-making powers are delegated from the President to appointed cabinet officials, and as a practical matter, further down to civil service professionals Regardless of the level at which the rule is drafted, the rulemaking process is at all times under the umbrella of the powers of the President. These rules are often the subject of political debate, lobbying, and electioneering, again without regard to who actually drafted the particular rule in question. Without question, federal rule-making is part of the political process. Similarly, whether it is the board or a delegated body that sets the rules for consideration of race in admissions, these decisions fall under the umbrella of the elected board and are thus part of the political process.

Telling evidence that board members can influence admissions policies—bringing such policies within the political process—is that these policies can, and do, shape the campaigns of candidates seeking election to one of the boards. As the boards are popularly elected, citizens concerned with race-conscious admissions policies may lobby for candidates who will act in

accordance with their views—whatever they are. Board candidates have, and certainly will continue, to include their views on race-conscious admissions policies in their platforms. *See* League of Women Voters, 2005 General Election Voter Guide, *available at* http://www.lwvka.org/guide04/regents/html (last visited May 22, 2012) (noting that a candidate for the Board of Regents pledged to "work to end so-called 'Affirmative-Action,' a racist, degrading system"). Indeed, nothing prevents Michigan citizens from electing a slate of regents who promise to review admissions policies based on their opposition to affirmative action. Once elected, the new slate may revise the bylaws, *see* Univ. of Mich. Bylaws § 14.03, and change their university's admissions policies—either by entirely revoking the delegation and handling all admissions policies at the board level or by enacting new bylaws giving more explicit direction to admissions committees. Thus, Proposal 2 affects a "political process."

ii. Reordering of a "Political Process"

The next issue is whether Proposal 2 reordered the political process in a way that places special burdens on racial minorities. The Supreme Court has found that both implicit and explicit reordering violates the Fourteenth Amendment. *See Seattle*, 458 U.S. at 474; *Hunter*, 393 U.S. at 387, 390. In *Hunter*, the express language of the charter amendment required any ordinance regulating real estate "on the basis of race, color, religion, national origin or ancestry" to be approved by a majority of the electorate and the City Council, as opposed to solely the City Council for other real-estate ordinances. 393 U.S. at 387, 390. This

reallocation of power was directly written into the charter amendment, creating "in effect . . . an 'explicitly racial classification treating racial housing matters differently'" from all other housing matters. *Seattle*, 458 U.S. at 468 (quoting *Hunter*, 393 U.S. at 389).

In *Seattle*, however, the reordering was implicit: On its face, Initiative 350 simply prohibited school boards from using mandatory busing, but its practical effect was to force "[t]hose favoring the elimination of *de facto* school segregation" to "seek relief from the state legislature, or from the statewide electorate" in order to overturn Initiative 350. *Id.* at 474. Nonetheless, "authority over all other student assignment decisions . . . remain[ed] vested in the local school board." *Id.* Whereas a proponent of smaller class sizes could seek redress at the local level, a proponent of integrative busing had to scale the more onerous hurdle of a successful statewide campaign. The *Seattle* legislation implicitly reallocated power because the "initiative remove[d] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body . . . ." *Id.* Similar to the amendment in *Hunter*, Initiative 350 modified "the community's political mechanisms . . . to place effective decisionmaking authority over a racial issue at a different level of government." *Id.*

The *Seattle* Court then clarified what sort of reordering contravenes the political-process doctrine: "[t]he evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the *comparative structural burden* placed on

the political achievement of minority interests." *Id.* at 474 n.17 (emphasis added). In both *Hunter* and *Seattle*, "the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place *comparative burdens* on minorities." *Id.* (emphasis added). Thus, any "comparative structural burden," be it local or statewide or national, satisfies the reordering prong of the *Hunter/Seattle* test. *Id.*

The comparative structural burden we face here is every bit as troubling as those in *Hunter* and *Seattle* because Proposal 2 creates the highest possible hurdle. This comparative structural burden is most apparent in tracing the channels for change available to a citizen promoting any policy unmodified by Proposal 2 and those available to a citizen promoting constitutionally permissible race-conscious admissions policies.

An interested Michigan citizen may use any number of avenues to change the admissions policies on an issue outside the scope of Proposal 2. For instance, a citizen interested in admissions policies benefitting legacy applicants—sons and daughters of alumni of the university—may lobby the admissions committees directly, through written or in-person communication. He may petition higher administrative authorities at the university, such as the dean of admissions, the president of the university, or the university's board. He may seek to affect the election—through voting, campaigning, or other means—of any one of the eight board members whom the individual believes will champion his cause and revise admissions policies accordingly. And he may campaign for an amendment to the Michigan Constitution.

Each of these methods, respectively, becomes more expensive, lengthy, and complex. Because Proposal 2 entrenched the ban on all race-conscious admissions policies at the highest level, this last resort—the campaign for a constitutional amendment—is the *sole recourse* available to a Michigan citizen who supports enacting such policies. That citizen must now *begin* by convincing the Michigan electorate to amend its constitution—an extraordinarily expensive process and the most arduous of all the possible channels for change. Just to place a proposed constitutional amendment repealing Proposal 2 on the ballot would require either the support of two-thirds of both the Michigan House of Representatives and Senate, *see* Mich. Const art. XII, § 1, or the signatures of a number of voters equivalent to at least ten percent of the number of votes cast for all candidates for governor in the preceding general election, *see id.* art. XII, § 2. Once on the ballot, the proposed amendment must then earn the support of a majority of the voting electorate to undo Proposal 2's categorical ban. *See id.* art. XII, §§ 1-2.

Only after traversing this difficult and costly road would our now-exhausted citizen reach the starting point of his neighbor who sought a legacy-related admissions policy change. After this successful constitutional amendment campaign, the citizen could finally approach the university—by petitioning the admissions committees or higher administrative authorities—to request the adoption of race-conscious admissions policies. By amending the Michigan Constitution to prohibit university admissions units from using even modest race-conscious admissions policies, Proposal 2 thus removed the authority to

institute any such policy from Michigan's universities and lodged it at the most remote level of Michigan's government, the state constitution. As with the unconstitutional enactment in *Hunter*, proponents of race-conscious admissions policies now have to obtain the approval of the Michigan electorate *and*, if successful, admissions units or other university powers—whereas proponents of other non-universal admissions factors need only garner the support of the latter. *See Seattle*, 458 U.S. at 468, 474.

The "simple but central principle" of *Hunter* and *Seattle* is that the Equal Protection Clause prohibits requiring racial minorities to surmount more formidable obstacles than those faced by other groups to achieve their political objectives. *See id.* at 469-70. A state may not "allocate[] governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Id.* at 470. As the Supreme Court has recognized, such special procedural barriers to minority interests discriminate against racial minorities just as surely as—and more insidiously than—substantive legal barriers challenged under the traditional equal protection rubric. *See id.* at 467 ("[T]he Fourteenth Amendment also reaches a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.") (internal quotation marks and citations omitted). Because less onerous avenues to effect political change remain open to those advocating consideration of nonracial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to

traverse a more arduous road without violating the Fourteenth Amendment. We thus conclude that Proposal 2 reorders the political process in Michigan to place special burdens on minority interests.

3. Objections to the Applicability of the Hunter/Seattle *Doctrine to Proposal 2*

The Attorney General and the dissenters make a number of arguments as to why Proposal 2 survives constitutional scrutiny. At the outset, it should be noted that adopting these arguments as to Proposal 2's constitutionality would be particularly ironic, given that these arguments applied with equal force to Initiative 350 in *Seattle*. While distinctions obviously exist between the policy at issue here and that in *Seattle*, the factual differences are not so material as to justify departure from relevant Supreme Court precedent.

a. Hunter/Seattle *Doctrine and Preferential Treatment Programs*

The Attorney General and the dissenters assert that *Hunter* and *Seattle* are inapplicable to Proposal 2 because those cases only govern enactments that burden racial minorities' ability to obtain *protection from discrimination* through the political process, whereas Proposal 2 burdens racial minorities' ability to obtain *preferential treatment*. At bottom, this is an argument that an enactment violates the Equal Protection Clause under *Hunter* and *Seattle* only if the political process is distorted to burden legislation providing constitutionally-mandated protections, such as anti-discrimination laws. Under this theory, a state may require racial minorities to endure a more

burdensome process than all other citizens when seeking to enact policies that are in their favor if those policies are constitutionally *permissible* but not constitutionally *required*. This effort to drive a wedge between the political-process rights afforded when seeking antidiscrimination legislation and so-called preferential treatment is fundamentally at odds with *Seattle*.

The only way to find the *Hunter/Seattle* doctrine inapplicable to the enactment of preferential treatment is to adopt a strained reading that ignores the preferential nature of the legislation at issue in *Seattle*, and inaccurately recast it as anti-discrimination legislation. Initiative 350 prohibited the *voluntary* busing of students to correct *de facto* segregation. 458 U.S. at 460-61. The school board was under no obligation to undertake this effort because there had been no finding that the District's segregation was the result of intentional racial discrimination. *Id.* at 491-92 (Powell, J., dissenting) ("The Court has never held that there is an affirmative duty to integrate the schools in the absence of a finding of unconstitutional segregation. Certainly there is no constitutional duty to adopt mandatory busing in the absence of such a violation.") (internal citations omitted). As such, the District's plan was an ameliorative measure and not a response to discrimination. It is therefore inaccurate to suggest that Initiative 350 affected antidiscrimination legislation by making it more difficult for minorities to obtain *protection from discrimination* through the political process. Quite the contrary: as the district court recognized, "[b]ecause prohibiting integration (when it is not constitutionally mandated) is not tantamount to discrimination . . . the Court in *Seattle*

did not (and could not) rely on the notion that the restructuring at issue impeded efforts to secure *equal* treatment."[8] *Coal. VI*, 592 F. Supp. 2d at 951. Therefore, in applying the *Hunter* political-process framework to an obstacle impeding preferential treatment, the *Seattle* Court drew no distinction between the equal protection rights at stake in seeking antidiscrimination legislation and those at stake in seeking preferential treatment.

It should be unsurprising, then, that the language of *Hunter* and *Seattle* encompasses any legislation in the interest of racial minorities, and thus is broader

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[8] In holding that Proposal 2 nonetheless does not violate the Equal Protection Clause, the district court asserted that the race-conscious admissions policies at issue here should be distinguished from the voluntary busing program at issue in *Seattle* because, unlike race-conscious admissions policies, "school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights." *Coal. VI*, 592 F. Supp. 2d at 951 (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 707 n.16 (9th Cir. 1997)). The district court erred in this respect. Indeed, such a distinction is incompatible with the Supreme Court's decision in *Grutter*, and for this reason, we decline to follow *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), as the district court did. In *Grutter*, the Supreme Court showed how narrowly-tailored race-conscious admissions programs are not inherently invidious, *see* 539 U.S. at 334-44, and do not work wholly to the benefit of members of one group, *see id.* at 330. The Court further explained that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* Nor are we swayed by *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012), which offered only conclusory support for the precedential decision in *Wilson*.

than it would be were the distinction urged by the Attorney General and the dissenters valid. *See, e.g.*, *Seattle*, 458 U.S. at 467 (noting that the Fourteenth Amendment protects against distortions of the political process that "place special burdens on the ability of minority groups to achieve *beneficial legislation*") (emphasis added); *id.* at 470 (requiring searching judicial scrutiny where state action makes it more difficult for racial minorities "to achieve *legislation that is in their interest*") (emphasis added) (internal quotation marks omitted); *id.* at 474 (finding it "enough that minorities may consider busing for integration to be *legislation that is in their interest*") (emphasis added) (internal quotation marks omitted); *Hunter*, 393 U.S. at 393 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact *legislation in its behalf* than it may dilute any person's vote . . . .") (emphasis added).

This language makes clear that the *Hunter/Seattle* doctrine works to prevent the placement of special procedural obstacles on minority objectives, whatever those objectives may be. The distinction urged by the Attorney General and the dissenters thus erroneously imposes an *outcome*-based limitation on a *process*-based right. What matters is whether racial minorities are forced to surmount procedural hurdles in reaching their objectives over which other groups do not have to leap. If they are, the disparate procedural treatment violates the Equal Protection Clause, regardless of the objective sought.

b. Proposal 2 as a Mere Repeal

Latching on to the Supreme Court's observation that "the simple repeal or modification of desegregation

or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification," *Crawford v. Bd. of Educ.*, 458 U.S. 527, 539 (1982); *accord Hunter*, 393 U.S. at 390 n.5; *Seattle* 458 U.S. at 483, the Attorney General implores us to classify Proposal 2 as a mere repeal of the universities' race-conscious admissions policies, rather than the kind of political restructuring that implicates the *Hunter/Seattle* doctrine. *Crawford*, a case decided the same day as *Seattle*, emphasizes the difference between mere repeals and political restructuring; state actors must retain the power to repeal policies without running afoul of the political-process doctrine—certainly not every policy elimination carries with it a political-process violation. *See* 458 U.S. at 540. *Crawford* brings this difference into focus, because the Court-approved political action in that case (amendment of the California Constitution) occurred at the same level of government as the original enactment (a prior amendment of the California Constitution), thus leaving the rules of the political game unchanged. *Id.*

The Supreme Court has twice distinguished the "mere repeal" at issue in *Crawford* from the political reordering at issue in *Hunter* and *Seattle*. The *Crawford* Court distinguished *Hunter* by clarifying that the charter amendment in *Hunter* was "something more than a mere repeal" because it not only repealed an ordinance adopted by the popularly elected City Council, it removed from the Council the power to reinstate it—more than just undoing an unpopular act, the electorate in *Hunter* had altered the framework of the political process. *Crawford*, 458 U.S. at 541. The *Seattle* Court drew the same distinction between the

Washington State legislation and the California amendment: it found that Initiative 350 "works something more than the 'mere repeal' of a desegregation law by the political entity that created it . . . by lodging decisionmaking authority over the question at a new and remote level of government." *Seattle*, 458 U.S. at 483. Just as in *Hunter*, the electorate in *Seattle* changed the rules of the political process.

Here, the rules are not the same after Proposal 2. Rather than undoing an act of popularly elected officials by simply repealing the policies they created, Michigan voters repealed the admissions policies that university officials created *and took the additional step* of permanently removing the officials' power to reinstate them. In short, Proposal 2 "works something more than the 'mere repeal' of a desegregation law by the political entity that created it." *Id.* Had those favoring elimination of all race-conscious admissions policies successfully lobbied the universities' admissions units, just as racial minorities did to have these policies adopted in the first place, there would be no equal protection concern. Rather, like Initiative 350 did for any future attempt to implement integrative busing (and the Akron city charter amendment did for any future attempt to enact a fair housing ordinance), Proposal 2 "burdens all future attempts" to implement race-conscious admissions policies "by lodging decisionmaking authority over the question at a new and remote level of government." *Id.*

This reallocation of decisionmaking authority at a "new and remote level of government" distinguishes the instant case from *Crawford*. *See id.* Certainly,

should Michigan's public universities want to abolish these race-conscious admissions policies, the admissions committees, the universities' presidents and provosts, and the universities' boards remain free to repeal them, without any infringement on the right to equal protection in the political process. The avenues of change available to Michigan's public universities parallel those available to the District in *Seattle*. In ruling the *statewide* repeal of the voluntary busing plan unconstitutional, the *Seattle* Court required any appeal to occur through *local* government, where the plan was originally enacted. Our decision no more entrenches a race-conscious policy than the Supreme Court's decisions in *Seattle* or *Hunter*. Indeed, while the dissenting opinions accuse us of judicially enshrining the presumptively invalid policy of considering race as one factor in holistic admissions determinations, we take no such step.[9]

More generally, the dissenting opinions criticize our holding today in broad and strident terms. At their core, these opinions express disapproval of the political-process doctrine itself, dissatisfaction that *Grutter* allowed for even modest race-conscious admissions policies, and incredulity at the possibility that a state constitutional amendment forbidding consideration of race could violate the Equal Protection Clause. But *Hunter* and *Seattle* have not been overruled; *Grutter* continues to permit the same holistic race-conscious admissions policies Proposal 2 seeks to permanently eliminate; and courts must

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[9] Moreover, by definition, we are only addressing valid, constitutional policies; the university boards have no authority to promulgate invalid, unconstitutional policies.

decide equal protection challenges by application of precedent, rather than resort to syllogism. Most importantly, our holding does not place race-conscious admissions policies beyond the political process. Opponents of affirmative action remain free to advocate for their preferred policies in the same manner and at the same level of government as its proponents.

4. Constitutionality of Proposal 2 Under the Political-Process Doctrine

Proposal 2 modifies Michigan's political process "to place special burdens on the ability of minority groups to achieve beneficial legislation." *See id.* at 467. Because Proposal 2 fails the *Hunter/Seattle* test, it must survive strict scrutiny. *See id.* at 485 n.28. Under the strict scrutiny standard, the Attorney General must prove that Proposal 2 is "necessary to further a compelling state interest." *Crawford*, 458 U.S. at 536. In *Seattle*, the Court did not consider whether a compelling state interest might justify a state's enactment of a racially-focused law that restructures the political process, because the government made no such argument. 458 U.S. at 485 n.28. Likewise, because the Attorney General does not assert that Proposal 2 satisfies a compelling state interest, we need not consider this argument. Therefore, those portions of Proposal 2 that affect Michigan's public institutions of higher education violate the Equal Protection Clause.[10]

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[10] Because the Plaintiffs' challenge is limited to public education, we do not decide today whether the portions of Proposal 2 that

5. Traditional Equal Protection Analysis

Having found that Proposal 2 deprives the Plaintiffs of equal protection of the law under the political-process doctrine, we need not reach the question of whether it also violates the Equal Protection Clause when assessed using the "traditional" analysis.

B. The University Defendants' Non-Dismissal

The University Defendants appeal the district court's denial of their motion to be dismissed as misjoined parties under Rule 21 of the Federal Rules of Civil Procedure. We review the district court's decision for an abuse of discretion and must affirm unless we are "left with a definite and firm conviction that the trial court committed a clear error of judgment." *Letherer v. Alger Group, L.L.C.*, 328 F.3d 262, 266 (6th Cir. 2003) (internal quotation marks and citation omitted), *overruled on other grounds by Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224 (2007).

Rule 21 states in relevant part: "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." Fed. R. Civ. P. 21. "The Federal Rules of Civil Procedure do not define misjoinder, but the cases make clear that misjoinder of parties occurs when [parties] fail to satisfy the conditions for permissive joinder under Fed. R. Civ. P. 20(a)." *Glendora v. Malone*, 917 F. Supp. 224, 227 (S.D.N.Y. 1996). Because a motion to be dismissed under Rule 21 tracks Rule 20(a), we must ask whether the Coalition

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affect public employment and public contracting also violate the Equal Protection Clause.

Plaintiffs have satisfied the rules for permissive joinder. Under Rule 20(a), defendants may be joined if "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). "A misjoinder of parties . . . frequently is declared because no relief is demanded from one or more of the parties joined as defendants." *Letherer*, 328 F.3d at 267 (quoting 7 Charles Alan Wright et al., *Federal Practice and Procedure* § 1683, at 475-76 (3d ed. 2001)).

The district court concluded that the University Defendants were properly joined parties under Rule 20(a) because the Coalition Plaintiffs asserted a request for relief on a claim involving common issues of law and fact. The district court found that "the claims brought against the universities are intertwined with those challenging Proposal 2," and "[i]f [the court] were to find Proposal 2 unconstitutional, affirmative action would not automatically be reinstated into the admissions process. Rather, the universities would have to choose to do so on their own." *Coal. IV*, 539 F. Supp. 2d at 941. Because the Coalition Plaintiffs' traditional equal protection claim could have required the University Defendants to grant relief by reinstating race-conscious admissions policies, the district court found Rule 20(a) satisfied and concluded that dismissal as a misjoined party was not appropriate. *See id.*

The discretionary language of Rule 21, coupled with our deferential standard of review, presents a

high hurdle for reversal of the district court's determinations. The Coalition Plaintiffs asserted a right to relief against the University Defendants, and so we are not "left with a definite and firm conviction that the trial court committed a clear error of judgment," *Lethierer*, 328 F.3d at 266, and affirm the district court's denial of the University Defendants' motion.

C. Dismissal of Russell as an Intervenor

Intervening Defendant Russell appeals the district court's decision granting the Cantrell Plaintiffs' motion for summary judgment to dismiss him from the case because he no longer satisfied the requirements for intervention. We review de novo a district court's grant of summary judgment, which "should be granted when the moving party can show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Geiger v. Tower Auto.*, 579 F.3d 614, 620 (6th Cir. 2009) (internal quotation marks omitted). We also review de novo district court decisions on motions to intervene as of right, except for the element of timeliness, which is reviewed for an abuse of discretion. *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007). "Because the timeliness element is not in dispute here, we review the entire intervention of right issue de novo." *Id.*

At the time Russell originally moved to intervene as of right, he was an applicant to the University of Michigan Law School. With his application pending at the time Proposal 2 passed, Russell was permitted to intervene because he purportedly had an interest in the immediate termination of race-conscious

admissions policies, as these policies could theoretically affect his chances of gaining admittance. During the pendency of this litigation, Russell has been denied admission from the University of Michigan Law School, attended and graduated from Wayne State University Law School, and following his graduation, accepted a position as a non-tenured lecturer at Oakland Community College and Oakland University.

Under Federal Rule of Civil Procedure 24(a), an interested party must meet four requirements before being permitted to intervene as of right: (1) his motion to intervene must be timely; (2) he must have a substantial legal interest in the subject matter of the case; (3) he must demonstrate that his interest will be impaired in the absence of intervention; and (4) he must demonstrate that the parties already before the court do not adequately represent his interest. *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005). An intervenor also must continue to meet these requirements throughout the duration of the litigation, as courts must be able to ensure that parties have a live interest in the case. *See Morgan v. McDonough*, 726 F.2d 11, 14 (1st Cir. 1984) (affirming the dismissal of an intervening party whose legal interest had lapsed because "even if [the party's original intervention were as of right,] it would have gained no absolute entitlement to continue as a party until termination of the suit").

Although Russell met all four requirements when he was permitted to intervene, it has become apparent during the course of litigation that Russell can no longer demonstrate that the parties already before the court do not adequately represent his interests.

Russell's burden of showing that "representation of his interests 'may be' inadequate" is "minimal," *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), however, he still must overcome "the presumption of adequate representation" that arises if he shares "the same ultimate objective as a party to the suit," *United States v. Michigan*, 424 F.3d at 443-44. Although the Attorney General's and Russell's interests initially diverged—the Attorney General agreed to stipulate to delay the application of Proposal 2, whereas Russell had an interest in Proposal 2's immediate enforcement—their interests are now aligned. Both now share the same ultimate objective: the validation of Proposal 2. The Attorney General is unquestionably mounting a firm defense of Proposal 2, including a victory in the district court. Any "mere disagreement over litigation strategy" Russell may have with the Attorney General's defense "does not, in and of itself, establish inadequacy of representation." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987). Therefore, there is no genuine issue of material fact as to whether the Attorney General adequately represents Russell's interests. Russell's intervention in this litigation is no longer proper and we affirm the district court's grant of the Cantrell Plaintiffs' motion for summary judgment to dismiss him.

III.

Finding those provisions of Proposal 2 affecting Michigan's public colleges and universities unconstitutional, we REVERSE the district court's judgment granting the Defendants-Appellees' motion for summary judgment. We further AFFIRM the district court's denial of the University Defendants'

motion to be dismissed as parties, and AFFIRM the district court's grant of the Cantrell Plaintiffs' motion for summary judgment as to Russell.

DISSENT

DANNY J. BOGGS, Circuit Judge, dissenting. In 1848, the relevant local authority, the Boston School Board, decided that race should be used in making assignments in the Boston public schools. *See Roberts v. City of Boston*, 59 Mass. 198, 208–09 (1849). They excluded and segregated black students. However, in 1855 the ultimate political authority, the legislature of Massachusetts, established the general principle against racial discrimination in educational choices.[1] The legislature was lauded for that choice. *See generally* J. Morgan Kousser, *"The Supremacy of Equal Rights": The Struggle against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 Nw. U. L. Rev. 941, 943 & nn. 8–9 (1988).

Over 100 years later, various Michigan local and subordinate state authorities began to implement policies of racial discrimination in decisions on, *inter alia*, educational admissions. The Supreme Court of the United States held that such actions were

[1] "In determining the qualifications of scholars to be admitted into any public school or any district school in this Commonwealth, no distinction shall be made on account of the race, color or religious opinions, of the applicant or scholar." 1855 Mass. Acts ch. 256.

permissible, but certainly not that they were compelled. *Grutter v. Bollinger*, 539 U.S. 306 (2003). Subsequently, the ultimate state political authority, the People of Michigan, voted to establish the same principle that Massachusetts did in 1855.[2] This is the same principle embodied in President Kennedy's Executive Order 10925 of 1961—that governmental decisions should be undertaken "without regard to race, creed, color or national origin." 26 Fed. Reg. 1977, sec. 301(1) (Mar. 8, 1961). Indeed, the very term "affirmative action" comes from that presidential order.[3]

The majority of the en banc court now holds that this action of the People of Michigan was unconstitutional, relying on an extreme extension of two United States Supreme Court cases ruling on very different circumstances.

To begin with, those two cases each involved a single action that transferred, for the first time, decision making on a single matter, a transfer held to be wholly aimed at one disadvantaged race. In one instance, approval of new anti-discrimination ordinances was moved from the city council to the

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[2] "The Univeristy of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich Const. art. I, § 26.

[3] "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." *Ibid.*

voters of the city of Akron, and in the other case, power over certain pupil assignment policies was moved from the citizens of one city in the state of Washington to the citizens of the entire state.

In our case, however, we have the citizens of the entire state establishing a principle that would in general have seemed laudable. Even plaintiffs here do not allege, in the context of their political-process argument, that if this constitutional provision had been enacted at some earlier time in Michigan, for example upon its entry into the union, or upon the enactment of its new constitution in 1963, that it would have been unconstitutional. They instead contend that because of current circumstances, and intervening political decisions of racial discrimination, these Supreme Court cases make the principled action of the People of Michigan unconstitutional.

Indeed, the majority seems to concede that some set of decision makers in Michigan would be able to reverse the policies that they claim are immune from actions by the entire body politic. Rather, they demand that any changes in the educational (and perhaps employment) policies here can be enacted only by individual actions of each of the university governing authorities (three of which are chosen by statewide election over eight years, Mich. Const. art. VIII § 5), each regional state university (whose governing boards are appointed on a staggered basis by the governor over eight years, *id.* § 6), and each local educational authority for community and technical schools (whose governing authorities are chosen by a variety of methods by each individual county and locality, *id.* § 7).

Thus, plaintiffs here contend that a citizen or student, whether from the Upper Peninsula or the city of Detroit, or from another state, who wants to pursue educational and employment opportunities in Michigan free from racial discrimination, must contest and succeed, one-by-one, in elections or selections in all of the many individual jurisdictions and methods of selection.

To simply state this proposition is to show how far afield this situation is from even the most generous interpretation of the *Hunter* and *Seattle* cases.

In addition, the situation in Michigan, in which the various local authorities are *permitted* (under *Grutter*) to engage in varieties of racial discrimination, both for and against variously defined groups, is wholly at odds with the single-instance restructuring of government involved in the Supreme Court precedents relied on by the majority.

Here, it was clear from the evidence in the *Grutter* case, and in the record in this case, discrimination may be practiced in favor of certain racially or ethnically defined minorities, primarily African-Americans (or perhaps those deemed to be "black," whether or not actually "American") or "Hispanics" (although there was some evidence that some groups generally defined as "Hispanic" (especially Cuban) might be discriminated against rather than in favor of, *see* Deposition of Allan Stillwagon, pp. 358-59, cited in *Grutter*, 539 U.S. at 293 (Kennedy, J., dissenting)). On the other hand, various groups, sometimes defined as racial minorities, may be discriminated against. *See Ho v. S.F. Unified Sch. Dist.*, 965 F. Supp. 1316 (N.D. Calif 1997) (Chinese); *St. Francis Coll. v. Al-Khazraji*, 481

U.S. 604 (1987) (Arabs); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (Jews).

Under these circumstances, holding it to be a violation of equal protection for the ultimate political authority to declare a uniform policy of non-discrimination is vastly far afield from the Supreme Court precedents.

I give the following example which is not fanciful in today's changing society. A child might be born who would, in today's conventional terms, be held to be one-half Chinese, one-fourth Eastern-European Jewish, one-eighth Hispanic (Cuban), and one-eighth general North European, mostly Scots-Irish. Under those circumstances, if that child or its parents wished it to compete for educational or employment opportunities in Michigan without discrimination for or against the child, however a bureaucrat might classify the child, the majority's position is that they could do so only by proceeding in a large number of individual political and election campaigns across the length and breadth of Michigan, rather than by, as was the case here, convincing voters of Michigan to enact a policy that would under most other circumstances have been held to be laudable.

I cannot agree that this decision is correct, either as a matter of general constitutional law or as an accurate interpretation of the Supreme Court precedents. I therefore respectfully DISSENT.

DISSENT

JULIA SMITH GIBBONS, Circuit Judge, dissenting. Proposal 2 is not unconstitutional under either a political restructuring theory or under traditional equal protection analysis. I therefore respectfully dissent.

I.

Elementary principles of constitutional law tell us that plaintiffs' challenge to Proposal 2 should have little to no chance of success. Plaintiffs argue that Michigan must retain its racial and other preference policies in higher education and that the state's voters cannot make the contrary policy choice that factors like race and gender may not be taken into account in admissions. They make this argument in the face of the core equal protection principle of nondiscrimination—a principle consistent with the choice of the people of Michigan. They make the argument despite the absence of any precedent suggesting that states must employ racial preferences in university admissions. Essentially, the argument is one of constitutional protection for racial and gender preference—a concept at odds with the basic meaning of the Equal Protection Clause, as understood and explained through decades of jurisprudence.

Although it has convinced a majority of this court, plaintiffs' argument must be understood for the marked departure it represents—for the first time, the presumptively invalid policy of racial and gender preference has been judicially entrenched as beyond

the political process. In reaching its conclusion, the majority strays from analysis bounded by familiar principles of constitutional law and loses sight of the parameters within which we should operate in deciding this case. To be accurate in characterizing the majority's approach, it relies on two Supreme Court cases, which it deems highly instructive. Yet, when examined carefully, these cases have no application here, and, in emphasizing them, the majority overlooks recent case law providing more relevant guidance.

II.

The political restructuring theory on which the majority relies does not invalidate Proposal 2. Racial preference policies in university admissions—presumptively invalid but permissible under limited circumstances and for a finite period of time—do not receive the same structural protections against statewide popular repeal as other laws that inure to the interest of minorities. To understand why this is the case, it is necessary to view the *Hunter/Seattle* doctrine in the context of the recent decisional law of race-based classification. *See Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

In holding that student-body diversity is a compelling state interest that can justify the narrowly tailored use of race in university admissions policies, *Grutter* set forth three principles about race-based admissions policies that bear repeating here. First, *Grutter* reminded us that "'[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race'"

and that, as a consequence, "race-conscious admissions policies must be limited in time." *Grutter*, 539 U.S. at 341, 342 (quoting *Palmore v. Sidotti*, 466 U.S., 429, 432 (1984)). This principle makes sense because all "racial classifications are presumptively invalid . . . ." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003). Second, *Grutter* indicated that the decision to end race-conscious admissions policies is primarily one to be made by states and their public universities, not courts. *See Grutter*, 539 U.S at 342 (noting that "sunset provisions . . . and periodic reviews" could be used to determine the continuing necessity of racial preferences and noting with favor race-neutral alternatives already employed in several states). And third, while racially conscious admissions policies are permitted, they are not constitutionally required. *Id.* at 325 ("[S]tudent body diversity is a compelling state interest that *can* justify the use of race in university admissions.") (emphasis added); *see Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 249 (6th Cir. 2006) ("*Grutter* never said, or even hinted, that state universities *must* do what they narrowly *may* do.").

A.

With these core principles in mind we examine the applicability of *Hunter* and *Seattle* to the passage of Proposal 2 in Michigan. We begin with *Hunter v. Erickson*, 393 U.S. 385, 386-87, 390 (1969), in which Akron voters repealed a fair housing ordinance that banned discrimination in the sale or lease of real property and created a more burdensome process for minorities to seek such protection. 393 U.S. at 386–87, 390. The underlying law—the repeal of which was

effected through section 137 of the City Charter and was found to violate the political restructuring doctrine—protected minorities by mandating their equal right to be free from discrimination. *Id.* at 390–93. *Hunter* thus involved the repeal of a presumptively valid law that mandated equal treatment; it did not involve the repeal of a racial preference policy or any other law that was itself presumptively invalid. *See Coral Constr., Inc. v. San Francisco*, 235 P.3d 947, 959 (Cal. 2010) ("In no sense did [*Hunter*] concern preferences . . . ."). Because *Hunter* considered only the political-process implications of repealing a law that required *equal* treatment, it cannot be read broadly to apply to the repeal of a law requiring *preferential* treatment. As we have observed, "[t]hese are fundamentally different concepts." *Granholm*, 473 F.3d at 251; *see Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997) ("It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment."). Thus, *Hunter* does not guide us here.

Nor does *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), suggest application of the political restructuring doctrine to Proposal 2. The underlying law in *Seattle* was a local ordinance that implemented a series of school desegregation measures, which was repealed by a statewide referendum called Initiative 350. *Seattle*, 458 U.S. at 460–62. In finding that the passage of Initiative 350 violated the political structure doctrine, *Seattle* explained that "when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such

legislation—is *singled out for peculiar and disadvantageous treatment*, the governmental action plainly rests on distinctions based on race." 458 U.S. at 485 (second emphasis supplied) (internal quotation marks omitted); *see also id.* at 474 ("The initiative removes the authority to address a racial problem—*and only a racial problem*—from the existing decisionmaking body . . . ." (emphasis supplied)). In other words, in order to trigger political-process concerns, *Seattle* instructs that the challenged enactment must single out racial issues or racially oriented legislation. And indeed, the challenged enactment in *Seattle*, though facially neutral, was "carefully tailored to interfere only with desegregative busing"—that is, to address "only a racial problem." *Id.* at 471 & n.14, 474. That is not the case here. Proposal 2 does not address "only a racial problem:" it prohibits any preference on the basis of race, sex, color, ethnicity, or national origin. Mich. Const. art. I. § 26. Nor was Proposal 2 "carefully tailored" to affect only university admissions: it extends not just to public universities but also to public employment and public contracting. *Id.* Accordingly, Proposal 2 is quite unlike the narrow anti-busing measure struck down in *Seattle*; it represents "a sea change in state policy, of a kind not present in *Seattle* or any other 'political structure' case." *See Coral Constr.*, 235 P.3d at 966 (Corrigan, J., concurring).

The majority is quick to conclude that Proposal 2 and Initiative 350 each target policies—affirmative action and integrative busing, respectively—that "inure[] primarily to the benefit of the minority" and therefore each has a "racial focus." (Maj. Op. at 15–18.) But in a political-restructuring challenge, it is not

enough to observe that some of the policies affected by the challenged enactment primarily benefit minorities. Nor is it enough to observe that, as here, the challenged enactment was passed in response to a high-profile case permitting racially conscious admissions policies under some circumstances. Though relevant, these observations are alone insufficient: in a political restructuring case, it is imperative to consider the scope of the challenged enactment itself.[1] The majority fails to account for the broad substantive reach of Proposal 2 when compared to the narrow focus of Initiative 350 and, in so doing, improperly stretches the political restructuring doctrine that *Seattle* articulates to the instant case.

There is an additional reason that the political restructuring doctrine should not apply here, a reason that has less to do with *Seattle* itself than with the evolution of equal protection jurisprudence since it was decided. Today, it is plain that a racially conscious student assignment system—such as the one that the *Seattle* initiative attempted to make more difficult to enact—would be presumptively invalid and subject to strict scrutiny. *See Parents Involved in Cmty. Sch. v. Seattle Schs. Dist. No. 1*, 551 U.S. 701, 720 (2007) ("[T]he school districts must demonstrate that the use

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[1] It is true that *Hunter* involved a challenged enactment that thwarted the passage of local ordinances focusing not only on racial but also on religious and ancestral discrimination. *Hunter*, 393 U.S. at 386. But *Hunter*'s section 137 was far narrower than Proposal 2 in that it did not extend to sex nor did it apply beyond housing matters. Furthermore, as explained above, *Hunter* did not even arguably involve the repeal of a law instituting racial preferences and thus does not suggest application of the political restructuring doctrine here.

of individual racial classifications in the assignment plans here under review is narrowly tailored to achieve a compelling government interest." (internal quotation marks omitted)). But that was not always the case. As the California Supreme Court has observed, "at the time *Seattle* was decided, the high court's prior decisions indicated that the assignment of pupils by ratios to achieve racial balance fell 'within the broad discretionary powers of school authorities' to formulate 'educational policy' and to 'prepare students to live in a pluralistic society . . . .'" *Coral Constr.*, 235 P.3d at 959 (quoting *Swann v. Charlotte- Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)); *see N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("[S]chool authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."); *see* Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for A More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. Pa. J. Const. L. 629, 648 & n.118 (2007) (writing, prior to *Parents Involved*, that "strict scrutiny has never been applied in the context of school desegregation by the Supreme Court"); *cf. Parents Involved*, 551 U.S. at 737 (plurality) ("[W]hen *Swann* was decided, this Court had not yet confirmed that strict scrutiny applies to racial classifications like those before us [*i.e.*, a racially conscious student assignment program]."). Indeed, it was not until 1995 that the Supreme Court made clear in *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), that strict scrutiny applies to all racial classifications. *See Parents Involved*, 551 U.S. at 720 (majority opinion) (citing *Adarand*); *id.* at 739 n.16

(plurality opinion) (citing *Adarand*); *id.* at 758 (Thomas, J., concurring) (citing *Adarand*); Jonathan Fischbach *et al.*, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 Harv. C.R.-C.L. L. Rev. 491, 529–30 (2008) ("*Adarand* . . . established the uniform application of strict scrutiny to all racial classifications."); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 Yale L.J. 1141, 1168 (2002).

Thus, when articulating the reach of the political restructuring doctrine, *Seattle* did not consider that the underlying policy affected by the challenged enactment was presumptively invalid.[2] But we must consider that fact here. And indeed, the circumstance that racially conscious admissions policies are subject to the most exacting judicial scrutiny and limited in time—legal realities that the *Seattle* Court neither confronted nor factored into its decision—counsels heavily against applying the political restructuring doctrine to the enactment of Proposal 2. *See Grutter*, 539 U.S. at 341–42. *Grutter*'s charge that "[u]niversities in other States can and should draw on the most promising aspects of . . . race-neutral alternatives as they develop" only

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[2] While the dissent in *Seattle* suggested that the busing program be subject to strict scrutiny, 458 U.S. at 492 n.6 (Powell, J., dissenting), the majority did "not specifically pass on that issue" because no one had challenged "the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation." *Id.* at 472 n.15 (majority opinion); *see also Parents Involved*, 551 U.S. at 721 n.10 (noting that in *Seattle* the question of "whether a district's voluntary adoption of race-based assignments in the absence of a finding of prior *de jure* segregation was constitutionally permissible" was "an issue . . . expressly reserved").

underscores this point. *Id.* at 342. So while the majority is correct that *Seattle* employs broad language about protecting the "'ability of minority groups to achieve *beneficial legislation*'" (Maj. Op. at 32 (quoting *Seattle*, 458 U.S. at 467)), it must be remembered that the "beneficial" policy that Proposal 2 purportedly makes more difficult to enact is itself "'highly suspect.'"[3] *Grutter*, 539 U.S. at 326 (quoting *City of Richmond v. J.A. Cruson Co.*, 488 U.S. 469, 493 (1989)). This is exactly the type of "[c]ontext [that] matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.* at 327. In short, equal protection jurisprudence regarding the use of racial classifications has developed markedly since *Seattle* was decided, and this development makes clear that applying the political restructuring doctrine to the enactment of Proposal 2 is hardly appropriate.

B.

In concluding that a race-based classification that is presumptively invalid, but permissible under limited circumstances and for a finite period of time, receives the same structural protections against statewide popular repeal as other laws that inure to the interest of minorities, the majority walks alone. The two highest courts to have considered the question have concluded that the political restructuring doctrine of

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[3] For this reason, it is unimportant whether at the challenged enactment in *Seattle* imposed "an obstacle impeding preferential treatment" (Maj. Op. at 30) or whether the enactment merely made it more difficult to seek protection from discrimination. Whatever the case, *Seattle* did not involve the rights of minorities to a policy that was presumptively invalid and explicitly limited in time.

Hunter and *Seattle* does not prevent the statewide popular elimination of race-based classification policies. The Ninth Circuit concluded that California's Proposition 209, which eliminated public race-based and gender-based affirmative action programs, did not violate equal protection because "[i]mpediments to preferential treatment do not deny equal protection." *Wilson*, 122 F.3d at 708. The court relied on an essential constitutional principle: "While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms . . . . The Equal Protection Clause, parked at our most 'distant and remote' level of government, singles out racial preferences for severe political burdens—it prohibits them in all but the most compelling circumstances." *Id.* The Ninth Circuit recently affirmed its commitment to the reasoning in *Wilson*, finding it "easily reconciled" with *Grutter*. *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1136 (9th Cir. 2012). The California Supreme Court came to the same conclusion, quoting *Grutter* for the principle that "'racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.'" *Coral Constr.*, 235 P.3d at 960 (quoting *Grutter*, 539 U.S. at 342). The court explained that "[i]nstead of burdening the right to equal treatment, [the statewide referendum banning race-based classification] directly serves the principle that 'all governmental use of race must have a logical end point.'" *Id.* (quoting *Grutter*, 539 U.S. at 342). Our own district court agreed: "Proposal 2 does not offend the Equal Protection

Clause by distancing racial minority groups from the means of obtaining *equal* protection." *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 957 (E.D. Mich. 2008).

The teaching of these cases is that equal treatment is the baseline rule embodied in the Equal Protection Clause, from which racial-preference programs are a departure. *See Grutter*, 539 U.S. at 342 ("[R]ace-conscious admissions programs . . . [are a] deviation from the norm of equal treatment of all racial and ethnic groups . . . ."). These programs—fundamentally different from the underlying policies in *Hunter* and *Seattle*—cannot receive special sanctuary from a decision of the majority of voters to return their law to the equal protection norm of equal treatment.

III.

There is another reason that *Hunter* and *Seattle* cannot forbid the amendment of the Michigan Constitution through the passage of Proposal 2. In both cases the relevant lawmaking authority was reallocated from a local legislative body to the "more complex government structure," *id.* at 477, of the city- or state-wide general electorate, thereby placing a "comparative structural burden . . . on the political achievement of minority interests," *id.* at 475 n.17. A key consideration in analyzing a *Hunter* political structure challenge, therefore, is whether the challenged law affects the ability of minorities to secure "legislation that is in their interest" as minorities. *Id.* at 474 (internal quotation marks omitted); *see also id.* at 475 n.17 ("Thus, in *Hunter*, the procedures for enacting racial legislation were modified in a such a way as to place effective control in the

hands of the citywide electorate. Similarly here [in *Seattle*], the power to enact racial legislation has been reallocated."). As the record here demonstrates, the people of Michigan have not restructured the state's lawmaking process in the manner prohibited by *Hunter* and *Seattle*. Instead, their vote removed admissions policy from the hands of decisionmakers who were unelected and unaccountable to either minority or majority interests and placed it squarely in an electoral process in which all voters, both minority and majority, have a voice.

A.

Public higher education in Michigan is unique in that "[t]he Michigan Constitution confers a unique constitutional status on [Michigan's] public universities and their governing boards." *Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ.*, 594 N.W.2d 491, 495–96 (Mich. 1999) (citing Mich. Const. art. VIII, §§ 5 and 6). These boards are "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is coordinate with and equal to that of the legislature." *Id.* at 496 n.8 (quoting *Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*, 132 N.W. 1037, 1040 (Mich. 1911)). Each governing board is vested with the power of "general supervision of its institution and the control and direction of all expenditures from the institution's funds." Mich. Const. art. VIII, § 5. The constitution provides for eight-member governing boards, elected to statewide office for eight-year terms, Mich. Const. art. VIII, § 5, and elections are typically staggered, with,

for example, an election every two years for regents of the University of Michigan.

Although these universities and their respective boards are created by the Michigan Constitution, the admissions policies are placed within the control of the boards or school authorities only within each board's bylaws. Thus, the admissions policies are not established by the state constitution, and it is necessary to look to testimony to determine where the power to set admissions policy lies.

The governing boards have fully delegated the responsibility for establishing admissions standards to several program-specific administrative units within each institution, which set admissions criteria through informal processes that can include a faculty vote. For example, at the University of Michigan Law School the admissions policy is set by the law school faculty admissions committee, with major substantive changes occasionally voted upon by the entire law school faculty. Similarly as described by its former dean, at the Wayne State University Law School the ultimate decision whether to change admissions standards rests with the faculty alone. Thus, as the Cantrell Plaintiffs readily admitted in their previous briefing, the "faculty are the primary architects of all the admissions criteria and protocols."

As the deans of both law schools explained, at neither university is there a system in place to review or alter admissions policies at a level above a vote of the faculty. Sarah Zearfoss, the dean of admissions at the University of Michigan Law School, testified that no one could change the school's admissions policy other than the faculty admissions committee or the

faculty itself, because "there's no higher body" to which someone unhappy with an admissions policy could advocate change. And Frank Wu, then the dean at Wayne State University Law School, agreed that "only the faculty at the law school has the authority to create and approve the admissions policy" at the school. Indeed, Wu testified that the admissions policy is not subject to the approval of the Wayne State University Board of Governors, and, in his view, if the Board of Governors attempted to alter the decision of the law school's faculty with respect to criteria for admission, "it would precipitate a constitutional crisis." Each institution's board may superficially have "plenary authority" over its respective institution (*see* Maj. Op. at 20), but the real authority to set admissions policy rests with each program-specific faculty within the universities.

The majority ignores the factual testimony of Deans Zearfoss and Wu, which explains how admissions policies are *actually* crafted. Instead, the majority emphasizes that the boards—although they have fully delegated their decisionmaking power to admissions directors and faculty—can revoke this authority and can revise any bylaw in order to effect changes in university admission policies. That the boards can legally revoke a delegation of authority or have occasionally revised their bylaws to effect a change in admissions policy, however, does not change the underlying factual reality that the law school deans describe. Their testimony demonstrates that program-specific faculties do not merely manage the "day-to-day implementation of policy," (Maj. Op. at 23); these entities also set and change admissions policies—without any significant oversight by the boards.

B.

The decisionmaking structure at the universities is important because these program-specific faculty admissions committees are far afield from the legislative bodies from which lawmaking authority was removed in *Hunter* and *Seattle*. To appreciate this critical difference we need look no further than *Seattle* itself.

In *Seattle*, the Court emphasized that the type of action it found objectionable was the creation of comparative burdens "on minority participation in the political process." 458 U.S. at 480 n.23; *see id.* at 486 ("[M]inorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups 'from effective participation in the political proces[s].'" (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 94 (1980) (White, J., dissenting))). The *Seattle* majority, however, did not view state university admissions committees as a part of the "political process" in the manner of an elected school board or city council. A dialogue between the majority and dissent in *Seattle* is particularly instructive on this point. In dissent, Justice Powell, critiquing the potential breadth of the majority's holding, argued:

> Thus, if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the dean of the law school, the faculty of the university

> system as a whole, the university president, the chancellor of the university, and the board of regents might be powerless to intervene despite their greater authority under state law.

Id. at 498 n.14 (Powell, J., dissenting). The majority, however, flatly dismissed this concern as a misunderstanding of the court's decision: "It is evident, then, that the horribles paraded by the dissent, *post*, at [footnote 14 of the dissent]—*which have nothing to do with the ability of minorities to participate in the process of selfgovernment*— are entirely unrelated to this case." *Id.* at 480 n.23 (emphasis added).

For the *Seattle* majority, then, an impermissible reordering of the political process meant a reordering of the processes through which the people exercise their right to govern themselves. *See id.* at 486 ("And when the State's allocation of power places unusual burdens on the ability of racial groups to *enact legislation* specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities' . . . from the 'majoritarian political process.'" (emphasis added) (quoting *United States v. Carolene Prods. Co.* 304 U.S. 144, 153 n.4 (1938); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973))); *see id.* at 467 ("But the Fourteenth Amendment also reaches a '"political structure that treats all individuals as equals' . . . yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to *achieve beneficial legislation*." (emphasis added) (quoting *Bolden*, 446 U.S. at 84)).

Thus, the academic processes at work in state university admissions in Michigan are not "political processes" in the manner contemplated in *Seattle*. Unlike the Seattle School Board and the Akron City Council, the various Michigan university admissions committees and faculty members are unelected. As at most public universities, tenured faculty members have significant vested rights associated with their employment in order to preserve academic freedom and independence. The faculty members who are permitted to vote on policy matters are therefore significantly insulated from political pressure by virtue of their tenure. These faculty are beholden to no constituency--student, local, or otherwise. And, as demonstrated by the testimony of the law school deans in this case, the people of Michigan have no ability to exert electoral pressure on the university decision makers to change their admissions polices. As they currently stand, the faculty admissions committees are islands unto themselves, vested with the full authority to set admissions policy for their respective university programs.

Of course, when an elected body delegates a power, it does not automatically follow that the delegatee's decisions fall outside the political process. But that is not the point. Rather, the testimony of the law school deans demonstrates that, whatever the formal legal structure, the faculty committees set admissions policies without significant review by the boards—thus insulating them from the political pressures the boards themselves face.[4]

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[4] *Nyquist v. Lee*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd Nyquist v. Lee*, 402 U.S. 935 (1971), a case from the Western District of

Furthermore, there is no "local" university constituency as there is a local constituency for a city council or city school board, *i.e.*, the city's voters. Rather, despite there being a broad student, faculty, and staff *community* associated with each university, Michigan's state universities were established as state-wide institutions with a state-wide *constituency*. The faculty admissions committees therefore do not "represent" any local constituency at all. This is particularly important because the *Seattle* majority looked closely at the fact that Washington's lodging of political decisionmaking authority over the busing question at the statewide level directly burdened minority interests by "mak[ing] the enactment of racially beneficial legislation difficult, [because] the particular program might not have inspired opposition

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New York that was summarily affirmed by the Supreme Court and cited in *Seattle*, is not to the contrary. In *Nyquist*, the court found that a New York statute that "prohibit[ed] state education officials and appointed school boards from assigning students, or establishing, reorganizing or maintaining school districts, school zones or attendance units for the purpose of achieving racial equality in attendance" unconstitutionally reordered the political process in violation of the Equal Protection Clause. *Nyquist*, 318 F. Supp. at 712, 720. The fact that *appointed* school boards were part of the political process at issue in *Nyquist* does not mean that the university faculty admissions committees are similarly part of the political process. The decision in *Nyquist* made note of how the local boards were accountable to the community: "Parties considering themselves aggrieved by local board actions may seek to have the Commissioner enforce those policies. [The New York statute], however, singles out for different treatment all plans which have as their purpose the assignment of students in order to alleviate racial imbalance." *Id.* at 719 (internal citations omitted). Thus, even the *appointed* school boards were accountable to the community in a way in which the faculty admissions committees certainly are not.

had it been promulgated through the usual [local] legislative processes used for comparable legislation." 458 U.S. at 483–84. The Court continued:

> That phenomenon is graphically demonstrated by the circumstances of this litigation. The longstanding desegregation programs in Pasco and Tacoma, as well as the Seattle middle school integration plan, have functioned for years without creating undue controversy. Yet they have been swept away, along with the Seattle Plan, by Initiative 350. As a practical matter, it seems most unlikely that proponents of desegregative busing in smaller communities such as Tacoma or Pasco will be able to obtain the statewide support now needed to permit them to desegregate the schools in their communities.

Id. at 484 n.27. The availability of "local" decisionmaking is therefore important when the political power of groups who could succeed at the local level is diluted in the statewide decisionmaking process. The universities here, however, are statewide institutions with a statewide constituency. There is nothing local about them.

Nor are the committees particularly accessible or subject to effective lobbying. While members of the public may attend faculty meetings at which admissions standards are reviewed, there is no formal mechanism by which a member of the public—student or not—can move the committees to amend the admissions standards. And while interested students and members of the public are, with advance notice, permitted to speak at faculty meetings to comment on

the admissions policies, the committees are not required to consider these comments seriously, issue written findings addressing these concerns, or do more than provide a forum for interested individuals to speak. Rather, it appears that the main source of divergent views on admissions policies is the faculty members themselves.

The lack of a viable electoral mechanism to change university admissions policies at a sub-constitutional level means that the voters' use of a constitutional amendment in this instance does not serve to create "comparative structural burden[s] . . . on the political achievement of minority interests." *Seattle*, 458 U.S. at 474 n.17. If, as the evidence before this court makes plain, the voters cannot exert electoral pressure on independent faculty committees, then all voters regardless of racial identity compete on the same level for the political achievement of their higher-education interests: the constitutional level. This state constitutional amendment does not, then, create an improper comparative structural burden, but rather merely requires proponents of the use of racial preferences in admissions policy to engage the same level of process followed by proponents of Proposal 2. Thus, contrary to what the majority suggests, the burden upon a citizen who advocates for legacy preferences in university admissions is similar to the burden upon a citizen who advocates for racial preferences. Although the former *may* attempt to lobby a faculty committee or university directly, these entities—according to the clear testimony of the law school deans and the manner in which authority has been delegated—will likely be unresponsive. Likewise, efforts to elect a particular board member, where the

evidence demonstrates that the boards do not alter the admissions policies approved by the faculty committees, will similarly have little effect on admission policies.

Although the majority appears to see no reason to distinguish between the unelected and unresponsive program-specific faculty admissions committees here and the legislative bodies from which lawmaking authority was removed in *Hunter* and *Seattle*, a consideration of political accountability in the political process is squarely grounded in the *Seattle* opinion. In *Seattle*, the Court undertook a close examination of Washington's system of "establish[ing] the local school board, rather than the State, as the entity charged with making decisions of the type at issue," 458 U.S. at 477:

> But Washington has chosen to meet its educational responsibilities primarily through "state and local officials, boards, and committees," and the responsibility to devise and tailor educational programs to suit local needs has emphatically been vested in the local school boards.
>
> Thus "each common school district board of directors" is made "*accountable* for the proper operation of its district *to the local community and its electorate*." To this end, each school board is "vested with the final responsibility for the setting of policies ensuring quality in the content and the extent of its educational program."

Id. at 477–78 (citations omitted) (emphases added); *see also id.* (noting the "disclosure and reporting provisions specifically designed to *ensure the board's 'accountability' to the people of the community*" (emphasis added)). It was only upon its consideration of the state statutory structure's vesting of decisionmaking in local and politically accountable school boards that the Court could conclude that "placing power over desgregative busing at the state level . . . restructured the Washington political process." *Id.* at 480. Taking this into account, it is difficult to conclude that, in amending their state constitution to prohibit the use of racial preferences in university admissions, the people of Michigan modified "the community's *political mechanisms* . . . to place effective decisionmaking authority over a racial issue at another level of *government*." *Id.* at 474 (emphases added). Michigan has not "'burden[ed] all future attempts' to implement race-conscious admissions policies 'by lodging decisionmaking authority over the question at a new and remote level of government.'" (Maj. Op. at 30–31 (quoting *Seattle*, 458 U.S. at 483).) Having little or no direct or indirect influence on the bodies that actually set admissions standards—the faculty committees—the people of Michigan made a political change at the *only* level of government actually available to them as voters. The Michigan electorate, therefore, as opposed to choosing a more complex structure for lawmaking, employed *the one* effective method available to exert electoral pressure on the mechanisms of government.

In short, Michigan has chosen to structure its university system such that politics plays no part in university admissions at all levels within its

constitutionally created universities. The Michigan voters have therefore not restructured the political process in their state by amending their state constitution; they have merely employed it.

IV.

Finally, it is plain that Proposal 2 does not violate the Equal Protection Clause under a traditional approach to equal protection. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). We apply strict scrutiny to laws that (1) include a facial racial classification or (2) have a discriminatory impact and a discriminatory purpose. *Adarand*, 515 U.S. at 227; *Davis*, 426 U.S. at 239–42. Proposal 2, which prohibits racial classifications, *a fortiori* does not classify facially on the basis of race. *See Wilson*, 122 F.3d at 702; *Coral Constr.*, 235 P.3d at 957. As to discriminatory impact and purpose, the district court did find "sufficient evidence to establish a fact question on the disparate impact part of the test" but found no discriminatory purpose. *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 951–52. Indeed, it stated that "the demonstration of a discriminatory purpose . . . dooms [the] conventional equal protection argument" because it "cannot [be] sa[id] that the only purpose of Proposal 2 is to discriminate against minorities." *Id.* (citing various motivations of Proposal 2's chief supporters that were not racially discriminatory). The district court's conclusions are correct. "[A]bsent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is

racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." *Arthur v. Toledo*, 782 F.2d 565, 574 (6th Cir. 1986). Thus, no heightened level of scrutiny need be applied to Proposal 2, and under rational basis review, Proposal 2 is easily justifiable. Proposal 2 does not violate the Equal Protection Clause under the conventional analysis. *See Brown*, 674 F.3d at 1135; *Wilson*, 122 F.3d at 701; *Coral Constr.*, 235 P.3d at 957.

V.

As a last matter, I have no disagreement with the majority's treatment of the procedural issues discussed in Part II.B and C.

VI.

For these reasons, I would conclude that Proposal 2 does not violate the Equal Protection Clause of the United States Constitution under either a political restructuring theory or traditional theory of equal protection. Accordingly, I would affirm the judgment of the district court.

DISSENT

ROGERS, Circuit Judge, dissenting. I join Judge Gibbons's compelling dissent.

Under the majority opinion, it is hard to see how any level of state government that has a subordinate level can pass a no-race-preference regulation,

ordinance, or law. Doing so would perforce make it harder for one minority or another to obtain a preference at the lower level. That alone can hardly render the no-race-preference act unconstitutional. Whatever *Hunter* and *Seattle* hold, the Supreme Court cannot have intended such a ban.

DISSENT

SUTTON, Circuit Judge, dissenting. I join Judge Gibbons' dissent and write separately to make a few additional points.

Today's lawsuit transforms a potential virtue of affirmative action into a vice. If there is one feature of affirmative-action programs that favors their constitutionality it is that they grow out of the democratic process: the choice of a majority of a State's residents to create race-conscious admissions preferences at their public universities not to benefit a majority race but to facilitate the educational opportunities of disadvantaged racial minorities. Such democratically enacted programs, like all democratically enacted laws, deserve initial respect in the courts, whether the particulars of a program satisfy the Fourteenth Amendment, *see Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), or violate it, *see Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003).

Yet this lawsuit turns these assumptions on their head. Democracy, it turns out, has nothing to do with it. Plaintiffs insist that the Fourteenth Amendment's

guarantee of "equal protection of the laws" imposes two new rules on the policy debates surrounding affirmative action in higher education. Rule one: States not only *may* establish race-conscious affirmative-action programs, but they *must* do so to comply with the Fourteenth Amendment. Rule two: even if the Fourteenth Amendment does not mandate that States establish affirmative-action programs at their public universities, it bars them from eliminating such programs through amendments to their constitutions.

A.

The first theory has little to recommend it, so little that the notion of mandatory affirmative action will come as a surprise to all Justices of the United States Supreme Court, past and present, who have labored to determine *whether* state universities may *ever* enact such race-conscious programs under the United States Constitution. No Justice has taken the position that this recurring and vexing debate has all been a distraction, one that overlooked the hidden truth that the Fourteenth Amendment necessarily permits affirmative-action programs because it demands them.

Plaintiffs nonetheless insist that, "to the extent that [Proposal 2] . . . bar[s] race or gender conscious programs that would be permissible under the Fourteenth Amendment, it violates the Equal Protection Clause." Coalition First Br. at 39; *see also, e.g.*, Oral Arg. at 7:36–45. Yet the words of the one amendment (prohibiting the State from "discriminat[ing] . . . on the basis of race") cannot violate the words of the other ("nor shall any State deny to any person . . . the equal protection of the laws").

That is especially true in the context of classifications based on race, which are presumptively unconstitutional and which must run the gauntlet of strict scrutiny to survive. *See Gratz*, 539 U.S. at 270. If racial preferences are only occasionally and barely constitutional, it cannot be the case that they are always required. A State that wishes to treat citizens of all races and nationalities equally "is free as a matter of its own law" to do so. *Oregon v. Hass*, 420 U.S. 714, 719 (1975). A first premise for resolving this case is, and must be, that a State does not deny equal treatment by mandating it.

B.

The claimants' other theory is of a piece. Having argued that the people of Michigan may not resort to the political process to eliminate racial preferences because the Fourteenth Amendment demands them, the claimants alternatively insist that the "political process doctrine" of the Fourteenth Amendment separately prohibits the State from eliminating such programs already in existence by way of a state constitutional amendment. Coalition First Br. at 27. That is not much of an alternative, as it comes to the same end. More fundamentally, the argument misapprehends what States may do as a matter of "politics" *and* "process." Under the realm of politics, as just shown, the people of a State may choose to end rather than continue affirmative-action programs. Under the realm of process, the people of a State are free to use amendments to their constitution—the same charter of state government that delegated power to create affirmative-action programs in the first place—as the vehicle for making the change.

It is not that easy, plaintiffs insist. Even if States may do all of these things, the political-process doctrine prohibits States from altering their constitutions in a way that places "special burden[s] on racial minorities within the governmental process." *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *see* Coalition First Br. at 28. Yes, of course. But Michigan did no such thing.

By any reasonable measure, Proposal 2 does not place "special burdens" on racial minorities. It bans "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const. art. I, § 26. That is not a natural way to impose race-based burdens. The words of the amendment place no burden on anyone, and indeed are designed to prohibit the State from burdening one racial group relative to another. All of this furthers the objectives of the Fourteenth Amendment, the same seed from which the political-process doctrine sprouted.

That the people of Michigan made this change through their Constitution, as opposed to state legislation or a new policy embraced by the governing boards at the three state universities, does not impose a "special burden" on any racial minority. There is nothing unusual about placing an equal-protection guarantee in a constitution. That is where individual-liberty guarantees often go, and that after all is where the national framers placed the federal counterpart. States need not place equal-protection guarantees at the structural location of the plaintiffs' choosing, be it at the governing boards of each university, the faculty

of each university or the admissions office of each university. Instead of neutralizing the political process, that approach would skew it.

What else at any rate could the people of Michigan have done? Keep in mind that Proposal 2 applies not just to "public education" but also to "public employment" and to "public contracting." Neither the governing boards of the universities nor the universities' faculties nor for that matter each university's admissions committee oversees "public employment" or "public contracting" for the entire State. And the Michigan Constitution prohibits the legislature from interfering in "the university's sphere of educational authority." *Federated Publ'ns, Inc. v. Bd. of Trustees of Mich. State Univ.*, 594 N.W.2d 491, 497 (Mich. 1999). That left the State just one option for addressing racial preferences in all three areas: a statewide constitutional amendment. This time-hallowed option places no special burden on proponents of affirmative action other than the customary burdens placed on *anyone* seeking to pass a constitutional amendment.

The charge that the Federal Constitution prohibits States from banning racial preferences through amendments to their constitutions also fails to account for one of the most fervent criticisms of state constitutions: They are *too easy* to change. The referendum option *facilitates* change, as it makes altering the constitution as easy as (if not easier than) altering legislation. After obtaining the requisite number of signatures (10% of the votes cast in the last gubernatorial election, *see* Mich. Const. art. XII, § 2), the proponents of change need to obtain just 51% of a

popular vote and are spared the need to obtain the consent of the Governor and each house of the legislature. That is why the former Chief Justice of the California Supreme Court, faced with an equally variable state constitution, decries the "perpetual instability of California's state constitutional law. *See* Ronald M. George, *Keynote Address*, 62 Stan. L. Rev. 1515, 1516 (2010).

Nothing prevents proponents of affirmative action from borrowing a page from the same playbook in a future state referendum—unless, that is, 51% of Michigan voters do not support the change. But if the caveat applies, the answer is not to resort to the political-process doctrine, the goal of which is to promote neutral democratic means and ends, not to ban them. The short of it is that a bare requirement of a 51% popular vote as a vehicle for constitutional change is as good as it gets—at least from the perspective of proponents of future change. States may create higher, super-majority impediments to change. But they cannot create *super-minority* facilitations of it.

Of the 51 constitutions in this country, moreover, the most difficult to change is the Federal Constitution, which requires three-quarters of the States to ratify an amendment. Now *that* is a difficult charter to change. Is it really possible that the same Federal Constitution that is nearly impervious to change precludes a State from housing its elimination of racial preferences in a constitution that requires just a 51% popular vote for passage? Doubtful.

Odder still, the United States Constitution generally does not meddle in the way the States

structure their governments. *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 109 (1967). If they want a unicameral legislature, they can have it. *See* Neb. Const. art. III, § 1. And if they want direct democracy through constitutional and legislative referenda, they can have it. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912). If even the "republican form of government" guarantee is unenforceable, *see* U.S. Const. art. IV, § 4; *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849), it is surely the case that the Fourteenth Amendment does not dictate the level of government at which a State must enact a statewide ban on race discrimination.

It is worth considering plaintiffs' alternative to this straightforward interpretation of the Fourteenth Amendment, the one every other court to face this issue has embraced, including our own when the plaintiffs sought to prevent Proposal 2 from going into effect in 2007. *See Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 250 (6th Cir. 2006); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 707 (9th Cir. 1997); *Coral Constr., Inc. v. City & Cnty. of San Francisco*, 235 P.3d 947, 960 (Cal. 2010). Instead of allowing the people of Michigan to end racial preferences through a statewide popular vote that amends the State Constitution, they insist the Fourteenth Amendment permits this change in one, and only one, way: multiple elections over multiple years. Their theory contains several premises and several steps. One: any change may not come through legislation because the Michigan Constitution puts the governing boards at each of the three public universities (Michigan, Michigan State and Wayne State) in charge of educational policy, including

apparently admissions policies, at each university. Two: there are eight members of the Board at each university, and two of them stand for election every two years in statewide elections. Three: these statewide elections are the only neutral way to permit opponents of racial preferences to establish such an admissions policy. Four: after eight years, the opponents of racial preferences will have had a chance to replace all members of the three Boards and presumably by then, if not a few years before, would have the votes to end racial preferences at each university. And all of this explains only the rules for Michigan's three public universities. Anyone wishing to change admissions policies at Michigan's *other* institutions of higher education faces an equally elaborate process. *See* Mich. Const. art. VIII, § 6 (authorizing the elected governor to appoint members of regional university boards to staggered eight-year terms); *id.* § 7 (authorizing locally elected boards to regulate community and junior colleges).

Whatever else one might say about the path on which this interpretation of the Fourteenth Amendment takes us, it does not follow Occam's razor in getting there. Yet needless complexity is the least of the problems raised by this theory. How would the supporters of Proposal 2 end racial preferences in public contracting and public employment, which the university boards do not oversee? Does plaintiffs' theory mean opponents of racial preferences must do both—win a statewide referendum *and* win twenty-four statewide individual elections? Must proponents of affirmative action do the same to reverse a contrary policy? Even if we ignore public contracting and employment, who says a single 10% petition drive and

a single 51% popular vote make life more difficult for proponents of change than twenty-four statewide elections (among others) for twenty-four individuals over an eight-year period? Where are the empirical studies to prove the point? Should not the proponents of invalidating a state constitutional amendment be expected to prove the premise before the court accepts this invitation? Could the supporters of Proposal 2 amend the Michigan Constitution to remove control of the universities from their governing boards and place it in the hands of the legislature? What then? Would statewide legislation banning (or reinstating) racial preferences be permissible? There are many questions here, and all of them counsel against adopting this disfiguring interpretation of the Fourteenth Amendment.

I do not doubt that Proposal 2 places a burden on proponents of affirmative action: They no longer have access to it, and they must amend the constitution to get it back. But the Fourteenth Amendment insists only that all participants in the debate have an equal shot. It does not ensure victory for one side or the other in this or that policy debate. It would be paradoxical if something called the "political process doctrine" insulated one side of a vigorous policy debate from a timeless rule of politics: win some, lose some. Winning some and losing some, as it happens, is just what has occurred across the country with statewide ballots seeking to eliminate racial preferences. While some initiatives have prevailed (California, Michigan, Nebraska and Washington), others have failed (Colorado, Missouri and Oklahoma). *See* Tim Hoover, *Amendment 46 Fizzling Out*, Denver Post, Nov. 7, 2008 at B4.

Another oddity of this theory is that it would apply even if the Michigan Constitution eliminated affirmative-action programs in another way. In 1963, the people of Michigan passed an earlier amendment to their Constitution, one that prohibited race discrimination by governmental entities. *See* Mich. Const. art. I, § 2. In view of this prohibition, a Michigan resident surely would have the right to bring a claim that the State Constitution's existing prohibition on race-based classifications bars a system of racial preferences in admissions, contracting and employment. If there is one thing that the closely divided decisions in *Bakke*, *Gratz* and *Grutter* illustrate, it is that the Michigan Supreme Court could reasonably invalidate, or reasonably uphold, racial preferences under the State Constitution's existing equal-protection guarantee. A decision invalidating racial preferences, however, would have precisely the same effect as Proposal 2, establishing that the Constitution bars racial preferences and placing the onus on proponents of racial preferences to alter the Constitution. The claimants have no answer to this point. If Proposal 2 violates the political-process doctrine, so too would a decision by the Michigan Supreme Court that comes to the same end through a permissible interpretation of the 1963 equal-protection guarantee.

The same is true of a state court's decision to apply strict scrutiny to racial preferences. Most state constitutions, including all of the ones in our circuit, mirror this aspect of the Federal Constitution: They require strict scrutiny of governmental classifications based on race. *See, e.g.*, *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003); *Harvey v. State, Dep't of Mgmt. &*

Budget, Bureau of Retirement Servs., 664 N.W.2d 767, 770 (Mich. 2003); *State v. Thompson*, 767 N.E.2d 251, 255–56 (Ohio 2002); *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). One might think these constitutional safeguards would be secure from second-guessing by federal courts, but they are not under plaintiffs' theory. For they impose special burdens on some policies that might benefit racial minorities in the admissions process without imposing the same burdens on policies that benefit groups categorized along non-suspect lines, such as children of alumni, athletes or band members. Under each of these state constitutions, a member of a racial minority who wants a governmental privilege must identify a compelling state interest that supports its provision. If plaintiffs are correct, that reality dooms the States' equal protection clauses, even though the federal Equal Protection Clause requires no less. That cannot be right.

The Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), which did not concern racial classifications, holds nothing to the contrary. Colorado enacted a constitutional amendment prohibiting the State and its municipalities from enacting laws banning discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Id.* at 624. In invalidating the amendment, the Court noted that the amendment "impos[es] a broad and undifferentiated disability" (the inability to seek protection from discrimination at the state or local level) "on a single named group" (gays and lesbians). *Id.* at 632. The amendment "was inexplicable by anything but animus toward the class it affects" and therefore "lack[ed] a rational relationship to legitimate state interests." *Id.* By

contrast, Proposal 2 serves a rational interest, indeed a compelling one: eliminating racial classifications in admissions, public employment and public contracting.

The Court's decisions in *Hunter* and *Seattle*, which did concern racial classifications, also hold nothing to the contrary. The laws invalidated in both cases were designed to disadvantage one minority group—African-Americans—and no other. In *Hunter*, the City of Akron in 1964 amended its charter to require that any housing ordinance forbidding discrimination "on the basis of race, color, religion, national origin or ancestry" be approved in a city-wide referendum before going into effect, an amendment designed to hinder only the political goals of the African-American community. *See* 393 U.S. at 391; *id.* at 394, 395 (Harlan, J., concurring). In *Seattle*, the State of Washington in 1978 enacted a law forbidding school districts from requiring children to be bused to schools distant from their homes, but made exceptions for busing designed for virtually every purpose *except* racial integration. 458 U.S. at 462–63. It thus "remove[d] the authority to address a racial problem—and only a racial problem—from [school boards]." *Id.* at 474.

The same cannot be said of Proposal 2. In the first place, Proposal 2 removes racial preferences, not anti-discrimination measures. To the extent Proposal 2 has any effect on the political structures through which a group may acquire special treatment in university admissions, it is a leveling one. The law imposes no "special burden[s]" on anyone, *Hunter*, 393 U.S. at 391, but instead eliminates "pernicious" "racial classifications," *Gratz*, 539 U.S. at 270. If ever there

were a neutral, non-special burden, that is it. The Equal Protection Clause freely permits governments to ban racial discrimination, as here, but it does not freely permit them to ban all bans on racial discrimination, as in *Hunter* and *Seattle*.

In the second place, Proposal 2 prohibits discrimination not just on the basis of race but also on the basis of sex, ethnicity and national origin. To the extent it disadvantages anyone, it disadvantages groups that together account for a majority of Michigan's population, not this or that racial minority. It "make[s] little sense to apply 'political structure' equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate." *Coal. for Econ. Equity*, 122 F.3d at 704.

Nor is it even clear which groups—men or women, this racial group or that one—Proposal 2 helps and hurts, or when each group will be affected. Perhaps there was a time when a ban on gender-based preferences favored men. Perhaps the opposite is true today, as female high school students increasingly outperform their male classmates. *See, e.g.*, Rob Mank, *Men Far More Likely to Benefit from Affirmative Action in College Admissions*, CBS News, Sept. 26, 2011, http://www.cbsnews.com/8301-503544_162-20111646-503544.html. A ban on racial preferences likewise may favor some racial groups today and others tomorrow. The one thing we know for sure is that race-based programs need not, indeed may not, last into perpetuity, as the Court assumed that *all* such programs would come to an end within 25 years—namely by 2028. *See Grutter*, 539 U.S. at 343. It is the

essence of democracy to allow the people to use their own judgment in deciding when a complicated policy has outlived its usefulness, and nothing in *Grutter* required the States to wait until 2028 to make that choice.

It is no answer to say that Michigan may adopt a statewide policy regarding racial preferences if, and only if, they adopt statewide policies on other admissions policies—from how much weight to give Advanced Placement courses to how many zoology students to admit to how to treat children of alumni to how to treat football players, oboists or thespians. The Equal Protection Clause reflects our collective judgment that generalizations based on race are dubious in the near term and destructive in the long term, making it appropriate to treat racial proxies, which are presumptively unconstitutional, differently from other more-pedestrian distinctions, which are presumptively constitutional. *Gratz*, 539 U.S. at 270. It does not bar Michigan from recognizing the same.

Any doubt that *Hunter* and *Seattle* support rather than undermine the constitutionality of Proposal 2 is removed by *Seattle*, the last of the two decisions. In *Seattle*, Justice Powell, no stranger to affirmative-action debates, raised the concern that the majority's reasoning meant that, "if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies." 458 U.S. at 499 n.14 (Powell, J., dissenting). No worries, the majority responded: The problem with Washington's anti-busing initiative was

"the burden it impose[d] on minority participation in the political process," *id.* at 480 n.23, a consideration that made Justice Powell's hypothetical "entirely unrelated to this case" because it had "nothing to do with the ability of minorities to participate in the process of self-government." *Id.* If the Court thought that the removal of an affirmative-action policy was "entirely unrelated" to the concerns in *Seattle*, then I am hard-pressed to understand why the same is not true in this instance—and just as hard-pressed to understand how anyone can insist our hands are tied in today's case. The companion political-process case to *Seattle*, handed down the same day, confirmed the point. The "Equal Protection Clause," it made clear, "is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, 538–39 (1982). That is all that happened here. The majority seeing it differently, I respectfully dissent.

DISSENT

GRIFFIN, Circuit Judge, dissenting. Today's decision is the antithesis of the Equal Protection Clause of the Fourteenth Amendment. The post-Civil War amendment that guarantees equal protection to persons of all races has now been construed as barring a state from prohibiting discrimination on the basis of race. As the United States Supreme Court has observed, "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the

Fourteenth Amendment, the voters of the State thereby had violated it." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982). Yet the majority has effectively so concluded in striking down a portion of Michigan's Proposal 2 (MICH. CONST. art. I, § 26). I join Judge Gibbons' dissent, except for Section III, and write separately to emphasize that the "political structure" doctrine is an anomaly incompatible with the Equal Protection Clause. I urge the Supreme Court to consign this misguided doctrine to the annals of judicial history.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. 14, § 1. Under its application, a state law is subject to strict scrutiny when it explicitly distinguishes between individuals on the basis of race. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279–80 (1986) (plurality opinion); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964). Such express racial classifications are suspect because, "[a]bsent searching judicial inquiry[,] . . . there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *see also id.* at 520 (Scalia, J., concurring in judgment).

Facially neutral laws, on the other hand, warrant strict scrutiny only if they are "motivated by a racial purpose or object," *Miller v. Johnson*, 515 U.S. 900, 913 (1995), or are "'unexplainable on grounds other than

race.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see also Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Standing alone, . . . [disproportionate impact on a racial minority] does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.") (internal citation omitted).

The ill-advised "political structure" doctrine employed by the majority in this case was crafted by the Supreme Court more than one hundred years after the ratification of the Fourteenth Amendment. Before today, the cases fitting its mold numbered three: *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); and *Lee v. Nyquist*, 318 F. Supp. 710 (W.D. N.Y. 1970) (three-judge court), *summarily aff'd*, 402 U.S. 935 (1971). The infrequent use of the doctrine is not surprising given its lack of a constitutional basis. It replaces actual evidence of racial motivation with a judicial presumption and, hence, is an aberration inconsistent with the Fourteenth Amendment.

The laws at issue in *Hunter* and *Seattle* were both facially neutral. *See Hunter*, 393 U.S. at 391 (noting that "the law on its face treats Negro and white, Jew and gentile in an identical manner"); *Seattle*, 458 U.S. at 471 (referring to the "facial neutrality" of the state legislation). Yet, in each case, the Supreme Court held that strict scrutiny applied without any need for the respective plaintiffs to show that the laws were enacted as a result of discriminatory intent or were inexplicable on grounds other than race. It simply

declared that there was an "'explicitly racial classification'" where the prior law inured to the benefit of racial minorities, and the newly enacted law moved the applicable decisionmaking process to a more remote level of government. *Seattle*, 458 U.S. at 468 (quoting *Hunter*, 393 U.S. at 389).

These decisions are justifiably characterized as "jurisprudential enigmas that seem to lack any coherent relationship to constitutional doctrine as a whole." David J. Baron, *The Promise of Cooley's Cities: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 561 (1999); *see also* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 Mich. L. Rev. 2409, 2476 (2003) ("It is therefore easy to view these cases as constitutional oddballs, difficult or impossible to explain in light of accepted equal protection principles."). "In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State . . . violate[s] no federal constitutional principle." *Seattle*, 458 U.S. at 491 (Powell, J., dissenting).

Moreover, as first noted by Justice Powell, the political structure doctrine unconstitutionally suspends our normal and necessary democratic process by prohibiting change when a lower level of state government has acted in a way that arguably benefits racial minorities. *Id.* at 494–96 (Powell, J., dissenting) ("The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress," but "[u]nder today's decision this heretofore undoubted supreme authority of a State's

electorate is to be curtailed whenever a school board—or indeed any other state board or local instrumentality—adopts a race-specific program that arguably benefits racial minorities.").

In addition, the majority in the present case eschews a "traditional" Equal Protection Clause analysis by deeming its well-established principles unnecessary to the legal equation. I respectfully disagree and would hold that by conventional equal protection standards, Proposal 2 passes constitutional muster. "A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997). In my view, racial discrimination and racial preference are synonymous. In the realm of a finite number of classroom seats, the preference given one person based upon his race is the discrimination inflicted upon another based upon his. Discrimination on the basis of race is racial discrimination, whether it is euphemistically called a "preference" or something else. In affirming California's substantially similar Proposition 209, which banned race and gender preferences, the Ninth Circuit in *Wilson* eloquently stated:

> When the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender. "Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race." *Adarand*, 515 U.S. at 230, 115

> S. Ct. at 2114. Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender. Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.

Wilson, 122 F.3d at 702; *cf. Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 250 (6th Cir. 2006) ("If the Equal Protection Clause gives heightened scrutiny to [gender-based classifications], a State acts well within the letter and spirit of the Clause when it eliminates the risk of any such scrutiny by removing gender classifications altogether in its admissions programs.") (internal quotation marks omitted).

In a footnote, the majority superficially acknowledges, but does not discuss, the circuit split it creates in declining to follow the Ninth Circuit decisions upholding the constitutionality of analogous Proposition 209. *See Wilson* and *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012). I would adopt the persuasive reasoning of *Wilson* and hold that, in amending their state constitution to prohibit racial discrimination and "preferential treatment," the citizens of Michigan did not violate the Equal Protection Clause of the Fourteenth Amendment, but rather enshrined its principles into the Michigan Constitution. Like Proposition 209, Michigan's proscription of racial

preference, "as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense." *Wilson*, 122 F.3d at 702.

Finally, in an effort to avoid confusion and aid further review, I note the limits of the majority's holding. My colleagues do *not* declare MICH. CONST. art. I, § 26 unconstitutional in its entirety. Rather, their holding is limited to "racial minorities" and our court's declaration "[f]inding those provisions of Proposal 2 affecting Michigan's public colleges and universities unconstitutional . . . ." Thus, the other provisions of MICH. CONST. art. I, § 26 that prohibit discrimination and preferential treatment on the basis of sex, ethnicity, or national origin in the operation of public employment, public education, and public contracting, survive this court's ruling. Further, the Michigan constitutional prohibitions against discrimination or preferential treatment based on race, except in the operation of public colleges and universities regarding "racial minorities," remain in effect. In this regard, art I, § 26(7) contains a severability clause: "Any provision held invalid shall be severable from the remaining portions of this section."

I caution that because the term "racial minorities" is not defined by the majority opinion, the class of persons benefitting from it is unclear and will be a potent source of litigation were it allowed to stand. Under today's en banc decision, not all persons are entitled to the equal protection of the laws.

For these reasons, I would affirm the district court and therefore respectfully dissent.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 11a0174p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 08-1387/1534

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs-Appellants (08-1387)/Cross- Appellees,
v.
REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY; MARY SUE COLEMAN; IRVIN D. REID; LOU ANNA K. SIMON,
Defendants-Appellees/ Cross-Appellants (08-1534),
MICHAEL COX, Michigan Attorney General,
Intervenor-Defendant-Appellee.

Nos. 08-1387/1389 /1534; 09-1111

No. 08-1389

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs,
CHASE CANTRELL, et al.,
Plaintiffs-Appellees,
v.
REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY; MARY SUE COLEMAN; IRVIN D. REID; LOU ANNA K. SIMON,
Defendants,
ERIC RUSSELL,
Intervenor-Defendant-Appellant,
JENNIFER GRATZ,
Proposed Intervenor-Appellant.

No. 09-1111

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs,
CHASE CANTRELL, et al.,
Plaintiffs-Appellants,

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY; MARY SUE COLEMAN; IRVIN D. REID; LOU ANNA K. SIMON,

Defendants,

MICHAEL COX, Michigan Attorney General,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 06-15024—David M. Lawson, District Judge.

Argued: November 17, 2009
Decided and Filed: July 1, 2011
Before: DAUGHTREY, COLE, and GIBBONS, Circuit Judges.

COUNSEL

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COLE, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. GIBBONS, J. (pp. 41–59), delivered a separate opinion concurring in part and dissenting in part.

OPINION

COLE, Circuit Judge. Proposal 2 is a successful voter-initiated amendment to the Michigan Constitution. In relevant part, it prohibits Michigan's public colleges and universities from granting "preferential treatment to[] any individual or group on the basis of race, sex, color, ethnicity, or national origin." Mich. Const. art. I, § 26. Our task is to determine whether Proposal 2 is constitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Fortunately, the slate is not blank. The Supreme Court has twice held that equal protection does not permit the kind of political restructuring that Proposal 2 effected. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969). Applying *Hunter* and *Seattle*, we find that Proposal 2 unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities. Accordingly, we **REVERSE** the district court's grant of summary judgment for the Defendants-Appellees and order the court to enter summary judgment in favor of the Plaintiffs-Appellants. Also, we **AFFIRM** the district court's decision granting the Cantrell Plaintiffs' motion for summary judgment as to Eric Russell, and **AFFIRM** the district court's decision denying the University Defendants' motion to be dismissed as parties.

I. BACKGROUND

A. Factual Background

These appeals are the latest chapter in the battle over the use of race-conscious admissions policies at Michigan's public colleges and universities. This saga began during the 1960s and 1970s, when African-American and other minority students and citizens first successfully lobbied for the adoption of these policies. The policies remained largely in place until challenges to them in the late 1990s, culminating in the Supreme Court's decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), which held that "universities cannot establish quotas for members of certain racial groups" or treat their applications uniquely. *Grutter*, 539 U.S. at 334. But the universities may "consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration," along with other relevant factors. *Id.*

Following these decisions, Ward Connerly, a former University of California Regent who had championed a proposition in California similar to the one at issue here, and Jennifer Gratz, the lead plaintiff in *Gratz*, mobilized to place on Michigan's November 2006 statewide ballot a proposal to amend the Michigan Constitution "to prohibit all sex- and race-based preferences in public education, public employment, and public contracting." *Operation King's Dream v. Connerly*, 501 F.3d 584, 586 (6th Cir. 2007). The initiative—officially designated Proposal 06-2 but commonly known as "Proposal 2"—was characterized as a proposal "to amend the State Constitution to ban affirmative action programs." *See* Notice of State

Proposals for November 7, 2006 General Election, http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf, at 5 (last visited June 24, 2011). Though Proposal 2 "found its way on the ballot through methods that undermine[d] the integrity and fairness of our democratic processes," *Operation King's Dream*, 501 F.3d at 591, once there it garnered enough support among Michigan voters to pass, on November 7, 2006, by a margin of 58% to 42%, *see* Mich. Dep't of State, 2006 Official Michigan General Election Results, http://miboecfr.nicusa.com/election/results/06GEN/90000002.html (last visited June 24, 2011).

Proposal 2 amended the Michigan Constitution by adding the following pertinent provisions to Article I—titled "Affirmative action":

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

Mich. Const. art. I, § 26. It took effect in December 2006 and wrought two significant changes to the admissions policies at Michigan's public colleges and universities. First, it forced them to modify the policies they had in place for nearly a half-century to remove consideration of "race, sex, color, ethnicity, or national origin" in admissions decisions. No other admissions criteria—for example, grades, athletic ability, or family alumni connections—suffered the same fate. Second, Proposal 2 entrenched this prohibition at the state constitutional level, thus preventing the public colleges and universities or their boards from revisiting this issue without repeal or modification of Proposal 2. We review these changes later in greater detail, and there discuss their significance.

B. Procedural Background

The litigation surrounding Proposal 2 has been lengthy and complicated. On November 8, 2006, the day after Proposal 2's approval, a collection of interest groups and individuals, including the Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary ("Coalition Plaintiffs"), filed suit in the United States District Court for the Eastern District of Michigan. They named as defendants then-

Governor Jennifer Granholm, the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University ("University Defendants") and alleged that the provisions of Proposal 2 affecting public colleges and universities violated the United States Constitution and federal statutory law. About one month later, the Michigan Attorney General ("Attorney General") filed a motion to intervene as a defendant; the court granted his motion the same day.

On December 19, 2006, a group of faculty members and prospective and current students at the University of Michigan ("the Cantrell Plaintiffs") filed a similar suit in the United States District Court for the Eastern District of Michigan against then Governor Granholm. Eric Russell, then an applicant to the University of Michigan Law School, and Toward A Fair Michigan ("TAFM"), a non-profit corporation formed to ensure implementation of Proposal 2, intervened in the litigation as defendants soon thereafter. The district court consolidated the two cases on January 5, 2007, and the Attorney General was permitted to intervene in the Cantrell lawsuit as part of the consolidation order. Because the Attorney General effectively replaced then-Governor Granholm as the representative of Michigan in this litigation, both Plaintiffs' groups later stipulated to her dismissal as a party.

On December 19, 2006, the district court issued what was, in effect, a preliminary injunction, postponing application of Proposal 2 to the universities' admissions and financial-aid policies until July 1, 2007, the conclusion of the 2006-2007 admissions and

financial-aid cycle. The district court's order stemmed from a stipulation among the University Defendants, Coalition Plaintiffs, Granholm, and the Attorney General consenting to the injunction. (Amended Order Granting Temporary Injunction and Dismissing Cross-Claim, Dist. Ct. Docket No. 39 ("Coal. I").) Russell and TAFM, while awaiting approval as intervenors, opposed the Attorney General's stipulation and sought a stay of the injunction from the district court. When two days had passed without a ruling on their motions, Russell and TAFM filed with us an "Emergency Motion for a Stay Pending Appeal." We granted their motion. *Coal. to Defend Affirmative Action v. Granholm* (*Coal. II*), 473 F.3d 237, 252 (6th Cir. 2006), *application to vacate stay denied*, 549 U.S. 1176 (2007). Meanwhile, we approved the district court's decision to allow solely Russell and TAFM to intervene in the Proposal 2 litigation. *Coal. to Defend Affirmative Action v. Granholm* (*Coal. III*), 501 F.3d 775 (6th Cir. 2007).

On October 5, 2007, the Cantrell Plaintiffs filed a motion for summary judgment as to intervening defendant Russell, arguing that he should be dismissed from the litigation because he no longer represented an interest distinct from that of the Attorney General. On October 17, 2007, the University Defendants filed a motion asking to be dismissed as parties. On November 30, 2007, the Attorney General filed a motion to dismiss for lack of standing or, in the alternative, a motion for summary judgment on the merits as to all Plaintiffs. Russell and the Cantrell Plaintiffs likewise filed motions for summary judgment the same day. On March 18, 2008, the district court issued two orders addressing these motions.

In the first order, the court denied the University Defendants' request to be dismissed as parties and the Cantrell Plaintiffs' motion for summary judgment and granted the Attorney General's motion for summary judgment, rejecting the Plaintiffs' arguments that Proposal 2 violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.* (*Coal. IV*), 539 F. Supp. 2d 924, 950-58 (E.D. Mich. 2008). In the second order, the court granted the Cantrell Plaintiffs' motion for summary judgment, dismissing Russell as an intervenor. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.* (*Coal. V*), 539 F. Supp. 2d 960 (E.D. Mich. 2008). The Cantrell Plaintiffs subsequently moved the court to reconsider the first order, but the court denied the motion. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.* (*Coal. VI*), 592 F. Supp. 2d 948 (E.D. Mich. 2008).

These appeals followed. The University Defendants appeal the court's denial of their motion to be dismissed as parties. Russell appeals the court's grant of the Cantrell Plaintiffs' motion for summary judgment dismissing him as a party to the action. The Cantrell Plaintiffs appeal the court's grant of the Attorney General's motion for summary judgment and its denial of their motion for reconsideration. Similarly, the Coalition Plaintiffs appeal the court's grant of the Attorney General's motion for summary judgment.

II. ANALYSIS

A. Proposal 2's Constitutionality

The Equal Protection Clause provides that no state shall "deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV. The Plaintiffs argue that Proposal 2 violates this provision in two distinct ways. Both Plaintiffs groups argue that Proposal 2 violates the Equal Protection Clause by impermissibly restructuring the political process along racial lines (the "political process" argument), and the Coalition Plaintiffs contend that Proposal 2 violates the Equal Protection Clause also by impermissibly classifying individuals on the basis of race (the "traditional" argument).

We review de novo a district court's grant of summary judgment and denial of a motion for reconsideration of that decision. *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009); *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1047 (6th Cir. 2001). Whether a state's constitution violates the federal constitution is a question of law, which we also review de novo. *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431 (6th Cir. 2008).

1. "Political Process" Equal Protection Analysis

The Equal Protection Clause "guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute . . . that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political

process in a reliable and meaningful manner."[1] *Seattle*, 458 U.S. at 467. But the Equal Protection Clause reaches even further, and prohibits "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* (internal quotation marks and citation omitted). "[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its

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[1] For this reason, the Supreme Court has repeatedly held that legislative enactments that burden racial minorities' ability to participate in the political process may violate the Constitution. *See, e.g., White v. Regester*, 412 U.S. 755 (1973) (invalidating "multimember" electoral districts that minimized the voting strength of resident Mexican-Americans); *Harman v. Forssenius*, 380 U.S. 528 (1965) (holding unconstitutional a statute that required voters either to file an annual certificate of residence or pay a poll tax "born of a desire to disenfranchise the Negro"); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that political redistricting that redefined municipal borders to exclude black residents would violate the Equal Protection Clause); *Smith v. Allwright*, 321 U.S. 649 (1944) (requiring the state Democratic party to admit black members in order that they be allowed to vote in the party primary election); *Lane v. Wilson*, 307 U.S. 268 (1939) (holding unconstitutional a statute having the effect of requiring all black citizens to apply for voting registration within a ten-day period or be forever barred from registering, but subjecting virtually no white citizens to the same requirement); *Nixon v. Herendon*, 273 U.S. 536 (1927) (holding unconstitutional a statute prohibiting black citizens from participating in primary elections for the state Democratic Party); *Guinn v. United States*, 238 U.S. 347 (1915) (holding unconstitutional a statute having the effect of subjecting all black citizens, but virtually no white citizens, to a literacy test in order to vote in state elections). In all these cases, the Court invalidated procedural hurdles that impeded racial minorities' political participation by either making it more difficult for these minorities to vote or diluting their voting power.

behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393.

The Supreme Court's statements in *Hunter* and *Seattle* clarify that equal protection of the laws is more than a guarantee of equal treatment under the law substantively. It is also an assurance that the majority may not manipulate the channels of change in a manner that places unique burdens on issues of importance to racial minorities. In effect, the political process theory hews to the unremarkable belief that, when two competitors are running a race, one may not require the other to run twice as far, or to scale obstacles not present in the first runner's course. Ensuring the fairness of political processes, in particular, is essential, because an electoral minority is by definition disadvantaged in its attempts to pass legislation; and "discrete and insular minorities" are especially so given the unique hurdles they face. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Ensuring a fair political process is nowhere more important than in education. Education is the bedrock of equal opportunity and "the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Safeguarding the guarantee "that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." *Grutter*, 539 U.S. at 331-32 (quoting Br. for United States as Amicus Curiae 13). "Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's

leaders. . . . [T]o cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332 (citation omitted). Therefore, in the context of education, we must apply the "political process" protection with the utmost rigor given the high stakes.

Of course, the Constitution does not protect minorities from political defeat: Politics necessarily produces winners and losers. We must therefore have some way to differentiate between the constitutional and the impermissible. And *Hunter* and *Seattle* do just that. They provide the benchmark for when the majority has not only won, but also rigged the game to reproduce its success indefinitely.

i. *Hunter* and *Seattle*

a. *Hunter*

The Supreme Court in *Hunter* addressed a situation where the citizens of Akron, Ohio overturned a fair housing ordinance enacted by the City Council. 393 U.S. at 386. The citizenry did more than merely repeal the ordinance, however. It amended the city charter through a referendum to require the approval of a majority of the electorate before any ordinance regulating real estate "on the basis of race, color, religion, national origin or ancestry"—past or future—could become effective. *Id.* at 387, 390 n.6. In other words, only ordinances based on the identified factors required approval of the majority; ordinances based on any other factor required only a vote by the City Council:

> In essence, the amendment changed the requirements for the adoption of one type of local legislation: to enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the City Council *and* of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the City Council.

Seattle, 458 U.S. at 468 (describing *Hunter*). The effect was not only to halt operation of the existing fair housing ordinance, but also to erect a barrier to any similar ordinance in the future. *Hunter*, 393 U.S. at 389.

The Court found that the disparity between the process for enacting a future fair housing ordinance and that for enacting any other housing ordinance "place[d] special burden[s] on racial minorities within the governmental process" by making it "substantially more difficult to secure enactment" only of legislation that would be to their benefit. *Id.* at 390-91. While the enactment treated "Negro and white, Jew and gentile" in an identical manner, the Court found that "the reality is that the law's impact falls on the minority." *Id.* at 391. That the law had been enacted via a popular referendum did not save it from implementing "a real, substantial, and invidious denial of the equal protection of the laws." *Id.* at 392-93.

b. *Seattle*

In *Seattle*, a case identical in many respects to the one we confront here, the Supreme Court applied *Hunter* to strike down a state statute, also enacted via a referendum, that prohibited racially integrative busing. *Seattle*, 458 U.S. at 487. Prior to the referendum, Seattle School District No. 1 ("District") had implemented a school desegregation plan—making extensive use of mandatory reassignments—to accelerate its program of desegregation. *Id.* at 460-61. The District was under no obligation to adopt this plan: Following *Brown v. Board of Education*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955), school boards had been "charged with the affirmative duty to take whatever steps might be necessary" to integrate schools that were unconstitutionally segregated because of racial discrimination, *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437- 38 (1968), but there had been no finding that the *de facto* segregation in Seattle's schools was the product of discrimination. Nonetheless, the school board implemented the plan to accelerate its existing program of voluntary busing, which some constituencies saw as insufficiently alleviating racial imbalances. *Seattle*, 458 U.S. at 460.

In response, Seattle residents drafted a statewide measure, Initiative 350, providing in relevant part that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." *Id.* at 462 (alteration in original) (internal quotation mark omitted). Though the initiative was worded as a general ban on all forms of mandatory busing, its myriad exceptions made its

real effect to eliminate school reassignments for racial purposes only, except where a court ordered such reassignments to remedy unconstitutional segregation. *Id.* at 462-63 (noting that Initiative 350 was phrased so as not to "prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools"). Initiative 350 made it on the Washington ballot and passed by a substantial margin, attracting over 65% of the statewide vote. *Id.* at 463.

The Court found that Initiative 350, like the Akron city charter amendment, violated the Equal Protection Clause. *Id.* at 487. Relying on *Hunter* and the Court's summary affirmance of *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970) (three-judge panel), *aff'd*, 402 U.S. 935 (1971), the Court stated that these two cases yielded a "simple but central principle": While "laws structuring political institutions or allocating political power according to neutral principles" are not subject to challenges under the Fourteenth Amendment, "a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Seattle*, 458 U.S. at 469-70 (internal quotation marks omitted). Echoing *Hunter*, the Court explained that this distinct analysis is necessary because such non-neutral allocations of power "place[] *special* burdens on racial minorities within the governmental process, thereby making it *more* difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest." *Id.* at 470 (internal quotation marks, citations, and brackets omitted).

The Court dismissed the argument that Initiative 350 was not intended to prevent busing for racially-integrative purposes, and explained why Initiative 350 violated the "simple but central" principle animating *Hunter* and *Nyquist*. *Seattle*, 458 U.S. at 471.

First, as a threshold matter, the Court concluded that desegregation of the public schools, like the fair housing ordinance in *Hunter*, "at bottom inures primarily to the benefit of the minority, and is designed for that purpose." *Id.* at 472. The Court reasoned that, while "white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom," desegregation is of primary benefit to minority children because these children "can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children for citizenship in our pluralistic society." *Id.* at 472-73 (internal quotation marks omitted). Because racial minorities therefore had reason to "consider busing for integration to be 'legislation that is in their interest,'" the "racial focus of Initiative 350 . . . suffices to trigger application of the *Hunter* doctrine." *Id.* at 474 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)).

Second, having concluded that Initiative 350 targeted a busing program that "inures primarily to the benefit of the minority," the Court held that "the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*." *Id.* As the Court explained, Initiative 350, like

the amendment to the city charter in *Hunter*, did more than repeal the school board's busing program:

> The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. . . . As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.

Id. By removing authority over busing for racial purposes from the school board and placing this authority at a more remote level of government, Initiative 350 required "those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action," and disadvantaged "those who would benefit from laws barring *de facto* desegregation." *Id.* at 474-75 (internal quotation mark omitted). Accordingly, the Court held that Initiative 350, in placing "special burdens on racial minorities," violated the Equal Protection Clause. *Id.* at 470.

In sum, *Hunter* and *Seattle* require us to apply strict scrutiny to enactments that change the governmental decisionmaking process for determinations with a racial focus. *Seattle*, 458 U.S. at

470; *Hunter*, 393 U.S. at 391; *cf. Carolene Prods.*, 304 U.S. at 153 n.4 (arguing that more exacting judicial scrutiny is required when the majority curtails "the operation of those political processes ordinarily to be relied upon to protect minorities").

ii. Application of the *Hunter/Seattle* Test

Hunter and *Seattle* thus expounded the rule that an enactment deprives minority groups of equal protection of the laws when it: (1) has a racial focus, targeting a goal or program that "inures primarily to the benefit of the minority"; and (2) works a reallocation of political power or reordering of the decisionmaking process that places "special burdens" on a minority group's ability to achieve its goals through that process. *Seattle*, 458 U.S. at 470; *Hunter*, 393 U.S. at 391.

Applying this rule here, we conclude that Proposal 2 targets a program that "inures primarily to the benefit of the minority" and reorders the political process in Michigan in such a way as to place "special burdens" on racial minorities.

a. Racial Focus

The first prong of the *Hunter/Seattle* test requires us to determine whether Proposal 2 has a "racial focus." *See Seattle*, 458 U.S. at 473. The Court explained that the question is not whether "members of the racial majority both favored and benefited from" the program or policy at issue, but whether the policy targeted by the law "at bottom inures primarily to the benefit of the minority, and is designed for that purpose." *Id.* at 472.

In *Seattle*, the Court observed that programs—in that context, the busing of children to increase the number of integrated schools—furthering the education of minority children enable them "to function in—and . . . [be] fully accepted by—the larger community." *Id.* at 473. Such programs do so, the Court explained, through "preparing minority children for citizenship in our pluralistic society, while . . . teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Id.* (internal quotation marks and citation omitted); *see also Grutter*, 539 U.S. at 330-32 ("[T]he [University of Michigan] Law School's [race-conscious] admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races. . . . [T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity." (fourth alteration in original) (internal quotation marks omitted)). The *Seattle* Court then concluded that Initiative 350 had a racial focus, because "it is enough that minorities may consider busing for integration to be 'legislation that is in their interest.'" *Seattle*, 458 U.S. at 474 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)).

Proposal 2, like Initiative 350, has a "racial focus," because the Michigan universities' affirmative-action programs "inure[] primarily to the benefit of the minority, and [are] designed for that purpose," for the reasons articulated by the Court in *Seattle*. *See id.* at 472. Just as the desegregative busing programs at issue in *Seattle* were designed to improve racial minorities' representation at many public schools, *see*

id. at 460, race-conscious admissions policies increase racial minorities' representation at institutions of higher education, *see, e.g.*, *Grutter*, 539 U.S. at 316, 328-33 (describing the University of Michigan Law School's minority-student-enrollment aims); *Gratz*, 539 U.S. at 253-56 (describing admissions policies at the University of Michigan regarding underrepresented minority groups). Indeed, underrepresented minorities lobbied for the adoption of such policies at Michigan's universities in the first place for this reason, (*see* Anderson Report, Dist. Ct. Docket No. 222 Ex. L. at 16-23), and, further, the unrebutted evidence in the record indicates that Proposal 2 will likely negatively impact minority representation at Michigan's institutions of higher education, (*see* Connerly Dep., Dist. Ct. Docket No. 222 Ex. A, at 119-21; Spencer Dep., Dist. Ct. Docket No. 203 Ex. D, at 100-01; Wu Dep., Dist. Ct. Docket No. 203 Ex. F, at 78; Zearfoss Dep., Dist. Ct. Docket No. 205 Ex. 3, at 56-57). Ample evidence thus grounds our conclusion that race-conscious admissions policies "inure[] primarily to the benefit of the minority." *See Seattle*, 458 U.S. at 472.

Yet the Attorney General argues, and we previously suggested, that the now-defunct Michigan admissions policies benefitted women as well, and that saves them. *See Coal. II*, 473 F.3d at 250-51. Our prior suggestion does not bind us, *see Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007), and we now reject it. The Supreme Court made it clear that even policies benefitting the majority—let alone another minority—may have a "racial focus," so that lens does not clarify anything. *See Seattle*, 458 U.S. at 472. In fact, it serves only to blur what is in reality a clear test: The question

is not whether the challenged law "burdens minority interests and minority interests alone," *Coal. II*, 473 F.3d at 250, but whether the law targets policies that minorities *may* consider in their interest, *Seattle*, 458 U.S. at 472. Even a cursory examination of the cases confirms this understanding. In *Hunter*, the ordinance likewise burdened non-racial minorities, including Catholics, Hispanics and numerous other groups (which, grouped together, would constitute a majority of the electorate), but the Court held that the law had a racial focus. 393 U.S. at 387. The same was true of the policy at issue in *Nyquist*, and the Court again agreed that it had a racial focus. 318 F. Supp. at 716-17. Likewise, as explained above, the race-conscious admissions policies stymied by Proposal 2 are in the interest of racial minorities and inure primarily to their benefit, so the polices have a racial focus as well.

This conclusion is not impacted by the fact that increased representation of racial minorities in higher education also benefits students of other groups and our nation as a whole. *Cf. Grutter*, 539 U.S. at 327-33 (describing the varied benefits supporting Michigan's compelling interest in increasing racial diversity at public institutions of higher education). Similar benefits accrued to children at integrated public schools under Seattle's desegregative busing plan, which the Supreme Court explicitly recognized: "[I]t should be . . . clear that white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom . . . [by] teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Seattle*, 458 U.S. at 472-73. Nonetheless, the *Seattle* Court found that the wider benefits of the busing plan did not serve to distinguish

Hunter, "for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance." *Id.* at 472. By the same token, race-conscious admissions policies' wider benefits do not undermine the conclusion that their primary beneficiaries are racial minorities.

We therefore find that the race-conscious admissions policies now barred by Proposal 2 inure primarily to the benefit of racial minorities and that Proposal 2, insofar as it prohibits consideration of applicants' race in admissions decisions, has a "racial focus."

b. Reordering the Political Process to Place Special Burdens on Racial Minorities

The second prong of the *Hunter/Seattle* test asks us to determine whether Proposal 2 works a reallocation of political power or reordering of the political process that places "special burdens" on racial minorities. *See Seattle*, 458 U.S. at 470; *Hunter*, 393 U.S. at 391.

1. Does Proposal 2 Reorder a "Political" Process?

The first issue within this prong is whether the Michigan admissions committees are "political," as that term is used in the *Hunter/Seattle* test. We begin by examining the word itself. "Political" has two possible meanings relevant to our discussion: "of or relating to government," Merriam-Webster, Webster's Third New International Dictionary: Unabridged 1755 (1993) (first definition), or "of, relating to, or involved in party politics," *id.* (third definition). Examining the Court's language, we conclude that the "political" requirement

seeks to ensure that the process at issue relates to government.

The political processes relevant in *Hunter* and *Seattle* were the Akron public-housing structure and the Washington public schools' student-assignment system, respectively. *See Seattle*, 458 U.S. at 474; *Hunter*, 393 U.S. at 390, 393. Clarifying the "political" nature of the latter, the Court referred to the "political process" interchangeably as a "decisionmaking process" and a "governmental process," and explained that the political power allocation in question is of "governmental power." *Seattle*, 458 U.S. at 470. The Court elsewhere identified the relevant characteristics that made the school boards "political": They were "creatures of the State" and had to "give effect to policies announced by the state legislature." *Id.* at 476. In other words, the boards were "political" because they were *governmental* entities, not necessarily electoral or partisan ones. *Id.* Even more explicitly, the Court found that Initiative 350's flaw was "us[ing] the racial nature of an issue to define the *governmental decisionmaking structure*." *Id.* at 470 (emphasis added); *see also id.* at 474 ("As in *Hunter*, then, the community's *political* mechanisms are modified to place effective *decisionmaking* authority over a racial issue at a different level of *government*." (emphasis added)). Indeed, the Court noted that the political "reallocation of power of the kind condemned in *Hunter*" is the removal of "authority . . . from the existing *decisionmaking* body." *Id.* (emphasis added); *see also id.* at 477 ("[I]t is irrelevant that the State might have vested all *decisionmaking authority* in itself, so long as the *political structure* it in fact erected imposes comparative burdens on minority interests . . .

." (emphasis added)). Thus, a process is "political" under *Hunter* and *Seattle* if it involves governmental decisionmaking.

The dissent disagrees. It defines a "political process" narrowly, as one "through which the people exercise their right to govern themselves," Slip Op. at 13, or one that is "electoral,"[2] *id.* at 18-19 & n.6, and suggests that a process is political only if it involves direct elections. In so doing, the dissent misapprehends the "political" nexus required in the *Hunter/Seattle* test. The electoral nature of a state system is relevant *not* to the political nature of a process, but to the reordering at issue. The Court's point in requiring that there be reordering of a "political process" was merely to ensure that the process was state-directed ("governmental") and mattered ("decisionmaking"), the same way Title VII cases require the alleged discriminatory act to relate to a company agent with relevant authority. No link to the electoral process is required to find a given process "political."

The dissent latches on to a lone mention of an "electorate" in *Seattle* to argue that the *Hunter/Seattle* political process must be an electoral, or voting-centered, political process. The statement at issue,

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[2] By "electoral," the dissent must mean "of or relating to election." *See* Merriam-Webster, Webster's Third New International Dictionary: Unabridged 731 (1993). Nothing in either definition of "political," however, relates more than tangentially to an election or voting: Yes, in a democracy, government exists because of elections, but the Court did not require there to be a "political process" for the purpose of elucidating first principles. The second meaning of government—in effect, "partisan"—is more related to elections, but the cases do not support (and the dissent does not advocate) such a reading.

however, was simply the Court's quotation of the language setting forth the school board's authority under Washington law. *See Seattle*, 458 U.S. at 478 (quoting Wash. Rev. Code § 28A.58.758(1)). And that quotation sits in a section explaining the structure of Washington's educational system generally and the power of the school boards specifically. *See id.* To argue that the key insight to the entire *Hunter/Seattle* test lies in this solitary quotation is unsupportable, especially given the abundance of language to the contrary in those cases. Moreover, there is no language in this section of *Seattle* suggesting that the Court was defining what it meant by a "political process." A process thus is "political" if it involves governmental decisionmaking. Nothing more is required.

This point is hammered home by the Court's affirmance of, and subsequent reliance (in *Seattle*) on, *Nyquist*. In *Nyquist*, the Court agreed with the three-judge panel that an enactment to New York's laws unconstitutionally reordered the political process when the enactment "prohibit[ed] state education officials and *appointed* school boards" from performing various education-related functions "for the purpose of achieving racial equality in attendance." 318 F. Supp. at 712 (emphasis added). The fact that the school boards at issue were not elected did not affect the Court's decision.[3] The *Hunter/Seattle* test therefore

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[3] Likewise, the dissent's dwelling on the term "legislation," *see* Slip Op. at 13-14, misapprehends that term's usage in the *Hunter/Seattle* test, for the Court considered the school board policies in *Seattle* and *Nyquist* to constitute such "legislation," *see Seattle*, 458 U.S. at 470, 474-75 & n.17; *Nyquist*, 318 F. Supp. at 718-19, and the admissions policies at Michigan's colleges and universities are of an identical character.

requires simply that the process at issue involve governmental decisionmaking.

Yet even using the dissent's erroneous definition of "political" as "electoral," the admissions committees here still qualify as "political." For in addition to possessing the same character as the school boards in *Seattle* and *Nyquist* and the Akron housing institutions in *Hunter*, they fall squarely within Michigan's electoral system.

The Michigan Constitution, the foundation of Michigan's government, establishes three public universities—the University of Michigan, Michigan State University, and Wayne State University—and grants the governing board of each university control of its respective institution. Mich. Const. art. VIII, § 5; *see also id.* art. VIII, § 6 (allowing the establishment of other institutions of higher learning, such as Michigan's other public colleges and universities, and according their governing boards similar control). At each institution, these boards and their members have slightly differing names—"Board of Trustees," "Board of Governors," "Board of Regents," and so on—but the same role: to run, with plenary authority, their respective institution. *Id.* art. VIII, §§ 5-6; *Glass v. Dudley Paper Co.*, 112 N.W.2d 489, 490 (Mich. 1961). Michigan law has confirmed this absolute authority again and again. *See, e.g.*, *Glass*, 112 N.W.2d at 490; *Attorney Gen. ex rel. Cook v. Burhans*, 7 N.W.2d 370, 371 (Mich. 1942); *Bd. of Regents of Univ. of Mich. v. Attorney Gen.*, 132 N.W. 1037, 1040 (Mich. 1911); 1979-80 Mich. Op. Atty Gen. 578, 1980 WL 114008, at *1-2 (Mich. A.G. Jan. 31, 1980).

Eight elected individuals populate each of these boards, and they hold office for eight years. Mich. Const. art. VIII, § 5; *see also id.* art. VIII, § 6. The boards govern the universities, including enacting the regulations that direct the university's government and determining when to retain or remove the president or faculty. *See* Mich. Comp. Laws §§ 390.3-.6 (University of Michigan).[4] The meetings at which the board takes such action are generally public. *See id.* § 390.20. Meanwhile, the bylaws, over which the boards have complete authority, detail the admissions procedures.[5]

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[4] Though the statutes and bylaws cited in this paragraph govern only the University of Michigan, the boards of the other public colleges and universities in Michigan are similarly empowered. *See, e.g.*, Mich. Comp. Laws §§ 390.102-.107 (Michigan State University), 390.641-.645 (Wayne State University).

[5] At Michigan State University, the Provost of the University "shall be appointed by the Board [of Trustees]," "shall serve at the pleasure of the Board," and "[s]hall be responsible for supervising procedures and policies relating to the admission of students." Mich. State Univ., Bd. of Trs. Bylaws, art. 4, *available at* http://www.trustees.msu.edu/bylaws (last visited June 24, 2011). The Board retains the authority to "determine and establish the qualifications of students for admission at any level" upon the recommendation of the President, whom the Board elects and who also serves at its pleasure, *id.* arts. 1, 4, as well as the more general authority to reallocate responsibility for admissions to other officers or to itself, *see id.* art. 17.

At Wayne State University, the President, elected by the Board, is authorized to establish specific admissions standards for undergraduate and graduate degree programs after (s)he has consulted with the relevant college or school and the Graduate Council, *see* Mich. Const. art. VIII § 5; Wayne State Univ. Statutes §§ 2.34.09.090, 2.34.12.350, *available at* http://www.bog.wayne.edu/code (last visited June 24, 2011), and the Board may amend its regulations to alter, remove, or shift this authority as it sees fit, *see* Wayne State Univ., Bd. of Governor Bylaws 10, *available at* http://www.bog.wayne.edu/files/bylaws.pdf (last visited June 24,

See Univ. of Mich., Bylaws of the Bd. of Regents § 8.01, *available at* http://www.regents.umich.edu/bylaws (last visited June 24, 2011). Nothing prevents the boards from altering this framework for admissions decisions if they are so inclined. *See* Mich. Const. art. VIII, § 5; Mich. Comp. Laws §§ 390.3-.6; Univ. of Mich., Bylaws of the Bd. of Regents § 8.01, *available at* http://www.regents.umich.edu/bylaws (last visited June 24, 2011).

Attempting to argue to the contrary, the dissent claims that the admissions committees are not connected to Michigan's electoral political system because the governing boards of the universities "have *fully delegated* the responsibility for establishing admissions standards." Slip Op. at 11 (emphasis added). The dissent rests this argument on "the testimony of the law school deans in this case." *Id.* at 14. But the dissent's argument fails for two reasons. First, the testimony the dissent references does not support the dissent's claim of "full delegation" or the idea that the boards could not theoretically change the policies; it merely describes the current admissions structures. There is one exception to this observation, however: former-Dean Wu's personal opinion that modification of the admissions structure might "precipitate a constitutional crisis." (Wu Dep., Dist. Ct. Docket No. 203 Ex. F, at 191-92). But this opinion is inadmissible as both speculation and a legal conclusion (notably, with no basis in Michigan law). *See Torres v. Cnty. of Oakland*, 758 F.2d 147, 149-51 (6th Cir. 1985).

2011) (describing the Board's authority to enact bylaws and regulations for the governance of the University).

Second, and much more to the point, the structure of Michigan's colleges and universities is a question of law, for it is set by constitution, statutes and regulations. *See United States v. Dedman*, 527 F.3d 577, 584-85 (6th Cir. 2008). And we would be remiss to rely on witness testimony to decide such questions, *see* Fed. R. Evid. 701; *Torres v. Cnty. of Oakland*, 758 F.2d 147, 149-51 (6th Cir. 1985); *cf. Becht v. Owens Corning Fiberglas Corp.*, 196 F.3d 650, 654 (6th Cir. 1999), particularly where as here a clear statutory structure is weighed against unfounded supposition. Still, the dissent protests: "As they currently stand, the faculty admissions committees are islands unto themselves, vested with the full and unreviewed authority to set admissions policy for their respective university programs." Slip Op. at 14. The current boards' policies, however, are besides the point. The key question is whether the boards' current policies—in the form of bylaws and regulations—could be altered, for example if the people of Michigan elected different boards dedicated to changing the universities' admissions policies. Michigan law provides a resounding "yes," *see* Mich. Const. art. VIII, §§ 5-6; *cf.* Mich. State Univ., Bd. of Trs. Bylaws, art. 5 (stipulating that "[t]he delegation of any authority by the Board to any committee shall not operate to relieve the Board or any member thereof of any responsibility imposed by law or the State Constitution"), and the dissent points us to no *law* indicating otherwise.

Moreover, because the dissent does not question the boards' electoral nature, the dissent's argument implies another untenable proposition: that delegation of admittedly electoral power to an unelected body renders the power ultimately exercised nonelectoral.

As an initial matter, the appointed boards in *Nyquist* soundly rebuff this argument. Yet the argument cannot hold water even aside from *Nyquist*. Let us begin by dissecting the dissent's contention in a more familiar electoral framework: the federal system. In parallel to Michigan's university structure, the members of the National Security Council ("NSC") are likewise unelected individuals receiving delegated electoral political power, though from the President of the United States. Do we consider the power *they* wield to be electoral? Of course. That they are a step removed from the electoral process does not mean that they are not exercising electoral political power. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 296 (1936) ("And the Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides . . . . It is by that law, and not otherwise, that the legislative, executive, and judiciary agencies which it created exercise *such political authority* as they have been permitted to possess." (emphasis added)); *see also Mistretta v. United States*, 488 U.S. 361, 393 (1989) (referring to the United States Sentencing Commission's work as of a "significantly political nature"); *cf. Walsh v. Heilmann*, 472 F.3d 504, 506 (7th Cir. 2006) ("Many units of government delegate important decisions to middle management, and when they do this they may insist that the holders of the delegated power be reliable implementers of the *elected officials' platforms*." (emphasis added)). If American voters do not like what the NSC does, they may exact an *electoral* price against the person from whom the NSC receives its power: the President.[6] The

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[6] Put more pointedly, it is the electoral *structure* that renders the

same is true of the admissions committees here, which wield the *electoral* power bestowed on them—through the boards—ultimately by the Michigan Constitution. *See* Part II.A.1.ii.b.2, *infra*.

In sum, we find apt the Court's rejoinder to claims similar to those the Attorney General and the dissent make: "[T]hat a State may distribute legislative power as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment." *Seattle*, 458 U.S. at 476 (quoting *Hunter*, 393 U.S. at 392) (first alteration added). Michigan, like "Washington[,] . . . has chosen to make use of a more complex governmental structure" than direct administration by the legislature, or even the university boards, of admissions decisions in university and college affairs. *See id.* at 476-77.

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power wielded electoral, not the nature of the person's position. No matter how many times this power is delegated, or to whom, an elected official is ultimately responsible for it. For example, though two State Department employees may reach their posts by different paths, one hired and one appointed, both individuals' power stems from the President, and they perform the same function: the work of the President. And a building manager working for the General Services Administration ("GSA"), like a faculty member on a public university's admissions committee, is hired and performs a function existing equally in the private sector. The building manager's private counterpart does not exercise electoral power, yet the GSA employee and Michigan faculty member do. The difference lies in the ultimate source of these latter two individuals' authority: the government. The fact remains that an elected official—be it the President of the United States, the Governor of Michigan, or a member of one of the university boards—is accountable to the electorate for the power that he delegated to the GSA, State Department, or university admissions committees, and he could equally choose to delegate that power to someone else or exercise it himself. This is what it means for power to be electoral.

However, as we have explained, the fact that the admissions committees received the political power they exercise through delegation rather than direct election is irrelevant to the *nature* of that power and thus the applicability of the *Hunter/Seattle* test.

Therefore, the admissions committees are "political" because they are governmental decisionmaking bodies. And even if they had to be tied to the electoral system, they are, because the individuals delegated with principal responsibility for admissions policies at Michigan's public colleges and universities are appointed by the institutions' governing boards—which are either elected by the citizens of Michigan or appointed by elected officials—and the boards are free to reassign this responsibility as they see fit. Thus, there is little doubt that Proposal 2 affects a "political process" under *Hunter* and *Seattle*.

2. Does Proposal 2 Effect a "Reordering" of the Political Process so as to Place Special Burdens on Racial Minorities?

The next issue is whether Proposal 2 reordered the political process to place special burdens on racial minorities. We find that Proposal 2 burdens *racial minorities* for the reasons articulated in Part II.A.1.ii.a, *supra*. As to whether there was a *reordering*, the Court has found that both implicit and explicit reordering violates the Fourteenth Amendment. *See Seattle*, 458 U.S. at 474; *Hunter*, 393 U.S. at 387, 390. In *Hunter*, the express language of the charter amendment required any ordinance regulating real estate "on the basis of race, color, religion, national origin or ancestry" to be approved by a majority of the electorate

and the City Council, as opposed to solely the City Council for other real-estate ordinances. 393 U.S. 387, 390.

In *Seattle*, however, the reordering was implicit: On its face, Initiative 350 simply prohibited school boards from using mandatory busing, but its practical effect was that "[t]hose favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate" through overturning Initiative 350. 458 U.S. at 474. Nonetheless, "authority over all other student assignment decisions . . . remains vested in the local school board." *Id.* The *Seattle* Court then clarified what sort of reordering contravenes the "political process" theory: "The evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, *the comparative structural burden placed on the achievement of minority interests*."[7] *Id.* at 474 n.17 (emphasis added). Thus, any "comparative structural burden," be it local or state-wide or national, satisfies the reallocation prong of the *Hunter/Seattle* test. *Id.*

We face here an enactment even more troubling than those at issue in *Hunter* and *Seattle*, as the hurdle Proposal 2 creates is of the highest possible order. An interested Michigan citizen may use any number of avenues to change the admissions policies on an issue

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[7] The Court's statement here rebuffs the dissent's attempt to argue that the "relevant lawmaking authority" also must be reallocated from a "local legislative body" to a "more complex government structure" with a broader constituency. *See* Slip Op. at 7.

unrelated to race. He may lobby the admissions committees directly, through written or in-person communication if the latter is available, or petition higher administrative authorities at the university: the dean of admissions, the president or dean of the university, or the university's board. *See* Part II.A.1.ii.b.1, *supra*; *see also, e.g.*, Univ. Defs. Admis., Dist. Ct. Docket No. 172 Ex. I, at 11, 14-15, 17-20; Wu Dep., Dist. Ct. Docket No. 203 Ex. F, at 190; Zearfoss Dep., Dist. Ct. Docket No. 205 Ex. 3, at 209- 10. And there is no question that the admissions committees are very much accountable to the universities' boards, which retain ultimate—and politically accountable—responsibility over admissions policies. *See* Mich. Const. art. VIII, §§ 5-6.

The individual seeking this non-race-related change may also seek to affect the election—through voting, campaigning, or otherwise—of any one of the eight board members whom the individual believes will champion his cause and revise the review of admissions determinations accordingly. These elections, though state-wide in scope, would likely be much more manageable than those surrounding constitutional amendments, which can be expensive, lengthy, and complex, (*see* Wilfore Decl., Dist. Ct. Docket No. 203 Ex. C ¶¶ 10, 29-30). Only as a last resort would the effort and expense of campaigning for an amendment to the Michigan Constitution be required—the only option that remains open for proponents of race-based admissions criteria.

Meanwhile, a Michigan citizen seeking that Michigan universities adopt race-based admissions policies must now *begin* by convincing the Michigan

electorate to amend the Michigan Constitution. Placing a proposed constitutional amendment abrogating Proposal 2 on the ballot would require either the support of two-thirds of both the Michigan House of Representatives and Senate, *see* Mich. Const. art. XII, § 1, or the signatures of a number of voters equivalent to at least ten percent of the number of votes cast for all candidates for governor in the preceding general election, *see id.* art XII, § 2. A majority of the voting electorate would then have to approve the amendment. *See id.* art. XII, §§ 1-2.

Only after traversing this difficult and costly process, (*see* Wilfore Decl., Dist. Ct. Docket No. 203 Ex. C ¶¶ 10, 29-30), would the now-exhausted Michigan citizen reach the starting point of his opponent who sought a non-race-related admissions policy change. By amending Michigan's Constitution to prohibit university admissions units from utilizing race-conscious admissions policies, proponents of Proposal 2 thus removed the authority to institute racially-focused policies from Michigan's universities and lodged it at the most remote level of Michigan's government, the state constitution.

In other words, as with the unconstitutional enactment in *Hunter*, proponents of race-conscious admissions policies now have to obtain the approval of the Michigan electorate *and* (if they are successful) the admissions units or other university powers, whereas proponents of other admissions policies need only the support of the latter. *See Seattle*, 458 U.S. at 468, 474 (describing *Hunter*).

The stark contrast between the avenues for political change available to different admissions

proponents following Proposal 2 illustrates why the amendment cannot be construed as a mere repeal of an existing race-related policy. Had those favoring abolition of race-conscious admissions successfully lobbied the universities' admissions units, just as underrepresented minorities did to have these policies adopted in the first place, there would be no equal protection problem. As the Supreme Court has made clear, "'the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.'" *Seattle*, 458 U.S. at 483 (quoting *Crawford v. Bd. of Educ.*, 458 U.S. 527, 539 (1982)); *accord Hunter*, 393 U.S. at 390 n.5. *Crawford* brings this distinction into focus, because the Court-approved political action in that case (amendment of the California constitution) occurred at the same level of government as the original enactment (a prior amendment of the California constitution), thus leaving the rules of the political game unchanged. 458 U.S. at 532, 540.

As illustrated above, however, Proposal 2 "works something more than the 'mere repeal' of a desegregation law by the political entity that created it." *Seattle*, 458 U.S. at 483. Rather, like Initiative 350 did for any future attempt to implement race-based busing (and the Akron city charter amendment did for any future attempt to enact a fair housing ordinance), "by lodging decisionmaking authority over the question at a new and remote level of government," Proposal 2 "burdens all future attempts" to implement race-conscious admissions policies. *Id.*

By the same token, precisely because Proposal 2 places special burdens on a political program of particular importance to racial minorities, it is not a sufficient response to point out that these minorities remain free to repeal it. The "simple but central principle" of *Hunter* and *Seattle* is that the Equal Protection Clause prohibits requiring racial minorities to surmount more formidable obstacles to achieve their political objectives than other groups face. *See id.* at 469-70. As the Supreme Court has recognized, such special procedural barriers to minority interests discriminate against racial minorities just as surely as—and more insidiously than—substantive legal barriers challenged under the traditional equal protection rubric. *See id.* at 467 ("[T]he Fourteenth Amendment also reaches a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." (internal quotation marks and citation omitted)). Because less onerous avenues to effect political change remain open to those advocating consideration of non-racial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to go down a more arduous road than others without violating the Fourteenth Amendment.

We thus conclude that Proposal 2 reorders the political process in Michigan to place special burdens on minority interests.

iii. Proposed Permutations of the *Hunter/Seattle* Test

a. Is Prohibiting "Preferential Treatment" Different From Prohibiting "Discrimination"?

The Attorney General asserts that *Hunter* and *Seattle* are inapplicable to Proposal 2 because the cases govern only enactments that burden racial minorities' ability to obtain protection from *discrimination* through the political process, whereas Proposal 2 burdens racial minorities' ability to obtain *preferential treatment*. In support of this distinction, the Attorney General points to our preliminary injunction ruling, and decisions of the Ninth Circuit and the district court. *See Coal. II*, 473 F.3d at 251; *Coal. for Econ. Equity*, 122 F.3d at 708; *Coal. IV*, 539 F. Supp. 2d at 956-57. None of these decisions is binding on us. *See Tenke Corp.*, 511 F.3d at 542 ("[C]onclusions of law made by a court granting [a] preliminary injunction are not binding at trial on the merits." (internal quotation mark omitted)); *Cross Mountain Coal. v. Ward*, 93 F.3d 211, 217 (6th Cir. 1996) ("[T]he decisions of other circuits are entitled to our respect, [but] they are not binding upon us."). And we do not find them persuasive.

We turn first to the distinction at issue and its true meaning. Differentiation between "discrimination" and "preference" in this context finds its origin in the Ninth Circuit. *See Coal. for Econ. Equity*, 122 F.3d at 707-09. The *Coalition for Economic Equity* court began by stating that "[e]ven a state law that does restructure the political process can only deny equal protection if it burden's an individual's *right* to equal treatment." *Id.*

at 707 (emphasis added). The court then continued: "It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment." *Id.* at 708. In so positing, the Ninth Circuit added another element to the *Hunter/Seattle* test. That element, stripped of the controversial and obfuscating distinction between "discrimination" and "preference," boils down to a belief that an enactment violates the Equal Protection Clause under *Hunter* and *Seattle* only if it undermines state action that is constitutionally mandated ("discrimination"), as opposed to constitutionally permissible ("preference").[8] Put differently: An enactment is unconstitutional if it transgresses a constitutionally-mandated action, i.e., an enactment is unconstitutional under the "political process" framework only if the enactment is already unconstitutional under the "traditional" rubric. But this reasoning defies logic. Using this rationale, the political process theory would be superfluous, for an aggrieved citizen could sue to enjoin the unconstitutional law under the traditional equal protection analysis. For that very reason, the Court

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[8] This must be so because there is no free-floating "right" to be free of discrimination. That right must therefore find its basis in either the United States Constitution—primarily through the Equal Protection Clause—or a federal statute. The latter was not at issue in *Coalition for Economic Equity*, so the Equal Protection Clause must ground the right discussed by the Ninth Circuit. Therefore, the only possible reading of the Ninth Circuit's decision is that the Equal Protection Clause, through the "political process" theory, only protects action which the Equal Protection Clause, through the "traditional" theory, already protects.

created the "political process" theory in the context of cases addressing state action that is constitutionally permissible (or "preferential" to use the Attorney General and Ninth Circuit's terminology). The facts of those very cases thus prohibit this distinction.

The Court in *Hunter* rejected the argument that the Akron amendment's effect was moot because the amendment was invalid under the 1968 Civil Rights Act, *see Hunter*, 393 U.S. at 388-89, or that traditional equal protection resolved the case, *id.* at 389. *Seattle* even more clearly involved constitutionally-permissible state action, as Initiative 350 responded to a voluntary school board effort to reduce the impact of *de facto* segregation. 458 U.S. at 460-61. The school board was under no obligation to undertake this effort because there had been no finding that the segregation was motivated by racial discrimination—a fact that the *Seattle* dissent repeatedly pointed out. *See, e.g.*, *id.* at 491-92 (Powell, J., dissenting) ("The Court has never held that there is an affirmative duty to integrate the schools in the absence of a finding of unconstitutional segregation. . . . Certainly there is no constitutional duty to adopt mandatory busing in the absence of such a violation."). Rather, the Board's plan was an ameliorative measure designed to combat the effects of Seattle's segregated housing patterns and "alleviate the isolation of minority students." *Id.* at 460. It is inaccurate, therefore, to suggest that Initiative 350 made it "more difficult for minorities to obtain *protection from discrimination* through the political process." *Coal. II*, 473 F.3d at 251. Quite the contrary: As the district court recognized, "[b]ecause prohibiting integration (when it is not constitutionally mandated) is not tantamount to discrimination, . . . the Court in

Seattle did not (and could not) rely on the notion that the restructuring at issue impeded efforts to secure *equal* treatment."[9] *Coal. VI*, 592 F. Supp. 2d at 951.

Similarly, in *Nyquist*, the New York Legislature responded to attempts to remedy *de facto* segregation "generated in large part by local housing patterns and economic conditions," 318 F. Supp. at 717, by passing a law prohibiting "state education officials and appointed school boards from assigning students, or establishing, reorganizing or maintaining school districts . . . for the purpose of achieving racial equality in attendance," *id.* at 712. Applying *Hunter*, the court concluded that "by prohibiting the implementation of plans designed to

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[9] In holding that Proposal 2 nonetheless does not violate the Equal Protection Clause, the district court asserted that the race-conscious admissions policies at issue here should be distinguished from the voluntary desegregative busing program at issue in *Seattle* because, unlike race-conscious admissions policies, "school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights." *Coal. VI*, 592 F. Supp. 2d at 951 (quoting *Coal. for Econ. Equity*, 122 F.3d at 708 n.16).

This purported distinction is erroneous and flies in the face of the Supreme Court's decisions in *Grutter* and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). In *Grutter*, the Supreme Court showed how narrowly-tailored race-conscious admissions programs are not "inherently invidious," *see* 539 U.S. at 334-44, and do not work "wholly to the benefit of members of one group," *see id.* at 330. The Court explained: "[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* In *Parents Involved*, the Court held that voluntary school desegregation programs can impose injury, depriving citizens of rights. 551 U.S. at 719.

alleviate racial imbalance in the schools," the statute "creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools." *Id.* at 718-19. In reaching this conclusion, the court rejected the defendants' argument that this classification did not violate the Equal Protection Clause because "in the absence of de jure segregation, the state is under no obligation to take affirmative action to reduce de facto segregation." *Id.* at 719. The court reasoned that the process-based nature of the *Hunter* inquiry precluded this distinction:

> [T]he argument that the state has not discriminated because it has no constitutional obligation to end de facto racial imbalance fails to meet the issue under Hunter v. Erickson. The statute places burdens on the implementation of educational policies designed to deal with race on the local level. . . . The discrimination is clearly based on race alone, and the distinction created in the political process, based on racial considerations, operates in practice as a racial classification.

Id. Accordingly, the court held the law unconstitutional, a decision that the Supreme Court summarily affirmed, 402 U.S. 935 (1971), and then subsequently relied on in *Seattle*.

It should be unsurprising, then, that the language of these decisions encompasses any legislation *in the racial minorities' interest*, and thus is broader than it would be were the Attorney General's distinction valid.

See, e.g., *Seattle*, 458 U.S. at 467 (noting the Fourteenth Amendment protects against distortions of the political process that "place special burdens on the ability of minority groups to achieve *beneficial legislation*" (emphasis added)); *id.* at 470 (requiring searching judicial scrutiny where state action makes it more difficult for racial minorities "to achieve *legislation that is in their interest*" (emphasis added) (internal quotation mark omitted)); *id.* at 474 (finding it "enough that minorities may consider busing for integration to be *legislation that is in their interest*" (emphasis added) (internal quotation mark omitted)); *Hunter*, 393 U.S. at 393 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact *legislation in its behalf* than it may dilute any person's vote . . . ." (emphasis added)); *cf. Nyquist*, 318 F. Supp. at 720 (holding that the state "has acted to make it more difficult for racial minorities to achieve *goals that are in their interest*" (emphasis added)).

The cases' context and reasoning, discussed above, crystallize the point of the *Hunter/Seattle* doctrine. The political process theory does not serve as a duplicative backstop against already unconstitutional action. Instead, it prevents the placement of special procedural obstacles on minority objectives, whatever those objectives may be. The distinction urged by the Attorney General thus erroneously imposes an *outcome*-based limitation on a *process*-based right. Again, what matters is if racial minorities are forced to surmount procedural hurdles in reaching this goal over which other groups do not have to leap. If racial minorities do, the disparate procedural treatment violates the Equal Protection Clause, regardless of the

goal sought. Accordingly, whether "all governmental use of race must have a logical end point," as the dissent asserts, Slip Op. at 21 (quoting *Grutter*, 539 U.S. at 342), is irrelevant to the constitutionality of Proposal 2 under *Hunter* and *Seattle*. The equal protection injury imposed by Proposal 2 is not the Michigan electorate's attempt to end affirmative action, but the method by which it sought to do so.

b. Does a Law Place Special Burdens on *Minorities* Even When Multiple Minorities Affected by the Enactment, Cobbled-Together, Would Constitute a Numerical Majority?

As to the issue of burdening *minorities*, the Attorney General argues that Proposal 2 places no special burden on racial minorities because they, together with women, constitute a numerical majority of voters and thus could theoretically repeal Proposal 2.[10] In so arguing, he points to the *Hunter* Court's statement in dicta that "[t]he majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U.S. at 391.

The Attorney General's argument is without merit. Examination of the context of that statement from *Hunter* reveals that the quotation referred to the *racial* majority at issue in that case, not the ad-hoc and theoretical numerical majority posited by the Attorney General. *See id.* And as the district court cogently stated:

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[10] We address this argument separately because our "racial focus" analysis does not encompass it fully. *See* Part II.A.1.ii.a, *supra*.

> The argument that racial minorities plus women constitute a majority of the population, and therefore Proposal 2 does not discriminate against minorities . . . borders on nonsense. The attempt to cobble together an artificial coalition of women and racial minorities in an effort to construct a numerical majority of citizens ignores the fact that affirmative action programs generally are targeted to benefit insular groups that separately have suffered from discriminatory practices in the past because of perceived traits unique to that group alone. Lumping minority groups into a contrived category does not allow any greater political influence over the process of advocating for affirmative action programs to achieve racial parity or otherwise render the process of changing the state constitution "bothersome but no more than that."

Coal. IV, 539 F. Supp. 2d at 956 (quoting *Hunter*, 393 U.S. at 391); *cf. Growe v. Emison*, 507 U.S. 25, 41 (1989) (noting that, under the Voting Rights Act, "a court may not presume bloc voting within even a single minority group," and so "it ma[kes] no sense for . . . [a court to] indulge that presumption as to bloc voting within an agglomeration of distinct minority groups").

Finally, as the Supreme Court has long recognized, minority groups may face political disadvantages independent of their numerical strength. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (noting that minority groups may be "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a

position of political powerlessness as to command extraordinary protection from the majoritarian political process"); *cf. Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (observing that women are underrepresented politically even though "[i]t is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority"). Therefore, it is a considerable oversimplification—and simply inaccurate—to conflate a simple numerical majority comprised of members of different minority groups with a political majority for which "a referendum might be bothersome but no more than that." *Hunter*, 393 U.S. at 391.

c. Does the *Hunter/Seattle* Test Contain an Intent Requirement?

Drawing on the language from *Seattle* that Initiative 350 "was effectively drawn for racial purposes," and "enacted because of, not merely in spite of, its adverse effects upon busing for integration," 458 U.S. at 471 (internal quotation marks omitted), the Attorney General also argues that a reallocation of political decisionmaking violates the Equal Protection Clause only if the Plaintiffs can demonstrate it was motivated by purposeful racial discrimination.

However, "the idea that a political restructuring claim must be based on [a finding of] purposeful discrimination finds no support in the [Supreme Court's] cases." *Coal. IV*, 539 F. Supp. 2d at 956. Indeed, in *Seattle*, the Court expressly rejected this argument. Acknowledging that "'purposeful discrimination is the condition that offends the Constitution,'" 458 U.S. at 484 (quoting *Pers. Adm'r v. Feeney*, 442 U.S. 256, 274 (1979)), the Court

nonetheless emphasized that "[w]e have not insisted on a particularized inquiry into motivation in all equal protection cases." *Id.* at 485. Rather, "'[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" *Id.* (quoting *Feeney*, 442 U.S. at 272). Legislation like that in *Hunter*, *Seattle*, and here, which restructures the political process along racial lines and places special burdens on racial minorities, thus "falls into an inherently suspect category," regardless of whether purposeful racial discrimination is its demonstrated motivation. *Id.*

iv. "Political Process" Conclusion

Proposal 2 thus modifies Michigan's political process "to place special burdens on the ability of minority groups to achieve beneficial legislation." *See Seattle*, 458 U.S. at 467.

v. Strict Scrutiny

Because Proposal 2 fails the *Hunter/Seattle* test, it must survive strict scrutiny to stand. *See Seattle*, 458 U.S. at 485. Under strict scrutiny, the Attorney General must prove that Proposal 2 is "necessary to further a compelling state interest." *Crawford*, 458 U.S. at 536. In *Seattle*, the Court did not consider whether a compelling state interest might justify a state's enactment of a racially-focused law that restructures the political process, because the government did not make the argument. *Seattle*, 458 U.S. at 485 n.28. Because the Attorney General likewise does not assert that Proposal 2 satisfies a

compelling state interest, we need not consider this argument either.[11]

We therefore hold that those portions of Proposal 2 that affect Michigan's public institutions of higher education violate the Equal Protection Clause.[12]

2. "Traditional" Equal Protection Analysis

Having found that Proposal 2 deprives the Plaintiffs of equal protection of the law under a "political process" theory, we do not reach the question of whether it also violates the Equal Protection Clause when assessed under the traditional framework.

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[11] Further, the two "compelling interests" advanced by amicus Russell are not actually compelling interests, as their rationale presumes that Proposal 2 does not suffer from any constitutional infirmity. Moreover, Russell does not show that Proposal 2 is *necessary* to further these "compelling" state interests.

[12] The dissent also makes much ado of the *Seattle* majority's response to Justice Powell's dissenting argument that the majority's decision would require finding unconstitutional a situation in which a higher authority within a university attempted to alter an admissions committee's decision to develop an affirmative-action plan. *See Seattle*, 458 U.S. at 480 n.23 (responding to *id.* at 498 n.14 (Powell, J., dissenting)). However, the hypothetical situation Justice Powell described is entirely distinguishable from that at issue here, in which decisonmaking authority has been removed to the highest level of state government, not to a higher level of authority within the university. The fact that *some* reorderings of political processes may be *de minimis* does not mean that *all* are. Accordingly, Justice Powell's argument and the *Seattle* majority's Delphic response—made in dicta in a footnote with no supporting explanation—are inapposite.

B. Ancillary Matters

We now turn briefly to the ancillary questions of whether the district court properly dismissed Russell and refused to dismiss the University Defendants.

1. The University Defendants' Non-Dismissal

The University Defendants appeal the district court's denial of their motion to be dismissed as misjoined parties under Rule 21 of the Federal Rules of Civil Procedure. We review the district court's decision for abuse of discretion and must affirm unless we are "left with a definite and firm conviction that the trial court committed a clear error of judgment." *Letherer v. Alger Group*, 328 F.3d 262, 266 (6th Cir. 2003) (internal quotation marks omitted), *overruled on other grounds by Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224 (2007).

The district court concluded that the University Defendants were properly joined parties under Federal Rule of Civil Procedure 20(a) because "[i]f this Court were to find Proposal 2 unconstitutional, affirmative action would not automatically be reinstated into the admissions process. Rather, the universities would have to choose to do so on their own." *Coal. IV*, 539 F. Supp. 2d at 941. The court therefore found that dismissal under Rule 21 was inappropriate. The University Defendants contend, however, that they lack the authority to provide Plaintiffs with the requested relief, an injunction against Proposal 2's enforcement, and therefore should be dismissed. In support of their argument, the University Defendants point us to an unpublished district court opinion. *See Brooks v. Glenn Cnty.*, No. CV288-146, 1989 U.S. Dist.

LEXIS 4776 (S.D. Ga. Apr. 25, 1989). We are not persuaded.

Rule 21 states in relevant part: "On motion or on its own, the court may at any time, on just terms, add or drop a party." Fed. R. Civ. P. 21. "The Federal Rules of Civil Procedure do not define misjoinder, but the cases make clear that misjoinder of parties occurs when [parties] fail to satisfy the conditions for permissive joinder under Fed. R. Civ. P. 20(a)." *Glendora v. Malone*, 917 F. Supp. 224, 227 (S.D.N.Y. 1996). Rule 20(a) requires that a right to relief be asserted against joined defendants. Therefore, "[a] misjoinder of parties . . . frequently is declared because no relief is demanded from one or more of the parties joined as defendants." *Letherer*, 328 F.3d at 267 (quoting 7 Charles Alan Wright et al., *Federal Practice and Procedure* § 1683, at 475-76 (3d ed. 2001)).

The discretionary language of Rule 21, coupled with our deferential standard of review, presents a high hurdle for reversal of the district court's determination. Here, because Proposal 2 is unconstitutional and university action is necessary to re-implement affirmative-action policies, we **AFFIRM** the district court's denial of the University Defendants' motion.

2. Russell's Dismissal

Intervening defendant Russell, a law student at Wayne State University at the time of oral argument, challenges the district court's decision to dismiss him from the case because he no longer satisfied the requirements for intervention. We review de novo a district court's grant of summary judgment. *Chen*, 580

F.3d at 400. "Summary judgment should be granted when the moving party can 'show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Geiger v. Tower Auto.*, 579 F.3d 614, 620 (6th Cir. 2009) (quoting Fed. R. Civ. P. 56(c)). We also review de novo district court decisions on motions to intervene as of right, except for the element of timeliness, which is reviewed for abuse of discretion. *Northland Family Planning Clinic v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007).

Under Federal Rule of Civil Procedure 24(a), an interested party must meet several requirements before being permitted to intervene as of right: (1) his motion to intervene must be timely; (2) he must have a substantial legal interest in the subject matter of the case; (3) he must demonstrate that his ability to protect that interest will be impaired in the absence of intervention; and (4) he must demonstrate that the parties already before the court do not adequately represent his interest. *See Coal. III*, 501 F.3d at 779. An intervenor also must continue to meet these requirements throughout the duration of the litigation, as courts must be able to ensure that parties maintain a live interest in a case. *Accord Morgan v. McDonough*, 726 F.2d 11, 14-15 (1st Cir. 1984) (affirming the dismissal of an intervening party whose legal interest had lapsed because "even if [the party's original] intervention . . . were of right, . . . it would have gained no absolute entitlement to continue as a party until the termination of the suit"); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 758 A.2d 916, 927 n.15 (Conn. App. Ct. 2000) ("A court also has the authority to dismiss intervenors once their interest in the matter

has expired. Federal cases illustrate that intervention as of right does *not* grant absolute entitlement to continue as a party until termination of the suit."); *see also* Fed. R. Civ. P. 24 advisory committee's note ("An intervention of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."); *cf. Friends of Tims Ford v. Tenn. Valley Auth.*, 585 F.3d 955, 963 n.1 (6th Cir. 2009) (declining to consider the defendant-intervenors' arguments regarding plaintiff's standing because the intervenors' ability to protect their interests was impaired only at later stages of litigation).

Here, there is no genuine issue of material fact as to whether the Attorney General adequately represents Russell's interests. While Russell's burden in showing that "representation of his interest 'may be' inadequate" is "minimal," *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), he still must overcome "the presumption of adequate representation" that arises if he shares "the same ultimate objective as a party to the suit," *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005). Although the Attorney General's and Russell's interests initially diverged—the Attorney General agreed to a stipulation to delay the application of Proposal 2, whereas Russell had an interest in Proposal 2's immediate enforcement—their interests are now aligned. Both now share the same ultimate objective: the validation of Proposal 2. The Attorney General has mounted a firm defense of Proposal 2 and succeeded in convincing the district court to grant summary judgment in his favor. *See Coal. IV*, 539 F. Supp. 2d at 924. As the district court noted, the

Attorney General's and Russell's summary judgment motions "duplicate each other." *Coal. V*, 539 F. Supp. 2d at 971. Thus, we agree with the district court's conclusion that "Russell's presence in the litigation is a mere makeweight that adds nothing of substance to the debate over Proposal 2's constitutionality." *Id.* Russell's intervention in this litigation is therefore no longer proper.

Accordingly, we **AFFIRM** the district court's grant of the Cantrell Plaintiffs' motion for summary judgment regarding Russell. While Russell is hereby dismissed as a party to this case, we nonetheless have considered his filings as we would those of amicus curiae.

III. CONCLUSION

For the reasons above, we **AFFIRM** the district court's decision granting the Cantrell Plaintiffs' motion for summary judgment as to Eric Russell, **AFFIRM** the district court's decision denying the University Defendants' motion to be dismissed as parties, and, because those provisions of Proposal 2 affecting Michigan's public colleges and universities are unconstitutional as a matter of law, **REVERSE** the district court's decision granting the Defendants-Appellees' motion for summary judgment and order the court to enter summary judgment in favor of the Plaintiffs-Appellants.

CONCURRING IN PART AND DISSENTING IN PART

JULIA SMITH GIBBONS, Circuit Judge, concurring in part and dissenting in part. I join the majority's opinion with respect to the procedural issues discussed in part II.B. I disagree, however, with the majority's conclusion that Proposal 2 is unconstitutional under a political restructuring theory of the Equal Protection Clause. In my view, Proposal 2 does not impermissibly restructure the political process in the state of Michigan to burden the ability of minorities to enact beneficial legislation. Moreover, Proposal 2 is not unconstitutional under traditional equal protection analysis. I therefore respectfully dissent.

I.

In November 2006, the people of Michigan amended the Michigan Constitution to prohibit the state, including its public colleges and universities, from discriminating against or granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, and public contracting. Mich. Const. art. I, § 26. A primary purpose and effect of this amendment was to remove the ability of state colleges and universities to employ then-existing race- and gender-preference admissions policies. Accordingly, the plaintiffs challenge the amendment as it relates to the state's colleges and universities.

Because "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause," *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003), it is important to consider the legal backdrop from which the effort to amend the Michigan Constitution unfolded. *See Hunter v. Erickson*, 393 U.S. 385, 391–92 (1969) (assessing the challenged referendum provision against the relevant legislative and legal background). The race-based admissions polices used by state universities in Michigan are familiar to the courts and the people of Michigan. *See Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 240 (6th Cir. 2006). The policies employed by the University of Michigan formed the basis of the significant and highly publicized Equal Protection challenges in *Grutter* and *Gratz v. Bollinger*, 539 U.S. 244 (2003). And, as noted by the majority, the effort by Ward Connerly and Jennifer Gratz to mobilize for a statewide ballot initiative occurred in direct response to the result in *Grutter*. *Granholm*, 473 F.3d at 240.

In *Grutter*, the Supreme Court concluded that diversity is a compelling state interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. 539 U.S. at 325, 328. Analyzing the highly individualized, holistic approach taken by the University of Michigan Law School, which considered "all pertinent elements of diversity," *id.* at 341 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)), the Court found that the university had narrowly tailored its approach to the purpose of diversity in higher education. *Id.* at 333–41. In *Grutter*'s companion case the Court, however, reaffirmed that the use of racial classifications are a "highly suspect

tool," *id.* at 326 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)), subject to strict scrutiny because "'[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *Gratz*, 539 U.S. at 270 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)). The Court reiterated that "remedial race-based governmental action generally 'remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.'" *Grutter*, 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 308 (opinion of Powell, J.)). Finally, the Court was mindful that because "'[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race' . . . race-conscious admissions policies must be limited in time." *Id.* at 341–42 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

The Court also indicated that the ability to fashion a time limit on the use of race-conscious admissions policies is not a tool placed primarily in the hands of the courts. Rather, it is first and foremost in the hands of states and their public universities. *See Grutter*, 539 U.S. at 342 ("[T]he durational requirement can be met by sunset provisions in race-conscious academic polices and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."); *see also id.* (describing state-law prohibitions on the use of racial preferences in admissions in California, Florida, and Washington). Indeed, the Court has repeatedly confirmed that the repeal or modification of race-related polices does not necessarily run afoul of the Equal Protection Clause.

See Hunter, 393 U.S. at 390 n.5; *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 483 (1982) ("[T]he simple repeal or modification of desegregation or antidiscrimination laws, without more, has never been viewed as embodying a presumptively invalid racial classification." (quoting *Crawford v. Bd. of Educ.*, 458 U.S. 527, 539 (1982))). A state or university may conclude, for example, that the use of racial preferences may no longer be necessary to further the interest in diversity, that the burdens associated with those preferences are too heavy, or that the means employed no longer enjoy legitimacy in the eyes of the people. And, as was the case with the California prohibition mentioned by the Court, it follows that a state or its electorate may act to impose a time limit, or end the use of racial preferences outright, when its public universities have not. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

It is from this legal backdrop that the popular effort to amend the Michigan Constitution to prevent the use of affirmative action in admissions developed. Taking it into account, we must turn to whether Michigan's repeal of this type of racial classification by constitutional amendment violates the Equal Protection Clause.

II.

As an initial matter, a broad view of plaintiff's contentions provides context and a bit of common sense about the requirements of the Constitution. Plaintiffs' argument is that the Equal Protection Clause prohibits Michigan from prohibiting discrimination in admissions to public colleges and universities through the passage of Proposal 2. Calling an admissions

practice a preference does not transform the practice into a nondiscriminatory one; preferences do indeed permit discrimination. Yet, we know that the Equal Protection Clause prevents "official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229 (1976).

Grutter and *Gratz* represent the Supreme Court's response to a university's use of racial preferences in admissions and together develop the circumstances under which policies that take race into account may be used. The burden on the university is a difficult one; it may use race as a factor only when there is a compelling interest in doing so and when the use is narrowly tailored. Racial preferences are not favored under the law but must be exactingly justified. No constitutional jurisprudence exists that requires their use. And, as the Supreme Court has told us, "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Crawford*, 458 U.S. at 538–39.

Within this broad constitutional landscape, plaintiffs contend that passage of Proposal 2 violated the Equal Protection Clause. They base their argument on *Hunter* and *Seattle*. These cases, without a doubt, secure racial minorities the right to equal process within the political arena. *Seattle*, 458 U.S. at 467; *Hunter*, 393 U.S. at 391. They prohibit a "distortion of the political process," *Crawford*, 458 U.S. at 538 n.14, by which a state "disadvantage[s] [a] particular group by making it more difficult to enact legislation in its behalf," *Seattle*, 458 U.S. at 476 (quotation marks and citation omitted), by "mak[ing] use of a more complex

governmental structure," *id.* at 477, or "lodging decisionmaking authority over the question at a new and remote level of government," *id.* at 483. But they do not guarantee that racial minorities will win every political battle. *Id.* at 484 ("If a governmental institution is to be fair, one group cannot always be expected to win . . . ." (quoting *Hunter*, 393 U.S. at 394 (Harlan, J., concurring))). Nor do they hold that the repeal of those policies is impermissible, although they may be preferred by significant numbers of racial minorities. Rather, *Hunter*, *Seattle*, and *Crawford* outline the constitutional limits on a particular type of political restructuring: the enactment of comparative structural burdens on "the ability of minority groups to achieve beneficial legislation." *Seattle*, 458 U.S. at 467. Because these cases do not prohibit "every attempt to address a racial issue, " *id.* at 485, it is important to consider the limiting bounds of this type of political restructuring challenge.

A.

In reviewing a *Hunter* political process challenge, we must, of course, consider whether the particular legislation or popular referendum at issue serves to impermissibly "distort" the state's political processes. *Crawford*, 458 U.S. at 541. *Seattle* makes clear that "the voters of the polity may express their displeasure through an established legislative or referendum procedure when particular legislation arouses passionate opposition." 458 U.S. at 483 (internal quotation marks and citation omitted). The state or its voters, however, may not "make[] the enactment of racially beneficial legislation difficult" by "lodging decisionmaking authority over the question at a new

and remote level of government." *Id.* And they may "no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than [they] may dilute any person's vote." *Id.* at 476 (quoting *Hunter*, 393 U.S. at 392–93). *Seattle* and *Hunter* therefore protect "the ability of minorities to participate in the process of selfgovernment." *Id.* at 480 n.23.

In *Hunter*, the impermissible political restructuring took the form of a more burdensome extra step in the City of Akron's legislative process. The people of Akron had amended their city charter by popular referendum to require that any city ordinance regulating real property "on the basis of race, color, religion, national origin, or ancestry" be subject to approval by a mandatory popular referendum, while all other ordinances regulating real estate only required the approval of the City Council. *Hunter*, 393 U.S. at 387, 390. The *Hunter* Court concluded that this amounted to an unconstitutional political restructuring because the charter amendment "obviously made it substantially more difficult to secure enactment of ordinances" barring discrimination in real estate. *Id.* at 390. Indeed, those minority voters supporting property-related anti-discrimination ordinances would not only have to win a legislative battle in the Akron City Council, but they would then have to win a public-referendum battle as well. *Id.* The default political structure entrenched in the mechanisms of a city council, which may allow for particularized and localized electoral pressure on individual council members, was therefore supplemented with the far more diffuse, and potentially onerous, political

structure inherent in winning popular approval of a law with a discrete set of immediate beneficiaries.

In *Seattle*, the voters of the state effectuated a more implicit restructuring of the legislative process. In the 1970s, the locally elected Seattle school board passed and implemented a series of school desegregation programs aimed at alleviating the isolation of minority students caused by segregated housing patterns. *Seattle*, 458 U.S. at 459–60. In 1977, local opponents of these measures, having previously failed in their attempt to recall School Board members who had voted for desegregation programs, *id.* at 460 n.1, organized to end Seattle's use of the programs at the statewide level, *id.* at 461–62. Their statewide initiative provided that local school boards could not employ mandatory desegregative busing except possibly when required as part of a judicial decree. *Id.* at 462–63. In enacting this initiative, the people of Washington thus moved the locus of political authority over this particular issue from the local to the statewide level "requir[ing] those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action." *Id.* at 474.

In both cases where the Court found an impermissible political restructuring, the relevant lawmaking authority was reallocated from a local legislative body to the "more complex government structure," *id.* at 477, of the city- or state-wide general electorate,[1] thereby placing a "comparative structural

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[1] In *Seattle*, Initiative 350 could also have been repealed by the state legislature after a period of two years. *See* 458 U.S. at 463 n.4.

burden . . . on the political achievement of minority interests," *id.* at 475 n.17. A key consideration in analyzing a *Hunter* political structure challenge, therefore, is whether the challenged law impacts the ability of minorities to secure "legislation that is their interest" as minorities. *Id.* at 474; *see also id.* at 475 n.17 ("Thus, in *Hunter*, the procedures for enacting racial legislation were modified in a such a way as to place effective control in the hands of the citywide electorate. Similarly here [in *Seattle*], the power to enact racial legislation has been reallocated."). Given the structural considerations inherent in this type of Equal Protection challenge, it is important to fully examine the particular political structures at work in this case to determine whether the people of Michigan have restructured the state's lawmaking process in the manner prohibited by *Hunter* and *Seattle*.

i.

"The Michigan Constitution confers a unique constitutional status on [its] public universities and their governing boards." *Federated Publ'ns, Inc. v. Bd. of Trustees of Mich. State Univ.*, 594 N.W.2d 491, 495–96 (Mich. 1999) (citing Mich. Const. art. VIII, §§ 5 and 6). The status of these boards has been described by the Michigan Supreme Court as "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is coordinate with and equal to that of the legislature." *Id.* at 496 n.8 (quoting *Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*, 132 N.W. 1037, 1039 (Mich. 1911)). Each governing board is vested with the power of "general supervision of its institutions and the control and direction of all

expenditures from the institution's funds."[2] Mich. Const. art. VIII, § 5. With this power comes significant independence, as the state constitution "limit[s] the Legislature's power" over the universities such that it "may not interfere with the management and control of" the universities. *Federated Publ'ns*, 594 N.W.2d at 497 (quotation marks and citation omitted). Therefore, the "constitutional autonomy of these institutions is plenary as to its educational programs, but does not insulate them from the health and safety laws of the state." 1979-1980 Mich. Op. Att'y Gen. 578, 1980 WL 114008 (1980); *see also Federated Publ'ns*, 594 N.W.2d at 497.

The constitution provides for eight-member governing boards, elected to statewide office for eight-year terms.[3] Mich. Const. art. VIII, § 5. Elections are typically staggered, with, for example, an election

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[2] The Michigan Constitution divides its state public universities into two categories. The first category, detailed in Mich. Const. art. VIII, § 5, consists of the University of Michigan, Michigan State University, and Wayne State University. The second category includes "other institutions of higher education established by law having authority to grant baccalaureate degrees." Mich. Const. art. VIII, § 6. This category includes, for example, Eastern Michigan University, Central Michigan University, and Grand Valley State University. *See* Mich. Const. art. VIII, § 4 (listing universities for which the state legislature shall appropriate moneys). Because the Plaintiffs focus on the universities described in section five, and because it is unclear from the record whether the universities described in section six employ race-conscious admissions policies, the following discussion will primarily pertain to the University of Michigan, Michigan State University, and Wayne State University.

[3] By contrast, the governing boards of the other state universities are appointed by the governor by and with the advice and consent of the state senate. Mich. Const. art. VIII, § 6.

every two years for regents of the University of Michigan. *See* About the Board of Regents, http://www.regents.umich.edu/about/ (last visited May 4, 2011); MSU Board of Trustees, http://www.trustees.msu.edu/about/establishment.html (last visited May 4, 2011); About the Board of Governors, http://bog.wayne.edu/about.php (last visited May 4, 2011).

As a preliminary matter, the majority suggests that our examination of the pertinent political structures must end with the Michigan Constitution. The majority opinion concludes that we may not rely on the testimony of university officials because the structure of the colleges and universities is a "question of law, for it is set by constitution, statutes and regulations." (Maj. Op. at 22.) Here, the nature of the decision-making process for admissions is one of both law and fact, and the witnesses gave instructive testimony that was within their personal knowledge.[4] Examination of the record is appropriate to ascertain how the decisions at issue are in fact made.

Although these universities and their respective boards are created by the Michigan Constitution, the admissions policies are placed within the control of the boards or school authorities only within each board's bylaws. *See* University of Michigan Board of Regents,

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[4] Oddly, the majority characterizes this testimony as opinion testimony inadmissible under Federal Rule of Evidence 701. To the extent the witnesses offered opinions, which were hardly the thrust of their testimony, their lay opinions were perfectly admissible. Any opinions were rationally based on the witnesses' perceptions, helpful to an understanding of the testimony or a fact in issue, and not based on the specialized knowledge of experts.

Bylaws Chapter VIII: Admission and Registration of Students, http://www.regents.umich.edu/bylaws/bylaws08.html (last visited May 4, 2011) (vesting responsibility for the admission of students in the associate vice provost and executive director of undergraduate admissions at the Ann Arbor campus, in the director of admissions and orientation at the Dearborn campus, and in the director of undergraduate admissions at the Flint campus); Michigan State University Board of Trustees, Bylaws, http://www.trustees.msu.edu/bylaws/#article8 (last visited May 4, 2011) ("The [MSU] Board encourages and supports the faculty in the development of educational and other programs . . . . Upon the recommendation of the President the Board may determine and establish the qualifications of students for admission at any level . . . ."); Wayne State University Board of Governors, Statutes, http://bog.wayne.edu/code/2_34_09.php (last visited May 4, 2011) ("After consultation with the College or School, the [Board-elected] President or his/her designee is authorized to establish specific admissions standards for degree programs."). Thus, the admissions policies are not set forth by the state constitution, and it is necessary to look to testimony to determine where the power to set admissions policy lies.

The governing boards have fully delegated the responsibility for establishing admissions standards to several program-specific administrative units within each institution, which set admissions criteria through informal processes that can include a faculty vote. (DE 172, Pls.' Russ. Mot., Ex. I (Univ. Defs.' Resp.) Nos. 4, 7; DE 203, Pls.' SJ Mot., Ex. E. (Zearfoss Dep.) at 64, 213–14, Ex. F. (Wu Dep.) at 190–91.) For example, as

noted by the majority, the University of Michigan Law School admissions policy is set exclusively by the law school faculty admissions committee, with major substantive changes occasionally voted upon by the entire law school faculty. (Maj. Op. at 25 (referring to the admissions committees as "the individuals delegated with principle responsibility for admissions policy"); Zearfoss Dep. at 213.) Similarly, as described by its former dean, at the Wayne State University Law School the ultimate decision whether to change admissions standards rests with the faculty alone. (Wu Dep. at 190–91.) Thus, as the Cantrell Plaintiffs readily admit, the "faculty are the primary architects of all the admissions criteria and protocols." (Reply Br. at 20 n.11.)

At neither university, however, is there a system in place to review or alter admissions policies at a level above a vote of the faculty. Sarah Zearfoss, the dean of admissions at the University of Michigan Law School, testified that no one could change the school's admissions policy other than the faculty admissions committee or the faculty itself, because "there's no higher body" to which someone unhappy with an admissions policy could advocate change. (Zearfoss Dep. at 214.) And Frank Wu, then the dean at Wayne State University Law School, agreed that "only the faculty at the law school has the authority to create and approve the admissions policy" at the school. (Wu Dep. at 191.) Indeed, Wu testified that the admissions policy is not subject to the approval of the Wayne State University Board of Governors, and, in his view, if the Board of Governors attempted to alter the decision of the law school's faculty with respect to criteria for admission, "it would precipitate a constitutional crisis."

(Wu Dep. at 192.) Each institution's board may superficially have "plenary authority" over its respective institution (*see* Maj. Op. at 21), but the ultimate authority to set admissions policy rests exclusively with each program-specific faculty within the universities.

ii.

The majority characterizes the dissent as reading *Hunter* and *Seattle* too narrowly by defining the political processes with which they deal as "electoral" processes. While the political processes in *Hunter* and *Seattle are* electoral in the sense that they relate to what electoral methods are employed to make policy, the majority opinion, not the dissent, draws the line between political and electoral. The point is simply that the situation here differs greatly from that of *Hunter* and *Seattle* in the ways described in this opinion; these program-specific faculty admissions committees are far afield from the legislative bodies from which lawmaking authority was removed in *Hunter* and *Seattle*. The most crucial and overarching difference, of course, is that the faculty admissions committees and individual faculty members are not politically accountable to the people of Michigan.

In *Seattle*, the court emphasized that the type of action it found objectionable was the creation of comparative burdens "on minority participation in the political process." 458 U.S. at 480 n.23; *see id.* at 486 ("[M]inorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups 'from effective participation in the political proces[s].'" (quoting *Mobile v. Bolden*, 446

U.S. 55, 94 (1980) (White, J., dissenting))). The *Seattle* majority, however, did not view state university admissions committees as a part of the "political process" in the manner of an elected school board or city council. A dialogue between the majority and dissent in *Seattle* is particularly instructive on this point. In dissent, Justice Powell, critiquing the potential breadth of the majority's holding, argued:

> Thus, if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the dean of the law school, the faculty of the university as a whole, the university president, the chancellor of the university, and the board of regents might be powerless to intervene despite their greater authority under state law.

Id. at 498 n.14 (Powell, J., dissenting). The majority, however, flatly dismissed this concern as a misunderstanding of the court's decision: "It is evident, then, that the horribles paraded by the dissent, *post*, at [footnote 14 of the dissent]—*which have nothing to do with the ability of minorities to participate in the process of selfgovernment*— are entirely unrelated to this case." *Id.* at 480 n.23 (emphasis added).

For the *Seattle* majority, then, an impermissible reordering of the political process meant a reordering of the processes through which the people exercise their right to govern themselves. *See id.* at 486 ("And when the State's allocation of power places unusual

burdens on the ability of racial groups to *enact legislation* specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities' . . . from the 'majoritarian political process.'" (emphasis added) (citing *United States v. Carolene Prods. Co.* 304 U.S. 144, 153 n.4 (1938) and *San Antonio Indep. Sch. Dist. v. Rodriquez*, 411 U.S. 1, 28 (1973))); *id.* at 467 ("But the Fourteenth Amendment also reaches a "political structure that treats all individuals as equals . . . yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to *achieve beneficial legislation*." (emphasis added) (quoting *Bolder*., 446 U.S. at 84)).

The evidence reveals that the academic processes at work in state university admissions in Michigan are not "political processes" in the manner contemplated in *Seattle*. Unlike the Seattle School Board and the Akron City Council, the various university admissions committees in Michigan and their faculty members are unelected. As at most public universities, tenured faculty members have significant vested rights associated with their employment in order to preserve academic freedom and independence. The faculty members who are permitted to vote on policy matters are therefore significantly insulated from political pressure by virtue of their tenure. Such faculty are beholden to no constituency—student, local, or otherwise. And, as demonstrated by the testimony of the law school deans in this case, the people of Michigan have no ability to exert electoral pressure on the university decision makers to change their

admissions polices. As they currently stand, the faculty admissions committees are islands unto themselves, vested with the full and unreviewed authority to set admissions policy for their respective university programs.

The majority opinion discounts the differences between facts here and those of *Hunter* and *Seattle* by arguing that processes are considered "political" as long as there is "governmental decisionmaking." In this argument it relies on *Nyquist v. Lee*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd Nyquist v. Lee*, 402 U.S. 935 (1971), a case from the Western District of New York that was summarily affirmed by the Supreme Court and cited in *Seattle*. In *Nyquist*, the court found that a New York statute that "prohibit[ed] state education officials and appointed school boards from assigning students, or establishing, reorganizing or maintaining school districts, school zones or attendance units for the purpose of achieving racial equality in attendance" unconstitutionally reordered the political process in violation of the Equal Protection Clause. *Nyquist*, 318 F. Supp. at 712, 720. The majority suggests that because *appointed* school boards were part of the political process at issue in *Nyquist*, the university faculty admissions committees are similarly part of the political process. (Maj. Op. at 20.) The decision in *Nyquist*, however, made note of how the local boards were accountable to the community: "Parties considering themselves aggrieved by local board actions may seek to have the Commissioner enforce those policies. [The New York statute], however, singles out for different treatment all plans which have as their purpose the assignment of students in order to alleviate racial imbalance." *Id.* at 719 (internal

citations omitted). Thus, even the *appointed* school boards were accountable to the community in a way in which the faculty admissions committees certainly are not. Again, the point is not selecting a label for the processes, but examining the factual similarities or dissimilarities of the situations.

There is no "local" university constituency as there is a local constituency for a city council or city school board, i.e., the city's voters. Rather, despite there being a broad student, faculty, and staff *community* associated with each university, Michigan's state universities were established as state-wide institutions with a state-wide *constituency*.[5] The faculty admissions committees therefore do not "represent" any local constituency at all. This is particularly important because the *Seattle* majority looked closely at the fact that Washington's lodging of political decisionmaking authority over the busing question at the statewide level directly burdened minority interests by "making the enactment of racially beneficial legislation difficult, [because] the particular program might not have inspired opposition had it been promulgated through the usual [local] legislative processes used for comparable legislation." 458 U.S. at 483–84. The court continued:

> That phenomenon is graphically demonstrated by the circumstances of this litigation. The longstanding desegregation programs in Pasco and Tacoma, as well as the Seattle middle

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[5] Indeed, some students, prospective students, alumni, and faculty members at each university are not members of that state-wide constituency, comprised of citizens and voters of the state of Michigan.

> school integration plan, have functioned for years without creating undue controversy. Yet they have been swept away, along with the Seattle Plan, by Initiative 350. As a practical matter, it seems most unlikely that proponents of desegregative busing in small communities such as Tacoma or Pasco will be able to obtain the statewide support now needed to permit them to desegregate the schools in their communities.

Id. at 484 n.27. The availability of "local" decisionmaking is therefore important when the political power of groups who could succeed at the local level is "diluted" in the statewide decisionmaking process. The universities here, however, are statewide institutions with a statewide constituency. There is nothing local about them.

The committees are also hardly the model of accessibility and locus of effective lobbying assumed by the majority. While members of the public may attend faculty meetings at which admissions standards are reviewed, there is no mechanism by which a member of the public—student or not—can move the committees to amend the admissions standards. (Wu Dep. at 190; Zearfoss Dep. at 209.) And, while interested students and members of the public are, with advance notice, permitted to speak at faculty meetings to comment on the admissions policies, the committees are not required to consider these comments seriously, issue written findings addressing these concerns, or do more than provide a forum for interested individuals to speak. (Zearfoss Dep. at 209–10; Wu Dep. at 190.) Rather, it appears that the main source of divergent

views on admissions policies is the faculty members themselves. (Zearfoss Dep. at 210.)

While the majority appears to see no reason to distinguish between these unelected and unresponsive program-specific faculty admissions committees and the legislative bodies from which lawmaking authority was removed in *Hunter* and *Seattle*, a consideration of political accountability in the political process is squarely grounded in the *Seattle* opinion. In *Seattle*, the Court undertook a close examination of Washington's system of "establish[ing] the local school board, rather than the State, as the entity charged with making decisions of the type at issue," 458 U.S. at 477:

> But Washington has chosen to meet its educational responsibilities primarily through "state and local officials, boards, and committees," and the responsibility to devise and tailor educational programs to suit local needs has emphatically been vested in the local school boards. . . . Thus "each common school district board of directors" is made "*accountable for the proper operation of [its] district to the local community and its electorate*." To this end, each school board is "vested with the final responsibility for the setting of policies ensuring quality in the content and the extent of its educational program."

Id. at 478 (citations omitted) (emphasis added); *see also id.* (noting the "disclosure and reporting provisions specifically designed to *ensure the board's 'accountability' to the people of the community*"

(emphasis added)). It was only upon its consideration of the state statutory structure's vesting of decisionmaking in local and politically accountable school boards that the Court could conclude that "placing power over desgregative busing at the state level . . . restructured the Washington political process." *Id.* at 480.

Taking this into account, it is difficult to conclude that, in amending their state constitution to prohibit the use of racial preferences in university admissions, the people of Michigan modified "the community's *political mechanisms* . . . to place effective decisionmaking authority over a racial issue at another level of *government*." *Id.* at 474 (emphasis added). Michigan has not "'burden[d] all future attempts' to implement race-conscious admissions policies" "'by lodging decisionmaking authority over the question at a new and remote level of government.'" (Maj. Op. at 28 (quoting *Seattle*, 458 U.S. at 483).) Having *no* direct or indirect influence on the bodies vested with authority to set admissions standards—the faculty committees—the people of Michigan made a political change at the *only* level of government actually available to them as voters. The Michigan electorate, therefore, as opposed to choosing a more complex structure for lawmaking, employed *the one* method available to exert electoral pressure on the mechanisms of government.

The lack of a viable electoral mechanism to change university admissions policies at a sub-constitutional level also means that the voters' use of a constitutional amendment in this instance also does not serve to create "comparative structural burden[s] on the political achievement of minority interests." *Seattle*,

458 U.S. at 474 n.17. If, as is the evidence before this court, the voters cannot exert electoral pressure on the fully independent faculty committees, then all voters regardless of racial identity compete on the same level for the political achievement of their higher-education interests: the constitutional level. That some academic decisionmaking remains at the faculty-committee level after the implementation of Proposal 2 is of no moment, because that decisionmaking is affirmatively not part of the state's electoral political process. The same policies that fully insulate faculty members from political opprobrium in their academic pursuits also protect them from political influence on their admissions policymaking. Michigan has chosen to structure its university system such that politics plays no part in university admissions at all levels within its constitutionally created universities. The Michigan voters have therefore not restructured the political process in their state by amending their state constitution; they have merely employed it.[6]

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[6] Even if—contrary to the evidence before the court—the people of Michigan could exercise effective electoral control over the board of governors at each respective state institution such that they could repeal the use of racial preferences, it is not clear that a choice to make use of a constitutional amendment in that instance would amount to the creation of a comparative political burden on the achievement of minority interests. Indeed, it would make use of neither a more complex or onerous structure of government nor remove the locus of political power from the local to statewide level. *Seattle*, 458 U.S. at 477, 480. Given the eight-year terms and staggered elections for board members, and the fact that electoral change must happen at the governing board of each individual state university, the process of effectuating political change through the board of governors appears to be arguably a *more* complex process than the comparative burden of a statewide referendum. And both types of elections—the board member

III.

If Proposal 2 does not effectuate an invalid restructuring of Michigan's political process, it is not necessary to reach broader questions relating to the substantive reach of the political restructuring doctrine. But again returning to the broader context, it is useful to highlight the tension between the doctrine and recent decisional law on the constitutionality of racial preferences.

Several courts have grappled with the question of whether racial preferences, those policies "potentially so dangerous" that they must be subject to strict scrutiny and "limited in time," *Grutter*, 539 U.S. at 342, may be eliminated when the people of a state amend their constitution to do away with all classifications based on race. The core constitutional question in each of these decisions is clear: should a race-based classification that is presumptively invalid, but permissible under limited circumstances and for a finite period of time, receive the same structural protections against statewide popular repeal as other laws that inure to the interest of minorities?

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elections and the constitutional referendum—occur at the statewide level with an electorate composed of the at-large statewide voting pool. There are therefore no inherent structural benefits or protections for minority voters in one system over the other. As opposed to the multi-district Akron city council in *Hunter*, for example, there is no mechanism by which minority voters could exercise bloc or regional voting in the board of governors system in a way that they could not in the state's constitutional referendum process. The use of the constitutional amendment mechanism, therefore, would not work to create a comparative political burden of the kind found in *Hunter* and *Seattle*.

The Ninth Circuit in *Wilson* answered in the negative, concluding that California's Proposition 209 did not violate equal protection because "[i]mpediments to preferential treatment do not deny equal protection." 122 F.3d at 1308. The court relied on an essential constitutional principle: "While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms. . . . The Equal Protection Clause, parked at our most 'distant and remote' level of government, singles out racial preferences for severe political burdens—it prohibits them in all but the most compelling circumstances." *Id.* The California Supreme Court recently agreed with this conclusion, holding that "*Seattle* cannot fairly be read as holding that the political structure doctrine protects presumptively unconstitutional racial preferences, as opposed to programs intended to bring about immediate equal treatment." *Coral Constr., Inc. v. San Francisco*, 235 P.3d 947, 960 (Cal. 2010). This logic has been further cemented by the Northern District of California, reinforcing the holding in *Wilson* in light of *Grutter*. In *Coalition to Defend Affirmative Action, Integration and Immigrant Rights v. Schwarzenneger*, No. 10-641 SC, 2010 WL 5094278 (N.D. Cal. Dec. 8, 2010), the federal district court stated, "*Grutter* does not hold that the Constitution *requires* the use of race in student admission decision; rather, it holds that the Constitution *tolerates* the use of race as one of many admission factors." *Id.* at *6. The court went on to note, "*Grutter* held that racial preferences, while not presumptively unconstitutional, must be limited in time. In so holding, the Supreme Court cited the 'race neutral alternatives' to racial preferences used by '[universities], where racial preferences are prohibited

by state law.'" *Id.* (citing *Grutter*, 539 U.S. at 342) (internal citations omitted).

These cases take the same approach as the district court in this case,[7] and their teaching is that equal treatment is the baseline rule embodied in the Equal Protection Clause, from which racial-preference programs are a departure. We therefore must review them with utmost care. Governing precedent is clear on this point: "'A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,'" *Grutter*, 539 U.S. at 341–42 (quoting *Palmore*, 466 U.S. at 432), and "all governmental use of race must have a logical end point," *id.* at 342. Because racial preference programs are exceptional, it is not altogether clear that the political structure doctrine would invalidate Proposal 2 even if it worked a restructuring of the political process in Michigan. *See Coral*, 235 P.3d at 966 (Corrigan, J., concurring) (noting that the United States Supreme Court has "approvingly referred to [California's Proposition 209] as a step in [the] direction" of ending the "governmental use of race" (citing *Grutter*, 538 U.S. at 342)). However, because Proposal 2 itself works no improper political restructuring under the circumstances before us, we need not address that issue today.

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[7] "[A]ffirmative action programs not mandated by the obligation to cure past discrimination are fundamentally different than laws intended to protect against discrimination." *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 957 (E.D. Mich. 2008).

IV.

It should also be noted that Proposal 2 is constitutional under a traditional equal protection analysis. Because the majority's holding turns on the political restructuring analysis, it declines to address this issue.

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). We apply strict scrutiny to those laws that racially classify individuals, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995), and intermediate scrutiny to those laws that classify individuals based on gender, *United States v. Virginia*, 518 U.S. 515, 531 (1996). Racial classifications are subject to strict scrutiny if (1) the law classifies on its face or (2) the law has a discriminatory impact and a discriminatory purpose. *See Davis*, 426 U.S. at 241. The district court concluded that Proposal 2, which prohibits racial classifications, *a fortiori* does not classify facially on the basis of race. *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 951. Although the district court did find "sufficient evidence to establish a fact question on the disparate impact part of the test," it did not find a discriminatory purpose. *Id.* Indeed, it stated that "the demonstration of a discriminatory purpose . . . dooms [the] conventional equal protection argument." *Id.* Furthermore, the district court found the equal protection argument based on gender "even less compelling" due to the less exacting level of scrutiny. *Id.* at 952. I agree with the conclusions of the district court.

Proposal 2 does not establish a facial racial classification because its text does not draw distinctions on the basis of race; in fact, it prohibits them. Additionally, Proposal 2 does not classify racially on an impact theory because it lacks a discriminatory purpose. "[A]bsent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." *Arthur v. Toledo*, 782 F.2d 565, 574 (6th Cir. 1986). Thus, no heightened level of scrutiny need be applied to Proposal 2, and under rational basis review, Proposal 2 is easily justifiable. Proposal 2 does not violate the Equal Protection Clause under the conventional analysis.

V.

For the foregoing reasons, I would conclude that Proposal 2 does not violate the Equal Protection Clause of the United States Constitution under either a political restructuring theory or traditional theory of Equal Protection. Accordingly, I would affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-15024
Hon. David M. Lawson

OPINION AND ORDER DENYING CANTRELL PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL

207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, the TRUSTEES of any other public college or university, community college, or school district, ATTORNEY GENERAL MICHAEL COX, and ERIC RUSSELL,

Defendants,

-and-

CONSOLIDATED CASES

Case No. 06-15637
Hon. David M. Lawson

CHASE CANTRELL, M.N., a minor child, by Karen Nestor, Mother and Next Friend, KAREN NESTOR, Mother and Next Friend of M.N., a minor child, C.U., a minor child, by Paula Uche, Mother and Next Friend, PAULA UCHE, Mother and Next Friend to C.U., a minor child, JOSHUA KAY, SHELDON JOHNSON, MATTHEW COUNTRYMAN, M.R., a minor child, by Brenda Foster, Mother and Next Friend, BRENDA FOSTER, Mother and Next Friend of M.R., a minor child, BRYON MAXEY, RACHEL QUINN, KEVIN GAINES, DANA CHRISTENSEN, T.J., a minor child, by Cathy Alfaro, Guardian and Next Friend, CATHY

ALFARO, Guardian and Next Friend of T. J., a minor child, S. W., a minor child, by Michael Weisberg, Father and Next Friend, MICHAEL WEISBERG, Father and Next Friend of S. W., a minor child, CASEY KASPER, SERGIO EDUARDO MUNOZ, ROSARIO CEBALLO, KATHLEEN CANNING, EDWARD KIM, M.C.C. II, a minor child, by Carolyn Carter, Mother and Next Friend, CAROLYN CARTER, Mother and Next Friend of M.C.C., II, a minor child, J.R., a minor child, by Matthew Robinson, Father and Next Friend, MATTHEW ROBINSON, Father and Next Friend of J.R., a minor child,

Plaintiffs,

v.

ATTORNEY GENERAL MICHAEL COX and ERIC RUSSELL,

Defendants,

_____/

OPINION AND ORDER DENYING *CANTRELL* PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

On March 18, 2008, the Court entered summary judgment in favor of the State in these consolidated cases, thereby rejecting the plaintiffs' claims that Proposal 2 – which amended Michigan's state constitution by prohibiting affirmative action programs in public education, employment, and contracting – offended the United States Constitution. The *Cantrell* plaintiffs now ask the Court to alter or amend the judgment on the theory that the Court relied upon an untenable distinction between prohibiting "preferential treatment" and withholding "equal protection" in

rejecting their arguments based on their *Hunter/Seattle* theory. The Court, however, will abide by its original decision.

Federal Rule of Civil Procedure 59(e) authorizes a district court to "alter or amend a judgment" in the case of a clear error of law, newly discovered evidence, an intervening change in controlling law, or manifest justice. *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 496 (6th Cir. 2006) (quoting *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)); *GenCorp., Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (citing *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)).

The *Cantrell* plaintiffs cite three bases of perceived legal error, although they all entail the distinction this Court drew between a state constitutional amendment that prohibits "preferential" treatment and one that denies "equal" treatment. There is no disputing that the Court found this difference important, reasoning that legislation making it more difficult for certain groups to achieve preferential treatment is significantly different than legislation that burdens efforts to achieve parity. *See Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 956-57 (E.D. Mich. 2008) (citing *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 707-08 (9th Cir. 1997)). The *Cantrell* plaintiffs submit that this distinction is "inconsistent with the process-based nature of the *Hunter-Seattle* principle," Br. in Supp. at 3; conflicts with precedent, *id.* at 7; and is "judicially unmanageable," *id.* at 9.

The plaintiffs contend that the Court misapplied *Hunter v. Erickson*, 393 U.S. 385 (1969), *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and *Romer v. Evans*, 517 U.S. 620 (1996), by failing to understand that those cases recognized a right to fairness in the political *process*, as opposed to entitlement to a particular *outcome*. The plaintiffs submit that to consider differently legislation that burdens, on the one hand, a group's interest in preferential treatment and, on the other, its interest in equal treatment is to inject a substantive component into the analysis that is inconsistent with the Supreme Court's jurisprudence. This Court respectfully disagrees. To acknowledge that there are limits to the *Hunter/Seattle* doctrine based on the nature of the legislative agenda that is burdened is not to tear the doctrine from its moorings; in fact, the Supreme Court's decisions placed substantial weight on this variable.

In *Hunter*, the Court not only stressed that the challenged ordinance "treat[ed] racial housing matters differently from other racial and housing matters," *Hunter*, 393 U.S. at 389, but also that it facilitated a community's tendency to discriminate, *see id.* at 391 ("[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that.").

In *Romer*, the Court addressed the constitutionality of an amendment to Colorado's Constitution that prohibited "all legislative, executive

or judicial action at any level of state or local government designed to protect . . . gays and lesbians" from discrimination. *Romer*, 517 U.S. at 624. The Court found this repugnant to the Equal Protection Clause because it "withd[rew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it [forbade] reinstatement of these laws and policies," save by another amendment. *Id.* at 627.

Seattle admittedly creates an unevenness in this line of thought, which the plaintiffs seek to exploit. In that case, a statewide initiative was passed that effectively prohibited desegregative busing. *Seattle*, 458 U.S. at 462. As in *Hunter*, the Court held that the initiative effectuated a racial classification by "remov[ing] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474. That selective restructuring of school board authority burdened future attempts to integrate (and thus minority interests) "by lodging decision-making authority over the question at a new and remote level of government." *Id.* at 483.

Because prohibiting integration (when it is not constitutionally mandated) is not tantamount to discrimination, the plaintiffs make a fair point: the Court in *Seattle* did not (and could not) rely on the notion that the restructuring at issue impeded efforts to secure *equal* treatment. But this does not mean that any political restructuring with a racial focus that happens to burden minority interests is unconstitutional. The initiative in *Seattle* is still

fundamentally different than Proposal 2 in that racial integration programs do not presumptively offend the Equal Protection Clause, whereas affirmative action programs might. The Ninth Circuit keyed in on this concept in *Coalition for Economic Equity v. Wilson*, writing as follows:

> The district court perceived no relevant difference between the busing programs at issue in *Seattle* and the racial preference programs at issue here. We have recognized, however, that "'stacked deck' programs [such as race-based 'affirmative action'] trench on Fourteenth Amendment values in ways that 'reshuffle' programs [such as school desegregation] do not." *Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist.*, 616 F.2d 1381, 1387 (9th Cir.), *cert. denied*, 449 U.S. 1061 603 (1980). Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights. *Id.*

Coalition for Economic Equity, 122 F.3d at 708 n.16. Although certain aspects of the Ninth Circuit's discussion have been undermined – the Supreme Court held in *Grutter v. Bolinger*, 539 U.S. 306, 334-35 (2003), that racial preferences may be necessary to further a compelling state interest in certain circumstances, and implied in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738, 2751 (2007), that desegregation

programs may deprive individuals of legal rights – the core principle remains sound. Desegregation is constitutionally *required* in certain instances, *see, e.g., Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 453-55 (1979); *Davis v. Bd. of School Comm'rs of Mobile Cty.*, 402 U.S. 33, 37-38 (1971); *Green v. School Bd. of New Kent Cty.*, 391 U.S. 430, 441-42 (1968); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-96 (1954); but the Supreme Court has *never* held that affirmative action is required, and *Grutter* made clear that it is barely tolerated. *See Grutter*, 539 U.S. at 341-43 (confirming that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race," and explaining in light of that, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today") (internal quotation marks omitted). It is reasonable to take account of this circumstance in interpreting the scope of the *Hunter/Seattle* doctrine.

The Court also must reject the plaintiffs' argument that distinguishing between an amendment that prohibits "preferential" treatment and one that denies "equal" treatment is "judicially unmanageable." As an initial matter, this argument is premised on a faulty assumption about the nature of adjudication. The Court does not render decisions by assessing how useful they may prove to future practitioners or judges. The Court's role is limited to ascertaining the law and applying it to the facts presented. Policy may inform the law in certain respects, but it cannot displace it. The Court will not contradict its view of the law simply because the plaintiffs perceive that this view may be difficult to apply.

The Court also disagrees with the plaintiffs' assertion that the distinction is too nice to understand and that it is mired in subjectivity. Courts, just like individuals, may disagree on the propriety of affirmative action in public education for a host of reasons. In cases such as this, a court's objective assessment of the legal issues may even be at odds with its subjective analysis of sound policy. But the idea that affirmative action constitutes race-based preferential treatment is well established by Supreme Court precedent. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Grutter*, 539 U.S. at 326; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Granted, it may not be so clear in other contexts whether the burdened legislative agenda calls for preferential (as opposed to equal) treatment. But courts deal with tough calls on a daily basis, and there is little doubt here that they will be equal to the tasks to come.

Finally, it bears noting that the challenges in this case were brought barely before the ink on Proposal 2 was dry. There is little in the record addressing the impact the legislation has had, or the difficulty in securing equal treatment it may cause. If objective facts ultimately demonstrate that the plaintiffs' worst fears are coming to pass, then an as-applied challenge may be appropriate.

The Court concludes that the *Cantrell* plaintiffs are not entitled to alteration or amendment of the judgment pursuant to Rule 59(e). The Court did not commit a clear error of law in determining that Proposal 2 facially passes muster under *Hunter* and progeny.

Accordingly, it is **ORDERED** that the motion to alter or amend the judgment by the *Cantrell* plaintiffs [dkt #253] is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 11, 2008

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 11, 2008.

s/Felicia M. Moses
FELICIA M. MOSES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-15024
Hon. David M. Lawson
JUDGMENT

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, the TRUSTEES of any other public college or university, community college, or school district, ATTORNEY GENERAL MICHAEL COX, and ERIC RUSSELL,

Defendants,

-and-

CONSOLIDATED CASES
Case No. 06-15637
Hon. David M. Lawson

CHASE CANTRELL, M.N., a minor child, by Karen Nestor, Mother and Next Friend, KAREN NESTOR, Mother and Next Friend of M.N., a minor child, C.U., a minor child, by Paula Uche, Mother and Next Friend, PAULA UCHE, Mother and Next Friend to C.U., a minor child, JOSHUA KAY, SHELDON JOHNSON, MATTHEW COUNTRYMAN, M.R., a minor child, by Brenda Foster, Mother and Next Friend, BRENDA FOSTER, Mother and Next Friend of M.R., a minor child, BRYON MAXEY, RACHEL QUINN, KEVIN GAINES, DANA CHRISTENSEN, T.J., a minor child, by Cathy Alfaro, Guardian and Next Friend, CATHY ALFARO, Guardian and Next Friend of T. J., a minor child, S. W., a minor child, by Michael Weisberg, Father and Next Friend, MICHAEL WEISBERG, Father and Next Friend of S. W., a minor child, CASEY KASPER, SERGIO EDUARDO MUNOZ, ROSARIO CEBALLO, KATHLEEN CANNING, EDWARD KIM, M.C.C. II, a minor child, by Carolyn Carter, Mother

and Next Friend, CAROLYN CARTER, Mother and Next Friend of M.C.C., II, a minor child, J.R., a minor child, by Matthew Robinson, Father and Next Friend, MATTHEW ROBINSON, Father and Next Friend of J.R., a minor child,

Plaintiffs,

v.

ATTORNEY GENERAL MICHAEL COX and ERIC RUSSELL,

Defendants,

_____/

JUDGMENT

In accordance with the Opinions and Orders entered on this date,

It is **ORDERED AND ADJUDGED** that judgment is entered for defendant Attorney General Michael Cox and against the plaintiffs. The complaints and amended complaints in these consolidated actions are **DISMISSED WITH PREJUDICE**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: March 18, 2008

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on March 18, 2008.

s/Felicia M. Moses
FELICIA M. MOSES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-15024
Hon. David M. Lawson

OPINION AND ORDER ADJUDICATING CERTAIN MOTIONS

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISEKING, BRANDON FLANNIGAN, JOSIE HYMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642,

AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, the TRUSTEES of any other public college or university, community college, or school district, ATTORNEY GENERAL MICHAEL COX, and ERIC RUSSELL,
Defendants,

-and-

CONSOLIDATED CASES
Case No. 06-15637
Hon. David M. Lawson

CHASE CANTRELL, M.N., a minor child by Karen Nestor, Mother and Next Friend, KAREN NESTOR, Mother and Next Friend of M.N., a minor child, C.U., a minor child, by Paula Uche, Mother and Next Friend, PAULA UCHE, Mother and Next Friend to C.U., a minor child, JOSHUA KAY, SHELDON JOHNSON, MATTHEW COUNTRYMAN, M.R., a minor child, by Brenda Foster, Mother and Next Friend, BRENDA FOSTER, Mother and Next Friend of M.R., a minor child, BRYON MAXEY, RACHEL QUINN, KEVIN GAINES, DANA CHRISTENSEN, T.J., a minor child, by Cathy Alfaro, Guardian and Next Friend, CATHY ALFARO, Guardian and Next Friend of T. J., a minor child, S. W., a minor child, by Michael Weisberg, Father and Next Friend, MICHAEL WEISBERG, Father and Next Friend of S. W., a minor child, CASEY

KASPER, SERGIO EDUARDO MUNOZ, ROSARIO CEBALLO, KATHLEEN CANNING, EDWARD KIM, M.C.C. II, a minor child, by Carolyn Carter, Mother and Next Friend, CAROLYN CARTER, Mother and Next Friend of M.C.C., II, a minor child, J.R., a minor child, by Matthew Robinson, Father and Next Friend, MATTHEW ROBINSON, Father and Next Friend of J.R., a minor child,

Plaintiffs,

v.

ATTORNEY GENERAL MICHAEL COX and ERIC RUSSELL,

Defendants,

_____/

OPINION AND ORDER GRANTING *CANTRELL* PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO INTERVENING DEFENDANT ERIC RUSSELL, DENYING MOTION TO INTERVENE BY JENNIFER GRATZ, AND DENYING AS MOOT PLAINTIFFS' RESPECTIVE MOTIONS TO CERTIFY THE MATTERS AS CLASS ACTIONS, INTERVENING DEFENDANT ERIC RUSSELL'S MOTION FOR SUMMARY JUDGMENT, *CANTRELL* PLAINTIFFS' MOTION TO COMPEL DISCOVERY, AND INTERVENING DEFENDANT ERIC RUSSELL'S MOTION TO COMPEL DISCOVERY FROM THE UNIVERSITY DEFENDANTS

Today the Court filed an opinion and order granting the Michigan Attorney General's motion for

summary judgment and a judgment dismissing the challenge by the plaintiffs in these consolidated cases to the constitutionality of an amendment to Michigan's constitution, which is generally referred to as Proposal 2. There are several motions before the Court that remain pending, and the Court will address them in this order. The plaintiffs in the *Cantrell* case move for summary judgment against intervening defendant Eric Russell on the ground that the basis for his interest in the litigation has evaporated following the rejection of his application to the University of Michigan's law school, which was considered under post-Proposal 2 criteria. The Court finds that Mr. Russell no longer has an interest in the subject matter of this case that cannot be protected adequately by the parties before the Court. Therefore, the Court will grant the motion for summary judgment and dismiss Mr. Russell as a party defendant. One Jennifer Gratz has filed a belated motion to intervene. The Court finds that Ms. Gratz fails to satisfy the requirements to permit her to intervene by right or permissably, and the Court will deny her motion. The Court also finds that its opinion and judgment on the State's summary judgment motion moots the pending discovery and class certification motions, and consequently those motions will be denied.

I.

As explained in the Court's opinion and order filed today adjudicating the parties' other motions for summary judgment, this litigation was commenced on November 8, 2006 by a group of organizations and individuals (the *Coalition* plainitffs), immediately after the adoption by the Michigan electorate of a state

constitutional amendment that effectively banned affirmative action programs by the State and its political subdivisions "in the operation of public employment, public education, or public contracting." Mich. Const. art. I, § 26(1). Another group of individuals with ties to the University of Michigan (the *Cantrell* plaintiffs) brought suit on December 19, 2006, contending that Proposal 2 is unconstitutional as it is applied to public colleges and universities.

On December 18, 2006, Eric Russell, who had applied for admission at the University of Michigan's law school, filed a motion to intervene as a party defendant. Russell was accepted by Wayne State University Law School beforehand, but his application to Michigan's law school was still pending. Russell argued in his motion to intervene that he had a substantial interest in this case because, as a white male applicant to Michigan, he stood to gain or lose depending on whether Proposal 2 remained in full force and effect, and he was concerned about "both his interest in being treated equally in the admissions process and in maximizing his chances of being admitted." Russell Mot. to Int. [dkt # 27] at 7. Russell argued that these interests would possibly be impaired if the Court denied intervention because he sought to have Proposal 2 become effective "as soon as possible," while the plaintiffs and the university defendants sought its invalidation. *See id.* at 9.

In addition, Russell contended that his interests would not be represented adequately by the then-present parties to the case because the university defendants and Governor Granholm had expressed strong disapproval of Proposal 2. Presciently, Russell

also made this argument with respect to Attorney General Cox on the grounds that he might have the inclination to resolve this litigation by permitting the university defendants to temporarily ignore Proposal 2 during the 2006- 2007 admissions cycle. *Id.* at 10. Such a resolution, sounding in eventual compliance, "would not do Eric Russell much good at all." *Ibid.* Unlike some members of the public, Russell represented that his interest was "to have a non-discriminatory and non-preferential system instituted right *now*, while his application is still under consideration." *Ibid.*

At around the same time Mr. Russell filed his motion for intervention, several other entities filed motions seeking the same relief. Before ruling on these matters, however, the Court entertained a stipulation requesting entry of a preliminary injunction that would have exempted the university defendants from complying with Proposal 2 through the 2006-2007 admissions cycle. The stipulation was signed by Michigan Attorney General Michael Cox, who had been ordered to intervene in the case. The Court entered an order pursuant to the stipulation, but that order was stayed pending appeal by the Sixth Circuit on December 29, 2006. *Coalition to Defend Affirm. Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006).

On December 27, 2006, the Court issued an opinion and order addressing all of the motions to intervene, denying them all except Russell's. *Coalition to Defend Affirmative Action v. Granholm*, 240 F.R.D. 368 (E.D. Mich. 2006), *aff'd*, 501 F.3d 775 (6th Cir. 2007). The Court determined that Russell qualified for intervention of right under Federal Rule of Civil Procedure 24(a) because he satisfied the four elements

recognized in the controlling jurisprudence where the other putative intervenors did not. The Court stressed the uniqueness of Russell's situation: as a white male with an application under consideration by the University of Michigan, Russell represented a tangible interest that no other party (or would-be intervenor) could claim. For instance, with respect to the element of timeliness, the Court explained that Russell satisfied this element because it was sensible for him to seek intervention only upon learning that the university defendants sought to forestall Proposal 2's effective date. *Id.* at 374. Similarly, the Court found that Russell had a substantial legal interest in intervention because, "if the present plaintiffs are successful in obtaining a ruling that the constitutional amendment is invalid, Russell's chances of gaining admission to the University of Michigan law school may be diminished." *Id.* at 375.

Subsequently, the Court held a scheduling conference with both the *Coalition* and *Cantrell* plaintiffs to establish dates and an approach for handling the litigation. The actions were consolidated, and the Court ordered that all of the defendants in one action would be deemed defendants in the other action. The Court then requested the parties to submit joint stipulations of fact with the hope that the issues might be pared down to only those that were genuinely disputed. That attempt failed, however, as the parties found no meaningful common ground.

In mid-May 2007, the *Coalition* and *Cantrell* plaintiffs each submitted a motion for class certification. Attorney General Cox and Governor Granholm each opposed the motions for class

certification, while Eric Russell concurred in the relief sought. The Court held a hearing on the motions on August 15, 2007 and took them under advisement.

In the mear time, on January 27, 2007 Eric Russell was denied admission to the University of Michigan Law School. It is undisputed that this decision was made in compliance with Proposal 2. Sarah Zearfoss, Assistant Dean and Director of Admissions at the University of Michigan, testified that she initially reviewed Mr. Russell's application on December 22, 2007 and then placed it on "hold" along with other applications that had been filed before Proposal 2's effective date. She then "looked at it without taking race into account as a factor." Mot. for Summ. J as to Russell, Ex. L, Zerfoss dep. at 199. She explained:

> Q. And do you recall the reasons, the primary reasons that you decided to deny Eric Russell's application?
>
> A. Again, it's really impossible to identify the particular thing that made a decision. I do recall what I thought were weaknesses in the application.
>
> Q. And what were those?
>
> A. Well, there were a lot of them.
>
> . . .
>
> Q. And given all those qualities that you've just talked about, would you characterize Mr. Russell's application for admission as a close case for admission.

A. No, it was not.

Q. Would you say that's the case whether you were applying the pre-Proposal 2 policy or the post-Proposal 2 policy?

A. That's correct.

Id. at 200, 205. It is also undisputed that Michigan did consider race in the initial application process prior to Proposal 2.

Assistant Dean Zearfoss also discussed how Russell would be treated should he submit a transfer application upon completion of his first year at Wayne State University Law School, as well as financial aid considerations if he were accepted. Zearfoss testified that race was not a factor, and in fact never had been when transfer applications were considered. As for financial aid, Zearfoss's testimony was less illuminating, but she did indicate that Proposal 2 has not impacted the process.

Turning to Wayne State University, law school Dean Frank H. Wu testified that race does not and will not affect Eric Russell's participation in law school activities and, more importantly, his eligibility for financial aid and scholarships. With respect to student activities, including participation in law review, Dean Wu stated that Proposal 2 had changed nothing. Dean Wu's testimony concerning financial aid was equally unequivocal, stating that he had "no reason to believe that if Proposal 2 were struck down at any point by a court, that any financial aid decision made as to Eric Russell or any other student would turn out differently because of race." Mot. for Summ. J. as to Russell, Ex.

M. Wu dep. at 185-86. Dean Wu also testified that Wayne State was in the process of amending scholarships to ensure conformity with Proposal 2. He stated that thirteen or fourteen scholarships funded in part by private donors contained impermissible criteria, and the school was therefore "systematically approaching donors . . . to indicate to them that following passage of Prop 2, references to race, gender or ethnicity and so on are impermissible." *Id.* at 238. Wu further stated that he had reached resolutions with some of the donors, thereby continuing funding for the scholarships. Wu confirmed that, as a Wayne State student, Eric Russell would be eligible to receive those scholarships provided that he met the criteria not referring to race, ethnicity, or gender. Finally, Dean Wu said that if a court declared Proposal 2 unconstitutional, he had "no way of predicting what the behavior of individual donors would be, but . . . [w]e would not expect even if Prop 2 were struck down tomorrow by a court, that we would go back and renegotiate the agreements." *Id.* at 239-40.

The *Cantrell* plaintiffs filed the present motion for summary judgment on October 5, 2007. The university defendants and the *Coalition* plaintiffs concur in the request, and Attorney General Cox takes no position on the matter.

During the litigation, the parties filed various motions to compel discovery. Those motions are rendered moot by this Court's disposition of the attorney general's motion for summary judgment, and they will be denied.

Finally, on February 1, 2008, Jennifer Gratz belatedly filed a motion to intervene as a defendant in

the consolidated matters through the same attorney that represents intervening defendant Eric Russell. Gratz argues that she has an interest in this litigation because she once lived in Michigan and she might apply to the University of Michigan law school for admission in 2009 or 2010. She explains that she did not move to intervene until after the dispositive motion deadline passed in this case because it only recently occurred to her that she might want to apply to a law school in Michigan.

II.

A motion for summary judgment under Fed. R. Civ. P. 56 presumes the absence of a genuine issue of material fact for trial. The Court must view the evidence and draw all reasonable inferences in favor of the non-moving party, and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotes omitted).

A fact is "material" if its resolution affects the outcome of the lawsuit. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001). "Materiality" is determined by the substantive law claim. *Boyd v. Baeppler*, 215 F.3d 594, 599 (6th Cir. 2000). An issue is "genuine" if a "reasonable jury could return a verdict for the nonmoving party." *Henson v.*

Nat'l Aeronautics and Space Admin., 14 F.3d 1143, 1148 (6th Cir. 1994) (quoting *Anderson*, 477 U.S. at 248). Irrelevant or unnecessary factual disputes do not create genuine issues of material fact. *St. Francis Health Care Centre v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000). When the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," there is no genuine issue of material fact. *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 534 (6th Cir. 2002).

The *Cantrell* plaintiffs argue that intervening defendant Russell should be dismissed from the case because the sole basis justifying his intervention – his pending application for admission to the University of Michigan Law School – no longer exists. Russell was denied admission to Michigan based on post-Proposal 2 criteria and he presently is a student at Wayne State University Law School. Russell concedes that he no longer has a pending application to Michigan's law school, but he says that he might want to transfer there, and he may also apply to either Wayne or Michigan for financial aid. He contends that absent Proposal 2, those institutions might consider race as a factor in deciding those applications. Russell also believes that the Michigan attorney general remains unable to protect his interests adequately.

When a party that has been granted intervention as of right no longer meets the requirements for such intervention, a court properly dismisses that party from the case. *See Morgan v. McDonough*, 726 F.2d 11, 14 (1st Cir. 1984) (affirming dismissal of intervenor where intervenor's interest had become adequately represented by party to the suit); *see also* Advisory

Committee Notes to Fed. R. Civ. P. 24 ("An intervention of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."). This rule applies to permissive intervention as well. *See Morgan*, 726 F.2d at 15.

Intervention, both as of right and by permission, is governed by Rule 24 of the Federal Rules of Civil Procedure. With respect to both types of intervention, the Sixth Circuit has stated that "Rule 24 should be 'broadly construed in favor of potential intervenors,'" but has also warned that "this does not mean Rule 24 poses no barrier to intervention at all." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991)).

Rule 24(a) deals with intervention as a matter of right and states:

> On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). "[T]o intervene as of right under Rule 24(a)(2), a proposed intervenor must establish the

following four elements: (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent the proposed intervenor's interest." *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005).

The first criterion is irrelevant since Russell already is a party to the case. The question is whether he should be permitted to remain in light of his changed circumstances. With the benefit of the parties' briefing on the summary judgment motions, the Court has little trouble concluding that there is no longer a good reason for Russell to remain in the litigation. The main reason undergirding Russell's presence in this case has evaporated, he has no interest at risk in the matter, and even if he did, it appears that the attorney general now has settled on a position that accords adequate representation to individuals in Russell's position.

The Sixth Circuit has adopted a liberal view of the nature of an interest that supports intervention of right, but it has consistently noted that "[t]he inquiry into the substantiality of the claimed interest is necessarily fact-specific." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). In *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007), the Sixth Circuit reiterated this rule while affirming this Court's December 2006 decision denying intervention to the Michigan Civil Rights Initiative Committee, the

American Civil Rights Foundation, and Toward a Fair Michigan. *See id.* at 780-84; *cf. id.* at 780 ("Although we have noted that this Circuit 'has opted for a rather expansive notion of the interest sufficient to invoke intervention of right,' *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (1997), this does not mean that any articulated interest will do."). The court held that these organizations' interest in the case was inadequate because, once Proposal 2 had been passed, "[t]heir interest in seeing Proposal 2 enforced . . . '[wa]s greatly diminished due to the state's responsibility in enforcing and defending [Proposal 2] as written.'" *Coalition*, 501 F.3d at 781 (quoting *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007)). In line with this conclusion, the Sixth Circuit has consistently held that a generalized political or ideological interest is not sufficient to support intervention by right. *See Northland*, 487 F.3d at 345 (observing that an organization had a weak case for intervention where it had "only an ideological interest in the litigation"); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 316-17 (6th Cir. 2005) (holding that petition-circulating committee was not entitled to intervention in an action challenging the constitutionality of an ordinance because its stake in the case was "'so generalized it will not support a claim for intervention of right'") (quoting *Athens Lumber Co., Inc. v. Fed. Elec. Comm'n*, 690 F.2d 1364, 1366 (11th Cir. 1982)).

Intervening defendant Russell argues that the nature of the injury in an equal protection claim of the present variety consists not in denial of the ultimate benefit, but in unequal treatment. *Northeastern Florida Chapter of the Associated General Contractors*

of America v. City of Jacksonville, 508 U.S. 656 (1993), and *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), support his position. Russell contends that he has a substantial legal interest in this action in that he has an interest in having his prospective transfer application reviewed without regard to race, gender, or ethnicity. Similarly, he claims an interest premised on a desire to obtain financial aid without regard to these considerations. Although these are not the same interests upon which Russell relied in seeking intervention, they likely suffice for the present.

However, once a substantial legal interest has been established, the Court asks a related question: whether the "intervenor's ability to protect that interest may be impaired in the absence of intervention," or, in this case, in the absence of continued intervention. *Michigan*, 424 F.3d at 443. Generally speaking, satisfaction of the latter inquiry entails only a "minimal" burden. *Grutter*, 188 F.3d at 399. In this case, although Eric Russell has shown a substantial legal interest, he has failed to satisfy the impairment element. As noted earlier, he no longer has an application pending at the Michigan law school. All the evidence suggests that Russell's transfer application would receive the same treatment regardless of the outcome of this case. Although the parties have submitted less evidence on the topic of financial aid at Michigan, what they have proffered likewise suggests that Russell's treatment would be the same whether Proposal 2 stands or falls. In other words, irrespective of Eric Russell's participation in this case and the arguments he might make, Michigan's treatment of Eric Russell will remain the same.

Assistant Dean Zearfoss's undisputed testimony establishes that race is not considered in evaluating transfer applications; this was the case even before Proposal 2 (dating back to at least 2001, when Zearfoss took over); and Michigan would not change this policy if Proposal 2 were struck down. Russell makes a valid point that, notwithstanding Zearfoss's representation, the university *could* legally consider race in transfer applications if the Court invalidated Proposal 2. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). The theory behind this rule seems to be that, when the defendant is able to commence the practice once more and has only stopped following the initiation of litigation, voluntary cessation of the practice is inherently suspect. *See ibid.* However, the Sixth Circuit and other courts have confirmed that the holding in *Aladdin's Castle* hinged largely on the fact that the defendant in that case had expressed an intent to take up the challenged practice once more if the case were dismissed as moot. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997) ("Critical to the Court's decision [in *Aladdin's Castle*], however, was the City's announced intention to reenact the unconstitutional ordinance if the case was dismissed as moot.") (citing *Aladdin's Castle*, 455 U.S. at 289-90); *see also Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir. 2007) (stating that *Aladdin's Castle* is limited to the "rare situation where it is *virtually certain* that the repealed law [will] be reenacted," and the fact that litigation may have prompted the repeal does not alone evince an intent to reenact) (internal quotes omitted).

In this case it is inappropriate to second-guess Michigan's representation when the evidence suggests its historical and future avoidance of consideration of race in transfer applications is not mere lip-service. Where a defendant's voluntary cessation of a challenged practice may be inherently suspect, *see Aladdin's Castle*, 455 U.S. at 289, there is nothing suspicious about a defendant proclaiming that it will continue to abide by a policy it has employed for years and which has not been changed materially by the commencement of litigation or the predicate events of that litigation. Michigan has not voluntarily *ceased* a challenged practice; it has simply stood by a course of action that is valid under Proposal 2.

On a related note, Russell suggests that Zearfoss's testimony leaves open the possibility that Michigan may consider ethnicity, as opposed to race, in the transfer application process. This argument finds no support in the record. Although the definitions of race and ethnicity may be distinct, when Zearfoss referred to ethnicity, she used the term as if it were interchangeable with race. Whatever ambiguity may exist on this point does not alter Zearfoss's testimony that Mr. Russell will not be treated differently than others because he is white.

The evidence in this case also suggests that Russell's other interest concerning Michigan – equal treatment in financial aid decisions – will likewise not be impaired if his participation in this litigation is discontinued. Although Zearfoss stated that financial aid was within her area of expertise "to a certain degree," she represented unequivocally that Proposal 2 has not impacted the financial aid process. Zearfoss

dep. at 215-16. This testimony has not been contradicted, and there is no reason to think that Michigan would consider race in its financial aid process in the event Proposal 2 were struck down.

The same conclusion can be made with respect to Russell's matriculation through Wayne's law school. Dean Wu testified that "[r]ace will not affect any financial aid decision made as to Eric Russell or any other student at Wayne State University Law School." Wu dep. at 185. Further, he stated that he has no reason to believe this would change in the event Proposal 2 were invalidated. It is unclear whether race was considered in the context of need-based financial aid before Proposal 2; there is in fact no evidence on the point. However, it is clear that race, ethnicity, or gender were factors in approximately fourteen annual scholarships. Wu dep. at 238. Wu testified that, following the passage of Proposal 2, he or a development officer "systematically approach[ed]" the donors to inform them that such criteria were impermissible. *Ibid.* Some of the donors – it is unclear how many – agreed to continue funding the scholarships with elimination of the impermissible criteria. *Id.* at 239. Accordingly, assuming he met the remaining criteria (for instance, one or more of the scholarships have been set aside for people from a particular geographic area), Russell "would be eligible to receive those scholarships." *Ibid.* This evidence remains unrebutted.

The Court concludes, therefore, that Eric Russell has failed to establish that impairment of his substantial legal interest with respect to both Michigan and Wayne State is possible if continued

intervention is denied. Although proof of impairment need only be "minimal," *Grutter*, 188 F.3d at 399, this element poses a burden nonetheless, which Russell has failed to carry.

Finally, having the benefit of reviewing the summary judgment briefs, it is apparent that Russell's interest in the litigation now parallels that of the attorney general. At one point in this litigation, the attorney general's lack of consistency in its acceptance of Proposal 2 was characterized by the court of appeals as "puzzl[ing]," *Coalition to Defend Affirm. Action v. Granholm*, 473 F.3d 237, 246 (6th Cir. 2006), and rightly so. However, it now appears that the attorney general has resolved to defend the measure, making arguments in his motion brief that Russell himself echoes in his own filings. The fact that the two summary judgment motions duplicate each other convinces the Court that Russell's presence in the litigation is a mere makeweight that adds nothing of substance to the debate over Proposal 2's constitutionality. Therefore, it is apparent that the attorney general – the party now before the Court – adequately represents the intervening defendant's interest, which has now matured into a judgment in the State's favor.

The motion for summary judgment as to intervening defendant Eric Russell, therefore, will be granted.

III.

The motion by Jennifer Gratz to intervene as a defendant can be disposed of quite easily based on her failure to satisfy any of the four factors required to

establish a right to intervene. First, the motion is untimely. Timeliness is "evaluated in the context of all relevant circumstances." *Stupak-Thrall*, 226 F.3d at 472-73 (internal quotation marks omitted). Several factors are considered, including the developments in the case, the purpose for intervention, and how long the proposed intervenors knew of their interest in the property or transaction at issue before they sought permission to intervene. *Id.* at 473-74. This case has now proceeded to a final disposition, and Gratz did not seek intervention until after discovery closed and all the parties filed their summary judgment motions. The purpose for intervention Gratz cites is to take up the cause of white law students defending Proposal 2 in the event Mr. Russell is dismissed from the case because of his changed circumstances. However, Mr. Russell's application to the Michigan law school was decided adversely to him in January 2007, and he was admitted to and began attending Wayne's law school in August 2007. Ms. Gratz has been aware of this case throughout its pendency. She has not explained the delay in applying for intervention.

Second, Ms. Gratz has not identified a substantial legal interest in the subject matter of the case. She has no application to any Michigan school pending. She represents in her motion that she might apply to Michigan's law school, but she testified under oath in her deposition in San Francisco in this case that she is a resident of California and has no immediate plans to return to Michigan. The Court finds no credible evidence that Ms. Gratz has an interest in the legal issues in this case that derives from her attempt to situate herself similarly to Russell's pre-admission-decision posture. Of course, Ms. Gratz also directed the

activities of the Michigan Civil Rights Initiative Committee, which was the driving force behind the passage of Proposal 2, suggesting that she has an ideological interest in defending the enforcement of the state constitutional amendment. However, the Sixth Circuit has deemed a mere interest in the "subsequent enforcement of the rule after its enactment" an insufficient reason to support intervention by right. *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 345 (6th Cir. 2007). The court explained:

> [T]he public at large – including public interest groups – has an interest in the procedure by which a given legal requirement is enacted as a matter of democratic legislative process. On the other hand, in a challenge to the constitutionality of an already-enacted statute, as opposed to the process by which it is enacted, the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant.

Ibid.

Gratz's ideological interest is no different than that of the organization she directed, the MCRI, to which the Court already denied intervention. Her ability to press these issues is cast into doubt by her apparent "confusion at the evidentiary hearing [on the propriety of MRCI's conduct in obtaining petition signatures] as to the purpose of the MCRI's proposal." *Operation King's Dream v. Connerly*, 501 F.3d 584, 590 (6th Cir. 2007). Moreover, the Sixth Circuit has held that "the MCRI's . . . status as [an] organization[] involved in the process leading to the adoption of Proposal 2 is

insufficient to provide [it] with a substantial legal interest in a lawsuit challenging the validity of those portions of Michigan's constitution amended by Proposal 2." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007).

Third, since Gratz has not demonstrated a sufficient interest to support intervention by right, she cannot show that denial of intervention will impair her ability to protect a substantial interest. *Coalition to Defend Affirmative Action*, 240 F.R.D. at 375 ("Of course, the inability to protect one's interest posits the existence of an interest to begin with."). The disposition of the summary judgment motions reinforces the fact that intervention is not necessary to defend the ballot proposal as well.

Fourth, as with Eric Russell, the attorney general will adequately represent Gratz's interest, such as it is, in matters before the Court.

Gratz also seeks permissive intervention under Rule 24(b). An applicant for permissive intervention "must prove that the motion for intervention is timely, there is at least one common question of law or fact, and the balancing of undue delay, prejudice to the original parties, and any other relevant factors favors intervention." *Coalition to Defend Affirmative Action*, 240 F.R.D. at 377 (citing *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997)). It is apparent that Gratz's motion has come too late. The case in the district court is over, at least for now. Allowing another party into the litigation would do nothing but prolong the process and delay the parties' inevitable date with the court of appeals.

For these reasons, the motion to intervene as a party defendant by Jennifer Gratz will be denied.

IV.

Because the attorney general's motion for summary judgment was granted, there is no need for the Court to address the class certification motions. Rule 23(c) provides: "At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). Although the Sixth Circuit has not interpreted this language, other courts and commentators have noted that a district court may decide dispositive motions, including motions for summary judgment, prior to entertaining class certification. A district court enjoys discretion in determining whether and when to certify a case, *Reeb v. Ohio Dept. of Rehabilitation and Correction*, 435 F.3d 639, 643 (6th Cir. 2006), and postponing a ruling on that matter in the interest of overall efficiency is appropriate. The Manual for Complex Litigation reflects the basic idea:

> The court may rule on motions pursuant to Rule 12, Rule 56, or other threshold issues before deciding on certification; however, such rulings bind only the named parties. Most courts agree, and Rule 23(c)(1)(A) reflects, that such precertification rulings on threshold dispositive motions are proper, and one study found a substantial rate of precertification rulings on motions to dismiss or for summary judgment. Precertification rulings frequently dispose of all or part of the litigation.

Manuel for Complex Litigation (Fourth ed.) § 21.133. As Rule 23 suggests, extensive discovery is often needed to rule on motions for class certification. *See* Fed. R. Civ. P. 23(a)-(b). Although conceptually distinct, the facts discovered often pertain to the merits. *See Oscar Private Equity Investments, Inc. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007) (observing that merits and certification questions often overlap); *Miles v. Merrill Lynch*, 471 F.3d 24, 41 (2d Cir. 2006) ("[T]he obligation to make [certification] determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement."); Fed. R. Civ. P. 23 Advisory Committee Notes to the 2003 Amendments ("[I]t is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis."). Therefore, if it becomes apparent that the case cannot proceed on the merits, it makes little sense to devote scare judicial resources to a merely academic certification analysis. *See Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) ("It is reasonable to consider a Rule 56 motion first when early resolution of a motion for summary judgment seems likely to protect both the parties and the court from needless and costly further litigation."). As the *Oscar* court explained, the authorities' recognition of this and other circumstances has "shaped the evolution of class certification and Rule 23. Rule 23(c)(1)(A) no longer demands that the district court rule on class certification 'as soon as practicable,' but instead insists only upon a ruling 'at an early practicable time.'" *See Oscar*, 487 F.3d at 267.

Dismissal prior to certification is *res judicata* as to the class representatives, but has no effect on the putative class members. *Wright*, 742 F.2d at 544. Entry of summary judgment dismissing the claims of class representatives normally has the effect of mooting a motion for class certification. *Cowen v. Bank United of Texas*, 70 F.3d 937, 941 (7th Cir. 1995); *see also Holman v. Rock Financial Corp.*, 388 F.3d 930, 941 (6th Cir. 2004) (concluding that "[w]e need not address the district court's denial of Plaintiff's motion for class certification because, as held above, the district court appropriately dismissed her complaint on the merits").

The Court's decision to grant summary judgment in favor of the State moots the class certification motions. Therefore, these motions will be denied.

V.

The Court finds that Eric Russell no longer has a sustainable position to support intervention. Likewise, Jennifer Gratz has failed to demonstrate that she should intervene either by right or by leave. The decision on the merits of the plaintiffs' claims in the summary judgment proceedings renders a decision on class certification unnecessary. Similarly, the dismissal of the action renders moot the pending discovery motions.

Accordingly, it is **ORDERED** that the *Cantrell* plaintiffs' motion for summary judgment as to intervening defendant Eric Russell [dkt #172] is **GRANTED**. Eric Russell is dismissed as a party defendant to these consolidated actions.

It is further **ORDERED** that intervening defendant Eric Russell's motion for summary judgment [dkt #202] is **DENIED** as moot.

It is further **ORDERED** that the plaintiffs' respective motions to certify the matters as class actions [dkt #107, 121] are **DENIED** as moot.

It is further **ORDERED** that the *Cantrell* plaintiffs' motion to compel discovery [dkt #156] is **DENIED** as moot.

It is further **ORDERED** that intervening defendant Eric Russell's motion to compel discovery from the university defendants [dkt #169] is **DENIED** as moot.

It is further **ORDERED** that the motion to intervene by Jennifer Gratz [dkt #241] is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: March 18, 2008

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on March 18, 2008.

s/Felicia M. Moses
FELICIA M. MOSES

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 06a0476p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, et al.,
Plaintiffs-Appellees,

v.

JENNIFER GRANHOLM, et al.,
Defendants-Appellees,

MICHAEL COX, Attorney General,
Intervenor-Defendant,

ERIC RUSSELL,
Intervenor-Appellant,

TOWARD A FAIR MICHIGAN,
Proposed Intervenor-Appellant

} No. 06-2640

ERIC RUSSELL; TOWARD A FAIR MICHIGAN,
Petitioners.

} No. 06-2642

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-15024—David M. Lawson, District Judge.

Decided and Filed: December 29, 2006
Before: SUHRHEINRICH, BATCHELDER, and SUTTON, Circuit Judges.

OPINION

SUTTON, Circuit Judge. On November 7, 2006, the people of Michigan approved a statewide ballot initiative—Proposal 2—which amended the Michigan Constitution to prohibit discrimination or preferential treatment based on race or gender in the operation of public employment, public education or public contracting in the State. Under the Michigan Constitution, the proposal was scheduled to go into effect on December 23, 2006. At stake today is whether the federal courts should permit this state initiative to go into effect or whether we should preliminarily enjoin it in part—in the part, that is, that applies to public universities and to all applicants to those universities. While the Michigan state courts remain free to suspend enforcement of Proposal 2 under state law for all manner of reasons, including those urged upon us here—uncertainty about the meaning of the law, uncertainty about the law's impact on current admissions policies and uncertainty about changing admissions policies in the middle of the current enrollment season—we are unable to identify any tenable basis under federal law for suspending the law's enforcement. The First and Fourteenth Amendments to the United States Constitution, to be sure, *permit* States to use racial and gender preferences under narrowly defined circumstances. But they do not *mandate* them, and accordingly they do not prohibit a State from eliminating them. In the absence of any likelihood of prevailing in invalidating this state initiative on federal grounds, we have no choice but to

permit its enforcement in accordance with the state-law framework that gave it birth.

I.

Legal and policy debates about admissions preferences in the university setting are not new to the people of Michigan. In 2003, the Supreme Court invalidated the University of Michigan's race-based admissions preferences in *Gratz v. Bollinger*, 539 U.S. 244, and it upheld the University of Michigan School of Law's race-based admissions preferences in *Grutter v. Bollinger*, 539 U.S. 306. In apparent response to those decisions, the Michigan Civil Rights Initiative, the executive director of which is Jennifer Gratz, the lead plaintiff in *Gratz v. Bollinger*, began a campaign to place a proposal on the state ballot that would amend the Michigan Constitution to prohibit race-and gender-based preferences in public employment, education and contracting. *See* The Michigan Civil Rights Initiative, http://www.michigancivilrights.org (last visited Dec. 26, 2006).

A.

On January 6, 2005, Gratz announced that her organization had obtained enough signatures under Michigan law to place its proposal—technically named Proposal 06-2 but commonly referred to as Proposal 2—on the statewide ballot. *See* http://www.michigan civilrights.org/media/JG-10605- remarks.pdf (last visited Dec. 26, 2006). The Michigan Board of State Canvassers eventually approved the ballot language for Proposal 2, which would amend Article I, § 26 of the Michigan Constitution if approved.

On November 7, 2006, the people of Michigan voted in favor of Proposal 2. Fifty-eight percent of the voters supported it, and 42% opposed it. *See* Michigan Department of State, 2006 Official Michigan General Election Results, http://miboecfr.nictusa.com/election /results/ 06GEN/90000002.html (last visited Dec. 26, 2006).

The constitutional amendment contains several pertinent provisions. *First*: "The University of Michigan, Michigan State University, Wayne State University and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const. art. 1, § 26.

Second: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Id.*

Third: "This section"—namely the amendment—"does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state." *Id.*

Fourth: "The remedies available for violations of this section shall be the same . . . as are otherwise available for violations of Michigan anti-discrimination law." *Id.*; *see, e.g.*, Mich. Const. art. VIII, § 2; Mich.

Comp. Laws § 37.2101 *et seq.* (the Elliot-Larsen Civil Rights Act).

Fifth: "This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section." Mich. Const. art. I, § 26.

Sixth: "This section does not invalidate any court order or consent decree that is in force as of the effective date of this section." *Id.*

Seventh: In accordance with the Michigan Constitution, the amendment was scheduled to go into effect 45 days after the election, which is to say December 23, 2006. *See* Mich. Const. art. XII, § 2.

On November 8, 2006, one day after the election, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights, and Fight for Equality By Any Means Necessary, along with other organizations and individuals opposed to Proposal 2 (collectively, the "plaintiffs"), filed a lawsuit against (1) Jennifer Granholm, the Governor of Michigan, and (2) the Regents of the University of Michigan, the Board of Trustees of Michigan State University and the Board of Governors of Wayne State University (collectively, the "Universities"), seeking a declaratory judgment that the amendment was invalid and a permanent injunction against its enforcement. They filed the lawsuit in the Southern Division of the Eastern District of Michigan. In their amended complaint,

plaintiffs contended that Proposal 2 violates two federal constitutional provisions (the First and Fourteenth Amendments), three federal civil rights statutes (Title VI, Title VII and Title IX) and one presidential order (Executive Order 11246). To date, plaintiffs have not independently filed a motion for a preliminary injunction or a temporary restraining order against enforcement of Proposal 2.

On December 11, the Universities filed a cross-claim against Governor Granholm, seeking (1) a declaratory judgment "that under federal law the Universities may continue to use their existing admissions and financial aid policies through the end of the current [enrollment] cycle" and (2) a preliminary injunction that "allows the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle." In support of their requests, the Universities noted that: (1) "[s]erious controversies exist regarding the validity, meaning, impact, and application of the Amendment"; (2) "[t]he Governor has requested an interpretation of the Amendment from the [state] Civil Rights Commission" in 90 days, but they cannot await the Commission's decision given the effective date (December 23) of the law; (3) "[t]he Amendment becomes effective in the midst of the Universities' current admission and financial aid cycle," which generally "run[s] from the early fall through the spring"; and (4) "[f]orcing the Universities to abandon their existing admissions and financial aid policies in the midst of this cycle would require them to apply different policies to applicants within the same cycle and different policies than they have announced" to the public.

In further support of their requests for declaratory and injunctive relief, the Universities argued that "[t]he Amendment implicates federal law." "It incorporates," they noted, "whole bodies of federal law by reference, including 'federal programs,' 'federal law,' and the 'United States Constitution.'" The Universities, they added, "put their admissions and financial aid policies in place in reliance on the Supreme Court's reaffirmation in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that they have an academic freedom right, based in the First Amendment to the Constitution of the United States, to select their students and that they may, in the course of doing so, give some consideration to such factors . . . as race." On the same day, they filed a motion for a preliminary injunction, seeking the same thing—to enjoin the enforcement of Proposal 2 through the end of the current admissions cycle.

On December 14, three days after the Universities filed their cross-claim, the Michigan Attorney General, Michael Cox, filed a motion to intervene in the lawsuit. *See* Fed. R. Civ. P. 24. The district court granted the Attorney General's motion to intervene that same day.

On December 18, the three sets of parties to the cross-claim—the Governor, the Attorney General, the Universities—and the plaintiffs in the underlying action filed a stipulation with the district court, which reads in part:

> It is hereby stipulated, by and between the parties that this Court may order as follows:
>
> (1) that the application of Const[.] 1963, art[.] [I], § 26 to the current admissions and

> financial aid policies of the University parties is enjoined through the end of the current admissions and financial aid cycles and no later than 12:01 a.m. on July 1, 2007, at which time this Stipulated Injunction will expire;
>
> (2) that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c), the Universities' cross-claim shall be and hereby is dismissed in its entirety, with prejudice only as to the specific injunctive relief requested in the cross-claim . . .
>
> . . .

Stipulation at 3.

That same day, matters grew more complicated when an individual and an interest group sought to intervene in the case. The individual was Eric Russell, a white male who has applied to the University of Michigan School of Law for admission in the fall of 2007, Affidavit of Eric Russell, at 1; the organization was Toward A Fair Michigan ("TAFM"), a non-profit entity "whose mission is to further understanding of equal opportunity issues involved in guaranteeing civil rights for all citizens," Affidavit of William Allen, at 1.

On December 19, the district court issued what it labeled a "temporary injunction." Consistent with the stipulation entered into by the Governor, the Attorney General, the Universities and the plaintiffs, the court enjoined application of Proposal 2 to the Universities' admissions and financial-aid policies until July 1, 2007, and dismissed the Universities' cross-claim. Dist. Ct. Order at 3. In essence, then, the cross-claimants dismissed their claim for an ordinary preliminary

injunction in exchange for the stipulated 194-day injunction. However the injunction is labeled, it remains a preliminary injunction, albeit one of finite duration.

That same day, Russell and TAFM filed a motion urging the district court to rule on their motion to intervene by December 21 and requesting a stay of the order enjoining enforcement of Proposal 2 before its effective date—December 23.

B.

On December 21, having heard nothing from the district court on their intervention or stay motions, Russell and TAFM filed a notice of appeal to this court. The next day, they filed in this court an "Emergency Motion for a Stay Pending Appeal" of the district court's preliminary injunction and a Petition for a Writ of Mandamus directing the district court to grant their motion to intervene and to vacate its preliminary injunction.

On December 26, we issued an order giving the parties to the cross-claim (the Governor, the Attorney General, the Universities) as well as the plaintiffs in the underlying action an opportunity to file responses to the motions by December 28. The order also gave Russell and TAFM an opportunity to file a reply brief by December 29. The City of Lansing, the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee each moved this court for leave to respond to Russell's motion and attached briefs to their motions. Because the district court has now denied their motions to intervene, and the denials have not been resolved on appeal, these entities are not parties

to this action. Nonetheless, we have considered their filings as we would the filings of *amici curiae*.

On December 27, the district court ruled on the motions to intervene. It granted Russell's motion and denied TAFM's motion both as of right and by permission. At the same time, it denied motions to intervene filed by the City of Lansing (Michigan), the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee. The district court has not ruled on Russell's motion for a stay pending appeal.

On December 28, Russell and TAFM filed an amended notice of appeal with respect to the preliminary injunction issued by the district court on December 19. TAFM also appealed the denial of its motion to intervene (No. 06-2656), as did the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee (No. 06-2653) and the City of Lansing (No. 06-2658).

C.

Let us be clear that the merits of the appeal of the order granting the preliminary injunction and the appeals of the orders denying the motions to intervene are not before this panel. In addition to the Petition for a Writ of Mandamus, the only matter presently before this panel is the motion filed by Eric Russell under his previously filed appeal, titled "Emergency Motion for a Stay Pending Appeal," asking us to stay the district court's preliminary injunction—in other words, to allow article I, section 26 of the Michigan Constitution to take immediate effect—until such time as Russell's appeal can be decided on the merits.

II.

As an initial matter, Russell plainly may challenge the validity of the preliminary injunction. He has standing to participate in the case because he has applied for admission to the University of Michigan School of Law for matriculation in 2007 and accordingly has a direct interest in whether Proposal 2 applies to the Law School's admissions decisions this year. And he may intervene as of right in the case for one of two reasons. Either the district court's failure to address his meritorious intervention motion before the effective date of Proposal 2 on December 23 amounted to an effective denial of the motion, which we may correct on appeal (and indeed have done so before in a similar setting) *see Americans United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990), and which we may review on an interlocutory basis, *see Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989). Or the district court's order granting the intervention motion on December 27 permitted Russell to file a new notice of appeal, which he did on December 28 and which allowed him to seek immediate review of the preliminary injunction. Either way, Russell is now a party in the case; he has filed a notice of appeal with respect to the preliminary injunction; we have jurisdiction over an interlocutory appeal from a preliminary injunction, 28 U.S.C. § 1292(a); he has filed a Motion for an Emergency Stay Pending Appeal; and we may review the stay motion in connection with our authority over the appeal of the preliminary injunction.

III.

Our standard for reviewing a motion for a stay pending appeal is a familiar one. Much like the standard for determining whether to issue a preliminary injunction, *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002) (per curiam), we consider "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). All four factors are not prerequisites but are interconnected considerations that must be balanced together. *Id.*

A.

There are several ways to look at the likelihood that the district court's preliminary injunction order will be upheld on appeal, and each of them holds little promise that we will be able to uphold the order. *First*, the order itself does not contain a sufficient ground for prohibiting Proposal 2 from going into effect. By its terms, the order rests on two grounds: (1) "a stipulation from all parties to the case"—which at that time included the plaintiffs in the underlying action, the Universities, the Governor and the Attorney General—"consenting" to the preliminary injunction sought by the Universities, and (2) the court's conclusion "that the interests of all parties and the public are represented adequately" by these parties. Order at 3. The order does not contain any discussion of the federal-law grounds for granting an injunction. It does

not contain any evidentiary findings concerning the need for immediate relief. And it does not address the four factors for granting a preliminary injunction: the Universities' likelihood of success on the merits of their cross-claim; the risk of irreparable injury to affected parties with or without the preliminary injunction; and the public interest. *See Six Clinic Holding Corp. II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 399 (6th Cir. 1997) ("requir[ing]" a district court "to make specific findings concerning each of the four factors"); *United States v. Sch. Dist. of Ferndale, Mich.*, 577 F.2d 1339, 1352 (6th Cir. 1978) (vacating district court's preliminary-injunction ruling because among other reasons the district court "failed to make an express finding as to probability of success on the merits").

Whether stipulated injunctions concerning the federal constitutionality of a state law—indeed a state constitutional amendment—are a good idea, bad idea or even a permissible idea need not detain us in gauging the merits of this stay motion. *See Evans v. City of Chicago*, 10 F.3d 474, 479 (7th Cir. 1993) (en banc) (plurality opinion) ("[T]he court must ensure that there is a substantial federal claim, not only when the decree is entered but also when it is enforced, and that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the office holder."); *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (en banc) ("Courts must be especially cautious when [state officials] seek to achieve by consent decree what they cannot achieve by their own authority."); *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) ("Judicial approval . . . may not be obtained for an agreement which is . . . contrary to the public interest."). The fact

remains that this stipulated injunction was flawed on its own terms. From the day it was entered (December 19), it could not be said that the injunction furthered "the interests of all parties and the public." By December 18, it was clear that at least one member of the public (Eric Russell) did not support the suspension of Proposal 2 because by then he (and others) had filed a motion to intervene as of right in the lawsuit precisely because he (and others) disagreed with the parties' stipulated injunction—in his case because it would jeopardize his efforts to gain admission to the Law School in the 2007 first-year class.

Subsequent events confirm that the stipulated injunction did not account for the concerns of all interested parties—namely, the district court's December 27 order granting Russell intervention as of right. Intervention Order at 15; *see* Fed. R. Civ. P. 24(a) (requiring intervention as of right when the individual has "an interest" in the case and "is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties"). In permitting Russell to intervene as a party in the case, the trial court concluded that his "individual interest . . . *may not* be taken into account by the present parties." Intervention Order at 15 (emphasis added). That seems to be an understatement. The parties knew of Russell's opposition to the stipulated injunction, to say nothing of the opposition to the injunction by other interested groups seeking to intervene in the case (including the proponent of Proposal 2), and nonetheless proceeded to seek its entry. Even now, the closest they have come to

accounting for his interests in the case is to say that "he is free to reapply" if the Law School denies him admission this year. Universities' Br. at 38. In the final analysis, the only articulated basis provided for the injunction—that it furthered "the interests of all parties and the public"—is not true and thus does not suffice to sustain the injunction.

Second, even if we look behind the court's December 19 order to the Universities' crossclaim and motion for a preliminary injunction, these filings do not supply a basis for enjoining the law on the ground that it violates federal constitutional or statutory law. Most of these pleadings deal with irreparable-harm and public-interest arguments: the difficulty of changing admissions and financial-aid policies in the midst of an enrollment cycle, uncertainty over the meaning of the amendment under state law and the delay that will occur before the Michigan Civil Rights Commission acts on the Governor's request to interpret the amendment within 90 days—all good-faith reasons for seeking delay, to be sure, but none of them pertinent to establishing a federal ground for suspending the law. As to that point, the Universities' request for a preliminary injunction says just one thing—that they have a First Amendment right to continue using race- and gender-based preferences. (More on that argument later.) The salient point, however, is that the request for a stipulated injunction was not premised on any agreement, or even suggestion, that Proposal 2 violated any federal law—constitutional or otherwise. That of course is because the Attorney General has taken the position that Proposal 2 is perfectly constitutional and the Governor has not yet taken any position on the issue.

Also unhelpful is the Universities' position that the federal courts should "determin[e] their rights and responsibilities under the Amendment" and delay the effective date of the law until that task has been completed. Cross-Claim at 5. This suggestion looks at the problem through the wrong end of the lens. State courts and state agencies (such as the Michigan Civil Rights Commission) generally get the first (and ultimately the last) crack at interpreting a state law—which is why uncertainty over the meaning of a state law often counsels in favor of a federal court staying its hand until the state courts have had a chance to construe the law. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941). We know of no authority (and none has been supplied to us) saying that uncertainty over the meaning of a state law by itself supplies a basis for a federal court to suspend the law's effective date.

That the meaning of the amendment could be affected by the meaning of certain federal statutes, as the Universities also complained, does not change matters. Cross-Claim at 4. The Universities never explained what those federal laws were or exactly how they would affect the meaning of the amendment. But even if the Universities had suggested, say, that Title VI of the Civil Rights Act of 1964 might conflict with Proposal 2 under certain constructions of the amendment and certain constructions of Title VI, that would not give a federal court license to suspend the amendment. One would first want to know how the State was implementing the amendment before undertaking the task of determining whether that interpretation conflicted with some yet-to-be-determined construction of Title VI.

All of this is prelude to the most unusual feature of the stipulated injunction: the premise for granting it no longer exists. The Universities filed a cross-claim against the Governor (and effectively the Attorney General once he had intervened) seeking a declaration of "their rights and responsibilities" under Proposal 2 and a preliminary injunction until that had been done. But in return for the Attorney General's and Governor's stipulating to a preliminary injunction, the Universities agreed to dismiss the request for declaratory relief. So while the district court has suspended the effective date of the law, it no longer has the Universities' request (or any other request) before it for declaring the Universities' "rights and responsibilities" under the amendment—or for that matter any other explanation for enjoining the law, save for the fact that some interested parties want it stayed.

In view of this point, it puzzles us that the Attorney General, who stipulated to the entry of the preliminary injunction, now contends that we lack jurisdiction to entertain a motion to stay it. Why? Because, he says, the Universities' underlying cross-claim has now been dismissed and because the district court did not permit Russell to become a party to the case until after that dismissal. But of course Russell was allowed to intervene in the "action," Fed. R. Civ. P. 24(a), not a cross-claim, and that action is alive and well. The Attorney General, moreover, seems to ignore what would seem to be a corollary to his proposed interpretation of this sequence of events—namely that if the cross-claim had already been dismissed, there would no longer be any basis for a preliminary injunction, *see supra*, and the district court could not

have undertaken the necessary inquiry into the parties' likelihood of success on the cross-claim, much less found that any such probability of success existed.

Third, the responses to the stay motion filed in our court by the four sets of parties to the stipulated injunction—the Governor, the Attorney General, the Universities and the plaintiffs in the underlying action—also do not support the injunction. While all four of them argue extensively about the hardships of complying with the law in the middle of the 2006-2007 admissions cycle, they do not offer tenable explanations for suspending Proposal 2 on the basis of federal law.

Far from raising doubts about the validity of the amendment under federal law, the Attorney General thoroughly explains why it *does not* violate the Federal Constitution or any federal statutes. While the Governor does not expressly defend the validity of the amendment in her appellate papers, neither does she say that it violates any federal law.

The First Amendment. In their response to the stay motion, the Universities argue that the amendment violates the First Amendment, specifically the Universities' right to select a diverse student body in the name of academic freedom. But it is one thing to defer to a state university's judgment in deciding who may attend that university—and to defer in the process to the university's academic freedom that "long has been viewed as a special concern of the First Amendment," *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)—in determining whether the university has run the gauntlet of defending presumptively unconstitutional

racial classifications. It is quite another to say that the First Amendment in general and academic freedom in particular prohibit a State from eliminating racial preferences. Were it otherwise, as Russell points out, "state laws requiring colleges to give preferences to state residents or to admit those in the top 10% of their high school classes" would routinely violate the First Amendment. Stay Motion at 17.

The Universities mistake interests grounded in the First Amendment—including their interests in selecting student bodies—with First Amendment rights. It is not clear, for example, how the Universities, as subordinate organs of the State, have First Amendment rights against the State or its voters. *See, e.g., Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 629 (1819). One does not generally think of the First Amendment as protecting the State from the people but the other way around—of the Amendment protecting individuals from the State. After all, *Bakke*, *Grutter* and *Gratz*—the lead cases upon which the Universities rely in claiming that Proposal 2 violates the First Amendment—involved constitutional challenges by individuals against States (or at least state officials). Even then, the States' invocation of the First Amendment in those cases hardly shows that the First Amendment trumps the Fourteenth. In *Bakke* and *Gratz*, the Court *invalidated* the racial preferences contained in the schools' admissions programs under the Equal Protection Clause. And while *Grutter* upheld the School of Law's use of racial classifications in making its admissions decisions, that was not because the First Amendment compelled it to do so. *Grutter* addresses academic freedom in the context of asking whether "the Law School's use of race is justified by a

compelling state interest," 539 U.S. at 327, a question it answers by saying that its decision is "in keeping with our tradition of giving a degree of deference to a university's academic decisions, *within* constitutionally prescribed limits." *Id.* at 328 (emphasis added); *see Bakke*, 438 U.S. at 311–12 (opinion of Powell, J.) (stating that "the attainment of a diverse student body" is "a constitutionally permissible goal for an institution of higher education"). One of those "constitutionally prescribed limits," however, is the separate requirement of narrow tailoring—an inquiry that no one maintains may be satisfied simply by invoking a university's legitimate, but hardly dispositive, interest in academic freedom.

In discussing the narrow-tailoring requirement, moreover, *Grutter* urged universities to look to States that had eliminated the use of race in making admissions decisions to determine whether race-neutral ways of furthering the universities' interests in a diverse student body existed. *See* 539 U.S. at 342 ("Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop."). If, as the Universities maintain, the First Amendment prohibits States from eliminating racial preferences in admissions, one would not expect the Court to urge universities to consider the efficacy of state laws doing just that. No less strange, *Grutter* ends by explaining that affirmative action programs may not exist in perpetuity. Noting that it has been 25 years since

Bakke, it remarked that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 343. The First Amendment, by contrast, has no termination point, whether in 25, 50 or 250 years, making it improbable that the same Court that decided *Grutter* would hold that state universities have a First Amendment right to maintain racial preferences.

The Equal Protection Clause. The plaintiffs in the underlying action offer a host of other arguments for sustaining the preliminary injunction. In addition to invoking the First Amendment, they claim that the amendment likely violates the Equal Protection Clause of the Fourteenth Amendment. We do not agree.

In contending that the Equal Protection Clause compels what it presumptively prohibits, plaintiffs face a steep climb. The Clause prevents "official conduct discriminating on the basis of race," *Washington v. Davis*, 426 U.S. 229, 229 (1976), and on the basis of sex, *United States v. Virginia*, 518 U.S. 515 (1996), not official conduct that bans "discriminat[ion] against" or "preferential treatment to" individuals on the basis of race or sex—as Proposal 2 does.

If "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), and if racial distinctions "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (citations omitted), a state constitutional amendment designed to eliminate such "distinctions" in state

government would seem to be an equal-protection virtue, not an equal-protection vice. After all, the "color-blind" goal of the Equal Protection Clause, *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), is "to do away with all governmentally imposed discrimination based on race," *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (citation and footnote omitted), making it difficult to understand how the same constitutional provision could prohibit a State from doing away with race- and sex-based classifications sooner rather than later. *See Crawford v. Bd. of Educ. of the City of Los Angeles*, 458 U.S. 527, 538–39 (1982) ("[T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.").

Grutter, it is true, says that States still may use racial classifications as a factor in school admissions when they can establish a compelling interest for doing so and when they can satisfy the demanding requirements of narrow tailoring. But *Grutter* never said, or even hinted, that state universities *must* do what they narrowly *may* do. Otherwise: the Court would not have directed state universities to look to "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law," to "draw on the most promising aspects of these race-neutral alternatives as they develop," 539 U.S. at 342; it would not have quoted in the next line of the opinion Justice Kennedy's concurrence in *United States v. Lopez*, 514 U.S. 549, 581 (1995), to the effect that "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from

clear"—such as looking for race-neutral methods of seeking diverse student bodies, *Grutter*, 539 U.S. at 343; and it would not have said that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today," *id.* Surely a State may offer more equal protection than the Fourteenth Amendment requires, *see Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free *as a matter of its own law* to impose greater restrictions . . . than those this Court holds to be necessary upon federal constitutional standards"), and surely a State may end racial preferences some years before they must do so. In the end, a law eliminating presumptively invalid racial classifications is not itself a presumptively invalid racial classification.

Much the same is true of classifications based on gender. "Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men)." *United States v. Virginia*, 518 U.S. 515, 532 (1996) (internal footnote and citation omitted); *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) ("[O]ur Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today.") (internal quotation marks omitted). If the Equal Protection Clause gives "heightened" scrutiny to such distinctions, a State acts well within the letter and spirit of the Clause when it eliminates the risk of any such scrutiny by removing gender classifications altogether in its admissions programs.

In taking this path, we do not walk alone. In 1997, the Ninth Circuit rejected an Equal Protection challenge to a similar proposition passed by the people of California. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997). Like Proposal 2, Proposition 209 outlawed discrimination or preferential treatment "on the basis of race, sex, color, ethnicity, or national origin" in the realms of public employment, education and contracting. Cal. Const. art. I, § 31(a). Like the plaintiffs in our case, the plaintiffs in the Ninth Circuit case argued that the state initiative denied them equal protection of the laws by burdening their right to seek the benefits of existing affirmative action programs. *See Coal. for Econ. Equity*, 122 F.3d at 705. And like the Ninth Circuit, we find these arguments unpersuasive. *See id.* at 702 ("A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender."); *see id.* at 708 ("The controlling words, we must remember, are 'equal' and 'protection.' Impediments to preferential treatment do not deny equal protection.").

Attempting to head off this conclusion, plaintiffs contend that Proposal 2 violates their equal protection rights by placing an unfair political burden on women and minorities who "may now seek relief" in the form of the re-institution of race- and gender-based admissions preferences "only by mounting a statewide campaign to amend" the Michigan Constitution. Complaint at 17. Three Supreme Court cases, they argue, demonstrate that state and local governments may not restructure the political process to disadvantage or discriminate against minorities. *See Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v.*

Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); *Romer v. Evans*, 517 U.S. 620 (1996).

In all three cases, however, the Court determined that the laws at issue burdened minority interests in the political process in a way that Proposition 2 does not. *Hunter* addressed an amendment to Akron's city charter requiring Akron's city council to obtain majority approval by the city before implementing housing ordinances dealing with racial, religious or ancestral discrimination. Although the provision purported on its face to treat all races equally, in "reality," the Court held, "the law's impact falls on the minority" because the "majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U.S. at 391. *Seattle* invoked *Hunter* to strike down a Washington State initiative preventing local school boards from using racially integrative busing. There the Court reasoned that the initiative "remove[d] authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests." 458 U.S. at 474. *Romer* struck down an amendment to the Colorado constitution that prohibited local governments from acting to protect homosexuals from discrimination, an amendment that "impose[d] a special disability upon [homosexuals] alone." 517 U.S. at 631.

Unlike the laws invalidated in *Hunter*, *Seattle* and *Romer*, Proposal 2 does not burden minority interests and minority interests alone. The proposal prohibits the State from discriminating against or granting preferential treatment to individuals on the basis of

"race, sex, color, ethnicity, or national origin." Mich. Const. art. I, § 26. No matter how one chooses to characterize the individuals and classes benefitted or burdened by this law, the classes burdened by the law according to plaintiffs—women and minorities—make up a majority of the Michigan population. As *Hunter* indicates, the "majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U.S. at 391. Unlike the *Hunter* line of cases, then, Proposal 2 does not single out minority interests for this alleged burden but extends it to a majority of the people of the State.

Even were we to consider only the law's restrictions on racial preferences, this political-process claim still would not be likely to succeed. The challenged enactments in *Hunter*, *Seattle* and *Romer* made it more difficult for minorities to obtain *protection from discrimination* through the political process; here, by contrast, Proposal 2 purports to make it more difficult for minorities to obtain *racial preferences* through the political process. These are fundamentally different concepts. The *Hunter*, *Seattle* and *Romer* decisions, moreover, objected to a State's impermissible attempt to reallocate political authority. *See Seattle*, 458 U.S. at 470 (prohibiting a government from "explicitly using the *racial* nature of a decision to determine the decisionmaking process"). Instead of reallocating the political structure in the State of Michigan, Proposal 2 is more akin to the "repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place," *Crawford*, 458 U.S. at 538, an action that does not violate the Equal Protection Clause. *See generally Coal. for Econ. Equity*, 122 F.3d at 708 (reasoning that

"[i]mpediments to preferential treatment do not deny equal protection").

Title VI. Plaintiffs next argue that Title VI of the Civil Rights Act of 1964 preempts Proposal 2. But they face several obstacles in bringing the claim. For one, the Civil Rights Act says that it may not be "construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4. That means plaintiffs must establish a form of "conflict preemption," which is to say they must show either that "compliance with both federal and state regulations is a physical impossibility" or that "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (plurality) (internal quotation marks omitted).

For another, Proposal 2 by its terms eliminates any conflict between it and federal-funding statutes like Title VI. "This section," the proposal says, "does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state." Mich. Const. art. I, § 26(4). And Title VI in turn says that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. What Title VI requires, in other words, Proposal 2 expressly allows—eliminating any conflict between the two laws.

Nor does Proposal 2 thwart the purposes of Title VI—"prevent[ing] discrimination in federally assisted programs." Pub. L. No. 88-352, 78 Stat. 241 (1964). Proposal 2 reinforces that goal by prohibiting state universities from discriminating, or granting preferential treatment, on the basis of race.

Title IX. Plaintiffs further contend that Title IX of the Education Amendments of 1972 preempts Proposal 2. This claim, too, holds little promise. Proposal 2, as shown, expressly avoids conflicts with federal-funding statutes like this one. Mich. Const. art. I, § 26(4). And by preventing discrimination on the basis of sex, Proposal 2 directly serves Title IX's objectives. *See* 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."). (In their complaint, plaintiffs also relied on Title VII and an Executive Order, but they have not invoked these provisions in seeking to uphold the preliminary injunction.)

B.

Having determined that Russell has a strong likelihood of reversing the district court's preliminary injunction, we must consider whether the other stay factors militate against granting a stay. They do not. The irreparable-injury factors do not meaningfully favor one set of parties over the other. To the extent plaintiffs and the Universities maintain that irreparable harm will occur to them because Proposal 2 violates their federal constitutional rights, that does not help them. As we have shown, they have little

likelihood of establishing that Proposal 2 violates the Federal Constitution.

What we have instead is a situation in which irreparable harm will befall one side or the other of the dispute no matter what we do. To respect university applicants who favor preferences this year is necessarily to slight those who oppose them—putting both equally at risk of disappointment when admissions decisions are made this year. And to respect the Universities' interest in preserving their current admissions and financial-aid programs during this enrollment cycle is necessarily to slight the public interest in permitting a statewide initiative to go into effect on the date that the Michigan Constitution requires. In short, "either party will suffer an irreparable injury if we rule against it." *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991). Nor can it fairly be said that Proposal 2 came as a sudden surprise to anyone. Efforts to pass the initiative began soon after the Supreme Court's decisions in *Grutter* and *Gratz*, and the initiative was passed near the beginning of the 2006-2007 admissions cycle after a long debate about the merits of it. The irreparable-harm inquiry in the end does not strongly favor one party or another.

With respect to the fourth factor, "the public interest lies in a correct application" of the federal constitutional and statutory provisions upon which the claimants have brought this claim, *id.*, and ultimately (in view of our interpretation of those provisions) upon the will of the people of Michigan being effected in accordance with Michigan law. All of this said, our decision ultimately "turn[s] on the likelihood of success

on the merits," *id.*, and our conviction that these are weak federal claims. If we saw the merits differently, we would likely treat the stay motion differently as well. *See Americans United*, 922 F.2d at 306.

* * * * *

Which leads us to our last point: this is an unusual way to use the federal courts. Ordinarily, one might wonder why a court would hesitate to delay the implementation of a state law for six months when the State's Governor, the State's Attorney General and its Universities stand together in urging its suspension. That is particularly so when they offer reasonable administrative grounds for the delay—uncertainty about how the law will be interpreted and uncertainty about applying it during this year's enrollment cycle. Yet none of those administrative grounds explains why the *federal courts* should delay the law's implementation on federal grounds. And none of those administrative grounds explains why a *federal court* should suspend the law while *it* declares the Universities' "rights and responsibilities" under the new state law—given that state courts, not federal courts, have the final say on the meaning of state laws and given that the only vehicle ever presented in this case for such a declaration of rights was the Universities' cross-claim, which they voluntarily dismissed.

All of this, however, strongly suggests that if an interim injunction should be granted in this case, it is the state courts, not the federal courts, that should grant it. The state courts assuredly have authority to delay the law's implementation during this enrollment cycle—either because the meaning of the law is unclear

or because it will be administratively onerous to apply it immediately. If, as the state parties have maintained throughout this litigation, a stipulated injunction accounts for the concerns of all interested parties and the people of Michigan, one can rest assured that the state courts will see it that way as well. But if the state courts do not see it that way, that proves only that there is another side to the story, one that the federal courts should be prepared to respect.

IV.

For these reasons, the motion for a stay pending appeal of the district court's preliminary injunction is granted, and the petition for a writ of mandamus is dismissed as moot.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-15024
Hon. David M. Lawson

AMENDED ORDER GRANTING TEMPORARY INJUNCTION AND DISMISSING CROSS CLAIM

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642,

AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, and the TRUSTEES of any other public college or university, community college, or school district,

Defendants,

and

REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant.

_____/

AMENDED ORDER GRANTING TEMPORARY INJUNCTION AND DISMISSING CROSS-CLAIM

This case was commenced on November 8, 2006 by several plaintiffs who claim that a recently-approved state constitutional amendment, Proposal 06-2, now known as Article 1, section 26 of the Michigan Constitution of 1963, that purports to bar the use of race, sex, color, ethnicity, or national origin to promote diversity in public hiring, contracting, and university admission decisions, violates the United States Constitution. On December 11, 2006, defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University filed a cross-claim against co-defendant Governor Jennifer Granholm seeking declaratory relief. The University parties also requested a preliminary injunction to delay the implementation of the state constitutional amendment until the current enrollment season is completed. Thereafter, the Michigan Attorney General sought permission to intervene as a defendant in the matter, together with a motion to expedite consideration of the motion to intervene, citing his "duty to defendant the constitutionality" of the ballot initiative. Mot. to Intervene ¶ 13. The parties to the case either took no position or consented to the relief, and the Court granted the motion to intervene on December 14, 2006.

On December 18, 2006, the Court received a stipulation [dkt #26] from all parties to the case, including intervening defendant Michigan Attorney General, consenting to the temporary injunctive relief

sought by the cross-claimants (the University defendants), and agreeing to dismiss with prejudice the portion of the cross-claim seeking a temporary injunction, and the balance of the crossclaim without prejudice. The Court finds that the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives, and the Court, therefore, will approve the stipulation.

Accordingly, it is **ORDERED** that the application of Article 1, section 26 of the Michigan Constitution of 1963 to the current admissions and financial aid policies of defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University is enjoined from this date through the end of the current admissions and financial aid cycles or until further order of the Court. This injunction shall expire at 12:01 a.m. on July 1, 2007, unless it is vacated by the Court before that date.

It is further **ORDERED** that the portion of the cross-claim by defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University seeking temporary injunctive relief is **DISMISSED WITH PREJUDICE**, and the remaining part of their cross-claim is **DISMISSED WITHOUT PREJUDICE**.

It is further **ORDERED** that each party shall bear its own fees and costs.

It is further **ORDERED** that the motion for preliminary injunction [dkt # 5] is **DISMISSED** as moot.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 19, 2006

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 19, 2006.

s/Felicia M. Moses
FELICIA M. MOSES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-15024
Hon. David M. Lawson

ORDER GRANTING TEMPORARY INJUNCTION AND DISMISSING CROSS CLAIM IN PART

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642,

AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

v.

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Defendants,

and

REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant.

_____/

ORDER GRANTING TEMPORARY INJUNCTION AND DISMISSING CROSS-CLAIM IN PART

This case was commenced on November 8, 2006 by several plaintiffs who claim that a recently-approved state constitutional amendment, Proposal 06-2, now known as Article 1, section 26 of the Michigan Constitution of 1963, that purports to bar the use of race, sex, color, ethnicity, or national origin to promote diversity in public hiring, contracting, and university admission decisions, violates the United States Constitution. On December 11, 2006, defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University filed a cross-claim against co-defendant Governor Jennifer Granholm seeking declaratory relief. The University parties also requested a preliminary injunction to delay the implementation of the state constitutional amendment until the current enrollment season is completed. Thereafter, the Michigan Attorney General sought permission to intervene as a defendant in the matter, together with a motion to expedite consideration of the motion to intervene, citing his "duty to defendant the constitutionality" of the ballot initiative. Mot. To Intervene ¶ 13. The parties to the case either took no position or consented to the relief, and the Court granted the motion to intervene on December 14, 2006.

On December 18, 2006, the Court received a stipulation from all parties to the case, including intervening defendant Michigan Attorney General, consenting to the temporary injunctive relief sought by the cross-claimants (the University defendants), and agreeing to dismiss the portion of the cross-claim seeking a temporary injunction [dkt #26]. The Court

finds that the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives, and the Court, therefore, will approve the stipulation.

Accordingly, it is **ORDERED** that the application of Article 1, section 26 of the Michigan Constitution of 1963 to the current admissions and financial aid policies of defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University is enjoined from this date through the end of the current admissions and financial aid cycles or until further order of the Court. This injunction shall expire at 12:01 a.m. on July 1, 2007, unless it is vacated by the Court before that date.

It is further **ORDERED** that the portion of the cross-claim by defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University seeking temporary injunctive relief is **DISMISSED WITH PREJUDICE**. The cross-claimants may proceed on the remaining part of their cross-claim.

It is further **ORDERED** that each party shall bear its own fees and costs.

It is further **ORDERED** that the motion for preliminary injunction [dkt # 5] is **DISMISSED** as moot.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 19, 2006

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 19, 2006.

s/Felicia M. Moses
FELICIA M. MOSES

Nos. 08-1387/1389/1534/09-1111
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 09, 2011
LEONARD GREEN, Clerk

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Plaintiffs-Appellants 08-1387)/Cross-Appellees,
Plaintiffs (08-1389/09-1111)

CHASE CANTRELL, ET AL.,
Plaintiffs-Appellees (08-1389), O R D E R
Plaintiffs-Appellants (09-1111),

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, ET AL.,
Defendants-Appellees/Cross-Appellants
08-1534),
Defendants (08-1389-09-1111)

MICHAEL COX, MICHIGAN ATTORNEY GENERAL,
Intervenor-Defendant-Appellee
(08-1387-09-1111)

ERIC RUSSELL,
Intervenor-Defendant-Appellant (08-1389),

JENNIFER GRATZ,
Proposed Intevenor-Appellant (08-1389).

BEFORE: BATCHELDER, Chief Judge; MARTIN, BOGGS, MOORE, COLE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, GRIFFIN, WHITE, and STRANCH, Circuit Judges.

A majority of the Judges of this Court in regular active service and who are not disqualified have* voted for rehearing of this case en banc. Sixth Circuit Rule 35(a) provides as follows:

"The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is **ORDERED**, that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

---

* Judges McKeague and Kethledge recused themselves from participation in this ruling.

SUPPLEMENTAL APPENDIX

RECORD
AND
BRIEFS

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION,
INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR
EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL PETITION APPENDIX

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in 06-15024/06-15637
issued March 18, 2008 ..... 267a-336a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-15024
Hon. David M. Lawson

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART UNIVERSITY DEFENDANTS' MOTION TO DISMISS, DENYING *CANTRELL* PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, GRANTING ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT, AND DISMISSING CASES

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN,

BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, the TRUSTEES of any other public college or university, community college, or school district, ATTORNEY GENERAL MICHAEL COX, and ERIC RUSSELL,

Defendants,

-and-

CONSOLIDATED CASES

Case No. 06-15637
Hon. David M. Lawson

CHASE CANTRELL, M.N., a minor child, by Karen Nestor, Mother and Next Friend, KAREN NESTOR, Mother and Next Friend of M.N., a minor child, C.U., a minor child, by Paula Uche, Mother and Next Friend, PAULA UCHE, Mother and Next Friend to C.U., a minor child, JOSHUA KAY, SHELDON JOHNSON, MATTHEW COUNTRYMAN, M.R., a minor child, by

Brenda Foster, Mother and Next Friend, BRENDA FOSTER, Mother and Next Friend of M.R., a minor child, BRYON MAXEY, RACHEL QUINN, KEVIN GAINES, DANA CHRISTENSEN, T.J., a minor child, by Cathy Alfaro, Guardian and Next Friend, CATHY ALFARO, Guardian and Next Friend of T. J., a minor child, S. W., a minor child, by Michael Weisberg, Father and Next Friend, MICHAEL WEISBERG, Father and Next Friend of S. W., a minor child, CASEY KASPER, SERGIO EDUARDO MUNOZ, ROSARIO CEBALLO, KATHLEEN CANNING, EDWARD KIM, M.C.C. II, a minor child, by Carolyn Carter, Mother and Next Friend, CAROLYN CARTER, Mother and Next Friend of M.C.C., II, a minor child, J.R., a minor child, by Matthew Robinson, Father and Next Friend, MATTHEW ROBINSON, Father and Next Friend of J.R., a minor child,

Plaintiffs,

v.

ATTORNEY GENERAL MICHAEL COX and ERIC RUSSELL,

Defendants,

_____/

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART UNIVERSITY DEFENDANTS' MOTION TO DISMISS, DENYING *CANTRELL* PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, GRANTING ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT, AND DISMISSING CONSOLIDATED CASES

The plaintiffs in these consolidated actions challenge the constitutionality of an amendment to Michigan's state constitution that was adopted by a majority vote of the electorate at the November 2006 election. The amendment, referred to throughout this opinion as Proposal 2, prohibits the State and its political subdivisions from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const. art. I, § 26(1). Before the Court are several dispositive motions filed by the parties, which were fully briefed and presented at oral argument held on February 6, 2008. For reasons discussed in detail below, the Court determines that there are no material fact issues that require a trial on any of the claims, and the Court must find that Proposal 2 does not violate the United States Constitution. Therefore, the Court will grant in part and deny in part the university defendants' motion to dismiss, deny the *Cantrell* plaintiffs' motion for summary judgment, grant the attorney general's motion for summary judgment, and dismiss these consolidated cases.

I. Facts and Proceedings

A. Background

In the 1960s minority racial groups in Michigan began lobbying the University of Michigan Board of Regents to consider an applicant's race in making admissions determinations, thereby treating minority status as a positive factor. In 1992, the University of Michigan law school crafted an admission policy that

used an applicant's race as one of many factors in assembling classes consisting of "a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Grutter v. Bollinger*, 539 U.S. 306, 314 (2003) (internal quotes omitted). The undergraduate school considered race in its admissions decisions since at least 1995. *Gratz v. Bollinger*, 539 U.S. 244, 254-55 (2003).

In 1997, white applicants who were rejected under those systems challenged the state schools' admission policies in federal court, arguing that they violated the Equal Protection Clause of the Fourteenth Amendment because race was considered as a factor in deciding whom to admit. However, the Supreme Court eventually held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325. In the case of the law school, the Court held that its admissions system "bears the hallmarks of a narrowly tailored plan," *id.* at 334, and upheld it against the constitutional challenge. The Court invalidated the undergraduate school's program because it resembled a quota system bereft of the necessary individualized consideration found in the law school's program, and therefore the system was not narrowly tailored to achieve the compelling state interest. *Gratz*, 539 U.S. at 275-76.

Not satisfied with that result, the plaintiff in *Gratz* joined forces with Ward Connerly and the Michigan Civil Rights Initiative (MCRI) to place on the November 2006 statewide ballot a proposal to amend Michigan's constitution to bar programs for state school admission, public employment, and public

contracting that grant preferential treatment on the basis of race or gender. The petition drive eventually was designated officially as Proposal 06-2, although throughout the process and this litigation it is known as Proposal 2, and it has been characterized by the Michigan Attorney General at oral argument in this case as an anti-affirmative action measure.

The signature-gathering phase of the initiative process generated considerable controversy. The Sixth Circuit found that "the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception. . . . By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes." *Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007). Nevertheless, Proposal 2 was allowed to remain on the ballot, and the Michigan voters approved the constitutional amendment with approximately 57.9% of the voters in favor and 43.1% disapproving. *See* State Proposal-06-2: Constitutional Amendment: Ban Affirmative Action Programs, at http://miboecfr.nictusa.com/election/results/06GEN/90000002.html (last visited Feb. 10, 2008). Only three of Michigan's 83 counties rejected the measure; the rest approved it.

Proposal 2 amended the state constitution by adding the following provisions:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any

individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

(4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or

> national origin, as are otherwise available for violations of Michigan anti-discrimination law.
>
> (7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.
>
> (8) This section applies only to action taken after the effective date of this section.
>
> (9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

Mich. Const. art. I, § 26. Although an exit poll conducted by Edison Media Research found that 86% of black voters voted "No" on Proposal 2, the reliability of that poll has been questioned. *See* Eric Russell Resp. to *Cantrell* Mot. for Summ. J., Ex. 1, Wilson Dec. at ¶ 4 (explaining that the reliability of this figure cannot be determined without knowing the sample size and how many people refused to respond).

The day after the election, a collection of interest groups and individuals (the *Coalition* plaintiffs) brought suit alleging that the state constitutional amendment violated the United States Constitution and federal law. They filed their complaint in this Court on November 8, 2006. Another group (the *Cantrell* plaintiffs) brought suit on December 19, 2006, contending that Proposal 2 was unconstitutional as it

is applied to public colleges and universities. This Court consolidated these cases on January 5, 2007.

Proposal 2 took effect on December 23, 2006. Although the Court granted the plaintiffs and the University defendants a measure of relief by entering a stipulated order temporarily enjoining Proposal 2's implementation at Michigan's universities, that injunction was short-lived. On December 29, 2006, the Sixth Circuit issued a stay of the injunction pending a full appeal as to the injunction only. *See Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 253 (6th Cir. 2006). That appeal subsequently was dismissed as moot, since the injunction merely put off the effective date of Proposal 2 until July 1, 2007. The universities thereafter implemented Proposal 2 and applied its requirements to the 2006-2007 admissions cycle. The *Coalition* plaintiffs amended their complaint on December 17, 2006, and again on March 28, 2007. The *Cantrell* plaintiffs amended their complaint on January 17, 2007.

Thereafter, the Court instructed the parties to attempt a stipulation of facts that would have permitted the issues to be adjudicated promptly by dispositive motion, but the attempt failed and the parties proceeded with discovery. On May 15 and 16, 2007, the plaintiffs filed motions to certify the matter as a class action. Those motions were argued and taken under advisement, and they will be adjudicated in a separate order. On October 5, 2007, the *Cantrell* plaintiffs filed a motion for summary judgment as to intervening defendant Eric Russell. The University defendants filed their motion to dismiss on October 17, 2007. On November 30, 2007, the Michigan attorney

general filed a motion to dismiss or for summary judgment, intervening defendant Russell filed a motion for summary judgment, and the *Cantrell* plaintiffs fled a motion for summary judgment. These motions were submitted for decision after oral argument on February 6, 2008.

These motions raise issues of standing, the propriety of joining the Michigan universities as defendants, and challenges to the plaintiffs' arguments that Proposal 2 violates the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. A discussion of the allegations in the complaints and the facts elicited through discovery, therefore, is necessary.

B. The Amended Complaints

1. The *Cantrell* Plaintiffs

The thrust of the *Cantrell* plaintiffs' complaint is that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment, but not in the traditional sense. Unlike the *Coalition* plaintiffs, whose complaint is discussed below, the *Cantrell* plaintiffs do not base their challenge on the argument that denying preferential treatment to minority students is unlawful *per se*, but rather on the idea that Proposal 2 places an undue burden on the ability of minority groups to effect changes in policy by altering the political structure. Their theory is tied to language in *Hunter v. Erickson*, 393 U.S. 385 (1969), *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), and *Romer v. Evans*, 517 U.S. 620 (1996).

The *Cantrell* plaintiffs exclusively challenge Proposal 2 as it is applied to Michigan's public universities, and the University of Michigan in particular. The named plaintiffs are eighteen individuals who all bear some connection to the University of Michigan and believe Proposal 2 is bad for that institution's future. Three of the named plaintiffs are students at the law school; four are undergraduate students; six are high school students who plan to apply to the university; one is a Ph.D. candidate; and four are professors. The majority of the named plaintiffs are members of a minority racial group, although a handful are Caucasians who believe that racial diversity is important to their educational experience. The plaintiffs purport to "represent a class of all present and future students and faculty at the University of Michigan who applied to, matriculated at, or continue to be enrolled at or employed by the University of Michigan in reliance upon the University's representation that it would continue to admit and enroll a diverse group of students at the school consistent with its former policies, which took race into account among other factors." *Cantrell* Amend. Compl. at ¶ 31.

These plaintiffs claim that Proposal 2 places an undue political burden on individuals or groups who would seek to alter public university polices regarding the consideration of race in the admissions process, because the only way to alter the policy is a state-wide ballot initiative rather than a petition to the governing body of the university, to which they would have had access before Proposal 2's passage. According to the *Cantrell* plaintiffs, persons seeking to alter admissions policies with respect to other factors, such as legacy

status or geographic origin, can simply appeal to the individual colleges or schools. On the other hand, "[t]his avenue is foreclosed . . . to those seeking beneficial admissions policies that include consideration of race . . . in the decision-making process." *Id.* at ¶ 51. These plaintiffs support their claim that obtaining a voter-approved constitutional amendment is more difficult than successfully petitioning individual university governing bodies to alter admissions policies by alleging, *inter alia*, the fact that access to the state ballot requires gathering signatures totaling "'not less than eight percent . . . of the total vote cast for all candidates for governor at the last preceding general election.'" *Id.* at ¶ 53 (quoting Mich. Const. art. 2, § 9).

Citing *Hunter* and *Seattle* for the proposition that "a state law violates the Equal Protection Clause when it 'disadvantage(s) any particular group by making it more difficult to enact legislation in its behalf,'" *Cantrell* Amend. Compl. at ¶ 57 (quoting *Hunter*, 393 U.S. at 393, and citing *Seattle*, 458 U.S. at 468), the *Cantrell* plaintiffs argue that "[b]y creating a political process that sets aside race, among other categories, for consideration 'at a new and remote level of government,' Proposal 2 imposes a 'substantial and unique burden on racial minorities.'" *Id.* at ¶ 58 (quoting *Seattle*, 458 U.S. at 470, 483). Based on this theory, the plaintiffs seek to permanently enjoin application of Proposal 2 at the University of Michigan and other public universities.

2. The *Coalition* Plaintiffs

Like the *Cantrell* plaintiffs, the *Coalition* plaintiffs focus principally, if not exclusively, on Proposal 2's

impact on public universities. In contrast to the *Cantrell* plaintiffs, however, the *Coalition* plaintiffs include persons and entities that bear a connection to schools other than the University of Michigan.

The named plaintiffs include the following organizations and individuals: (1) the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN); (2) the United for Equality and Affirmative Action Legal Defense Fund (UEAALDF), a non-profit corporation founded by BAMN; (3) the Rainbow PUSH coalition; (4) the Defend Affirmative Action Party (DAAP), a student organization at the University of Michigan; (5) some twenty-seven minority high school students who plan to attend either the University of Michigan, Michigan State University, or Wayne State University; (6) three recent graduates from the University of California at Berkeley who plan to attend graduate school at one of either Michigan, Michigan State, or Wayne State; (7) two minority community college students who plan to apply to either Michigan, Michigan State, or Wayne State; (8) three other individuals with "substantial college credits" who plan to apply to either Michigan, Michigan State, or Wayne State; (9) one minority student currently attending Michigan; (10) an individual who helped circulate the petition for Proposal 2; and (11) six local unions with large minority memberships. The named plaintiffs purport to represent three classes of individuals: the first class is comprised of all African American, Latino, and Native American applicants to or students at Michigan, Michigan State, and Wayne State; the second class is made up of all women applicants to or students at

those schools; and the third includes all African American, Latino, and Native American citizens who want to lobby for or vote for changes in the admission and other policies at the University of Michigan, Michigan State University, and Wayne State University that benefit African American, Latino, and Native American citizens.

These plaintiffs present a political-burden argument that is similar to the one made by the *Cantrell* plaintiffs, except that it extends to gender. The *Coalition* plaintiffs also claim that Proposal 2 directly discriminates against university applicants on the basis of their race and gender because "Proposal 2 has as its primary aim reducing the admission of black, Latino, and Native American students and of women students into some programs," *Coalition* Sec. Am. Compl. at ¶ 107, by eliminating the "desegregation plans that have resulted in the admission of significant numbers" of such students, *id.* at ¶ 106. Paradoxically, the *Coalition* plaintiffs contend that elimination of so-called preferential treatment actually amounts to discrimination, explaining:

> In its history, in its evident purpose, in its defiance of the state tradition of control of the universities by the governing boards, and in its adoption of explicit race and gender classifications, Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment by intentionally discriminating against black, Latino/a, Native American and women students.

Id. at ¶ 111.

In addition, the *Coalition* plaintiffs contend that Proposal 2 violates the First Amendment and is preempted by Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. The *Coalition* plaintiffs' First Amendment argument is premised on the Supreme Court's pronouncement in *Grutter v. Bollinger* that institutions of higher learning have a right to academic freedom rooted in that Amendment. According to the *Coalition* plaintiffs, universities have a First Amendment right to consider race and gender in the selection of faculty and students in order to promote diversity and fruitful education; and students, in turn, are the beneficiaries of that right, which Proposal 2 violates.

The *Coalition* plaintiffs also argue that Proposal 2 conflicts with Title VI of the Civil Rights Act of 1964 and is therefore preempted by that Act. They contend that Title VI, specifically 42 U.S.C. § 2000d, prohibits race- and national origin-based discrimination in programs that receive federal funding. Pursuant to Title VI, the Department of Education promulgated regulations that prohibit universities receiving federal funds from using admission criteria that either discriminate on the basis of race or impede the goal of eliminating racial discrimination. *See* 34 C.F.R. 100.3(b)(2). In light of California's experience with Proposition 209, the *Coalition* plaintiffs allege that Proposal 2 will "result in a devastating decline in the number of black, Latino/a and Native American students, in direct violation of the purpose of Title VI and of the specific prohibitions of the regulations that implement Title VI." *Coalition* Sec. Amend. Compl. at ¶ 127. Finally, the *Coalition* plaintiffs claim that Proposal 2 is preempted by Title IX of the Education

Amendments of 1972, the gender-based analog to Title VI. *See* 20 U.S.C. § 1681; 34 C.F.R. § 106.23).

Based on these claims, the *Coalition* plaintiffs ask the Court to enjoin permanently the implementation of Proposal 2 at the University of Michigan, Michigan State University, and Wayne State University.

C. Facts Presented From Discovery

The information gathered by the parties through discovery falls into two categories: the prospect for minority enrollment after Proposal 2's implementation compared with beforehand; and the difficulty involved in amending the state constitution.

1. Minority Admissions Before and After Proposal 2

Pursuant to the state constitution, the University of Michigan, Michigan State University, and Wayne State University are controlled by boards of regents. Mich. Const. art. VIII, § 5. These boards are endowed with a high degree of autonomy; each enjoys the power of "general supervision of its institution and the control and direction of all expenditures from the institution's funds." *Ibid.* These governing bodies have delegated the responsibility to establish admissions policies to departments within the respective institutions. These "admitting units" have "establish[ed] admissions systems that allow for the consideration of a variety of factors." *Cantrell* Mot. for Summ. J as to Russell [dkt # 172], Ex. I, Univ. RFA Resp. at ¶ 5.

Over time and partly as a result of lobbying efforts, the universities' admissions systems and standards have evolved. Students and other individuals have

always been "free to lobby the Universities for or against the adoption of particular admissions policies." *Id.* at ¶ 7. Beginning in the 1960s, African Americans and other groups of minorities lobbied for the consideration of race in admissions, and it appears that the universities embraced the concept.

As noted above, in 2003 the United States Supreme Court weighed in on the legitimacy of the admissions policies at Michigan and Michigan Law in *Gratz v. Bollinger* and *Grutter v. Bolinger*, invalidating the undergraduate admission plan and sustaining the law school's plan. Following these decisions, Michigan amended its undergraduate admissions policy to comply with the Supreme Court's instruction. According to Theodore Spencer, associate vice-provost and director of undergraduate admissions, the *Grutter* decision provided a "great road map of what a holistic [and permissible] review process should look like." *Cantrell* Mot. for Summ. J., Ex. D, Spencer Dep. at 38. The key to this "holistic" process was that no single factor was dispositive. "[H]olistic means that the decisions are not just based on grades and test scores, it means that it's not just based on perhaps being an alum or any one particular factor, race or anything else, but rather on the composite review of all the information that the student provides." *Ibid.* Race was still considered, but admissions officers would consider "50 to 80 different categories" in conducting their review. *Id.* at 35.

Frank H. Wu, dean at Wayne State University Law School, testified similarly that prior to Proposal 2, the admissions committee considered a wide variety of non-academic factors that "contribute to a diverse and

engaged law student body." *Cantrell* Mot. for Summ. J., Ex. F, Wu Dep at 32. Therefore, if a minority applicant failed to possess an LSAT score and GPA that would on their own qualify her for admission, the admissions committee would consider race, in addition to other factors that might "reduce[] the reliability of GPA as an index of academic achievement and promise." *Ibid.*

In response to Proposal 2's passage, the universities eliminated race from their admissions criteria but continued to consider various other non-academic factors, such as geography, alumni connections, socioeconomic status, and athletic ability. At Michigan Law, for instance, "the meat of th[e] [pre-Proposal 2] policy is the same [as the post-Proposal 2 policy] . . . with the exception of race." *Cantrell* Mot. for Summ. J., Ex. E, Zearfoss Dep. at 192. It is the undisputed testimony of university officials that Proposal 2 prohibits them from considering race to any degree.

Based on the information offered by the parties, the most that can be said is that it is not clear exactly how Proposal 2 will affect minority admissions in the long run. What evidence there is suggests that minority admissions will fall at the state's more selective schools, but the degree to which this will occur is subject to debate. Two different types of evidence have been submitted on the matter: (1) testimony by admissions officials; and (2) testimony by outside experts. Both draw heavily on California's experience under Proposition 209.

Theodore Spencer, Sarah Zearfoss (dean of admissions at Michigan Law), and Frank Wu all testified that Proposal 2 will depress minority

enrollment. Spencer expressed doubts over the ability to maintain minority enrollment through the use of a proxy, like socioeconomic status. He explained that university officials in California, Washington, Texas, and Georgia (states with laws similar to Proposal 2) "cannot achieve the same sort of racial and ethnic diversity that they had prior to such measures . . . without considering race." Spencer Dep. at 100-01. Similarly, Zearfoss testified that she excepts a decline in minority admissions because, in her view, it is impossible "to get a critical mass of underrepresented minorities . . . without considering race." Zearfoss Dep. at 56-57, 193. Wu stated that although some creative approaches might mitigate the effects of Proposal 2. he "did not think that any one of these proposals or any combination of these proposals was reasonably likely to result in the admission of a class that had the same or similar or higher numbers of African Americans, Latinos and Native Americans as the prior policy." Wu Dep. at 78. Even Ward Connerly, the architect of Proposal 2, admitted that, following the amendment, "the University of Michigan would be virtually resegregated as the University of California Berkeley and UCLA have," *Cantrell* Mot. for Summ. J., Ex. K, Connerly Dep. at 120, although he stated that this was not his intent.

In terms of expert testimony, the *Cantrell* plaintiffs offer the declarations of two purported experts in the field of race and admissions, William Bowen and Jeannie Oakes. Mr. Bowen is a former president of Princeton University and the author of two books on race-conscious admissions policies. In addition to highlighting the salutary effects of affirmative action, Bowen states that "[t]he available evidence indicates

that race-neutral alternatives are unlikely to be as effective as race-conscious admissions in enrolling a diverse student body." *Cantrell* Mot. for Summ. J., Ex. L, Bowen Decl. at ¶ 11. In particular, "income-based strategies are unlikely to be good substitutes" because, although African Americans and Latinos are "overrepresented in the country's poor population, the great majority of that population is still white." *Id.* at ¶ 12.

Jeannie Oakes, Presidential Professor in Educational Equity at UCLA, is of a similar mind. In her study, Oakes "dr[ew] from the experiences of Texas and California and contrast[ed] relevant circumstances in these states with those in Michigan." *Cantrell* Mot. for Summ. J., Ex. M, Oaks Decl., Ex. 1, The Viability of Race-Neutral Approaches for Achieving Diversity at the University of Michigan, at 2. In 2005 and 2006, Oakes found that blacks at the University of Michigan were underrepresented by almost 300% when compared with K-12 enrollment figures at public schools in the state. She used these and other pre-Proposal 2 figures to calibrate a baseline; she did not assume that these numbers constituted sufficient diversity, but simply inquired whether these levels (whether adequate or not) could be maintained. She stated her findings as follows:

> A. Race-neutral admissions strategies (e.g., Percent Plans) have not been effective as replacements for race-conscious strategies in maintaining or increasing diversity in the public universities in Texas and California, two states with restrictions on race-conscious

practices in university admissions similar to those required under Michigan's Proposal 2.

Race-neutral Percent Plans that guarantee admission to the top ranked graduates of each public high school have not been successful in either California or Texas in maintaining levels of racial diversity comparable to those achieved with race-conscious policies prior to the *Hopwood* case in Texas or the passage of Proposition 209 in California that made race-conscious policies impermissible.

B. Michigan differs from California and Texas in ways that make it even more unlikely that race-neutral approaches would result in the diversity required at the University of Michigan. In fact, such strategies would likely exclude from admission in-state African American and Latino high school graduates with academic preparation sufficient to succeed at the university.

> B.1. Whereas the top-tier universities in California and Texas draw their freshman classes almost exclusively from graduates of California [and Texas] high schools, a majority of those offered admission as first-time freshmen at the University of Michigan (including a majority of those from underrepresented minority groups) are not Michigan residents. Race-neutral admissions criteria (e.g., Percent Plans) and outreach strategies focused on Michigan high schools

would not benefit the large percentage of underrepresented minority students who are drawn from other states. Moreover, given the substantially lower scores on academic admissions criteria of nonresident underrepresented admits, in comparison to non-underrepresented admits, few of these underrepresented out-of-state admits would likely be admitted were race not a consideration in the admissions processes.

B.2. The high degree of racial segregation in Michigan high schools means that students from underrepresented minority groups are concentrated in a very small percentage of the state's high schools. As a result, a plan guaranteeing admission to high ranking students at each of the state's high schools would have its greatest benefit to students in schools with predominantly white populations and yield a relatively small number of underrepresented minority students.

B.3. The small number of Michigan high schools with predominantly URM populations produces relatively few graduates with the academic records that would make them competitive for admission at the University of Michigan. This, in part, results from the relationship between the high

> concentration of poverty at racially isolated minority schools and the low level of opportunity associated with these schools. Lower levels of opportunity, in turn, affect the academic performance of students, specifically their ability to meet state standards on assessment tests, qualifying for state merit aid for college. These low levels of achievement are related to the racial and/or poverty composition of a student's high school. Consequently, race-neutral "Percent Plans" would likely result in the admission of underrepresented minority students with academic preparedness far below that required to succeed in an "elite" university.

Id. at 3-4.

Although the defendants have not produced evidence directly contradicting these conclusions, they have taken the position that they are mere speculation. *See* Cox Resp. Br. at 20- 21. In addition, defendant Eric Russell challenges the underlying assumption that preferential treatment is good for racial minorities. In support of this argument, he submits the declaration of Richard H. Sander, a law professor at UCLA who has garnered much attention for his development of the "mismatch effect" theory, first introduced in an article appearing in the *Stanford Law Review*. *See A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004). The driving principle of that theory is that affirmative action

harms minorities in the long run by placing them in institutions where they cannot compete or keep up with the pace of instruction. According to Sander, this theory finds support in the case of the University of Michigan's law school: data from 2004, 2005, and 2006 "show very large disparities in bar passage rates across racial lines," with black graduates of Michigan Law "about eight times as likely to fail on their first attempt as were white graduates." Russell Reply [dkt # 181], Ex. 1, Sander Decl. at ¶ 6.

In addition, the *Coalition* plaintiffs offer evidence and argument that the conditions that necessitated resort to affirmative action programs to achieve parity in opportunity for minority students still exist after the passage of Proposal 2. They cite as examples *de facto* residential segregation, unequal resources for K through 12 schools for minorities, limited minority access to resources and programs, and racial stereotyping. According to Dr. Gary Orfield, who testified at the *Grutter* trial in this Court, even with affirmative action programs in effect, minority students' SAT scores typically are significantly lower that white students' scores regardless of income levels, and minority students do not have the same access to honors or advanced placement classes that can boost grade point average. *Coalition* Resp. Br., Ex. M, Orfield testimony, at 11, 92, 103-104. In 2005, the University of Michigan undergraduate program offered no admission to students from fourteen different Detroit high schools which are intensely segregated. *Coalition* Resp. Br., Ex. J, Miller Decl. at 9.

The attorney general did not reply to the *Coalition* plaintiffs' brief. Intervening defendant Russell replies to the *Coalition* plaintiffs' arguments primarily by referring to Ward Connerly's deposition testimony that he believes eliminating racial preferences favoring minorities will benefit minority students in the long run by eliminating artificial equalizers and forcing them to compete in the larger society on the basis of merit.

2. Difficulty Amending the State Constitution

There is also some ambiguity concerning just how onerous it would be to secure an amendment repealing Proposal 2. Kristina Wilfore, executive director of Ballot Initiative Strategy Center, Inc., a non-profit organization that researches and trains people in the ballot initiative process, has submitted a declaration on behalf of the *Cantrell* plaintiffs positing that state-wide ballot initiatives are typically expensive and time-consuming and often unsuccessful. She has also suggested that repealing Proposal 2 would be particularly difficult due to unique features in Michigan's ballot initiative process and specific factors inherent in the subject matter of affirmative action. According to Wilfore, Michigan poses obstacles because (1) it is a "politically competitive state . . . with a large number of initiatives vying for voters' attention on any given ballot"; (2) its media market is expensive when compared with other states; (3) the state constitution requires signatures from 8% of the total vote cast for all candidates for governor in the preceding general election; and (4) "Michigan has an unusually short time frame for the gathering of signatures and filing of petitions." *Cantrell* Mot. for Summ. J, Ex. C, Wilfore

Decl. at ¶¶ 29-32. In addition, she says that Proposal 2 would be particularly challenging to repeal due to the fact that (1) polling data regarding affirmative action is unreliable, i.e., individuals often behave differently when they get to the voting booth; (2) affirmative action is a tough cause to market because it is complex and elicits emotional responses; and (3) "[t]here is no single obvious financial benefactor who would support the pro-affirmative action policy." *Id.* at ¶¶ 36-37.

Intervening defendant Russell counters this evidence with the testimony of Jennifer Gratz, director of the Michigan Civil Rights Initiative Committee, who believes that "Ms. Wilfore exaggerates both the effort and expense associated with putting an initiative or referendum on the ballot in Michigan." Russell Resp. Br., Ex. 3, Gratz Decl. at ¶ 4. According to Gratz, polling is not necessary; a popular initiative can be passed with less than $5 million; and Michigan does not have a particularly short signature-gathering period (California, Oklahoma, and Massachusetts have shorter periods). Moreover, the funding marshaled in opposition to Proposal 2 shows that monetary support would not be a major obstacle. "One United Michigan ('OUM'), the ballot initiative committee that was the chief opponent of Proposal 2 in the 2006 election, received and spent just a little less than $4.8 million," including contributions from General Motors Corporation, Chrysler Corporation, and Ford Motor Company. *Id.* at ¶¶ 10, 12.

II. The University Defendants' Motion

The *Coalition* plaintiffs (but not the *Cantrell* plaintiffs) sued the university defendants seeking mandatory injunctive relief with respect to Proposal 2's

effect on admissions policies that include consideration of race. The university defendants now ask this Court to dismiss them from the action pursuant to Federal Rule of Civil Procedure 21 on the grounds that they are not proper parties to the case. They also contend that Count 6 of the *Coalition* plaintiffs' amended complaint – alleging a violation of the First Amendment – should be dismissed for lack of standing.

As to the Rule 21 argument, the university defendants point out that although they must follow Proposal 2, they did not draft or enact it; they cannot repeal it, amend it, or ignore it; and they have no responsibility to enforce it against anyone or defend it in court. Therefore, they argue, they are not proper parties from whom relief can be obtained. The university defendants contend that the *Coalition* plaintiffs have no standing to assert a First Amendment claim because the right to academic freedom does not belong to any of the plaintiffs, but rather to the universities. Because of Supreme Court authority generally stating that there is a prohibition against asserting the constitutional rights of others, these defendants argue that the *Coalition* plaintiffs cannot establish standing.

Federal Rule of Civil Procedure 21 states:

> Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

Fed. R. Civ. P. 21. The Rule allows dismissal of misjoined parties; "[t]he cases make it clear that

parties are misjoined when they fail to satisfy either of the preconditions for permissive joinder of parties set forth in Rule 20(a)." Wright, Miller & Kane, Federal Practice and Procedure § 1683 (3d ed. 2001) (citing *Michaels Bldg. Co. v. Ameritrust Co.*, 848 F.2d 674 (6th Cir. 1988)). According to Rule 20, defendants are properly joined when the claims asserted against them arise from a common transaction or occurrence and those claims present some common question of law or fact. Fed. R. Civ. P. 20(a).

With these criteria in mind, the Sixth Circuit has held that dismissal for misjoinder is proper where the party is not responsible for the alleged harm and does not have the power to accord relief. *See Sutherland v. Mich. Dep't of Treas.*, 344 F.3d 603, 612-13 (6th Cir. 2003) (approving dismissal of the State of Michigan where the only claim brought against the State was for employment discrimination and the State was not the plaintiff's employer). The one instance where a court may dismiss a party under Rule 21 notwithstanding her satisfaction of the Rule 20(a) requirements lies in the context of diversity jurisdiction. *See Soberay Mach. & Equip. Co. v. MRF Ltd.*, 181 F.3d 759, 763 (6th Cir. 1999) (noting that "[i]t is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered," to preserve complete diversity).

The Court believes that the university defendants are properly joined as parties to this case, and dismissal for misjoinder is not appropriate, because the claims brought against the universities are intertwined with those challenging Proposal 2 in general. The

Coalition plaintiffs allege that it is discriminatory (in a conventional sense) to abolish preferential treatment in admissions policies, and both groups of plaintiffs claim that Proposal 2's impact on admissions amounts to a discriminatory restructuring of the political process. Because the claims against the university defendants and the attorney general share common questions of law and fact and arise out of the same occurrence, the preconditions of joinder under Rule 20(a) have been met, and dismissal is unwarranted. Although it is true that the universities are not responsible for the alleged harm resulting from the *passage* of Proposal 2, and they have no authority to repeal it, striking down that amendment would not grant the plaintiffs the relief they ultimately seek without action on the universities' part. If this Court were to find Proposal 2 unconstitutional, affirmative action would not automatically be reinstated into the admissions process. Rather, the universities would have to choose to do so on their own. And given the undeniable stake that the universities have in all these issues, it would simply be inappropriate to cast them aside, even if they desire the ultimate result the plaintiffs seek to achieve.

The standing issue requires a different analysis. A plaintiff who establishes Article III standing requirements faces the additional "rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). There is an "exception" to this rule when "the party asserting the right has a 'close' relationship with the person who

possesses the right," and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Id.* at 130. The "close relationship" element requires consideration of whether "'the relationship between the litigant and the third party [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter.'" *Powers v. Ohio*, 499 U.S. 400, 413 (1991) (quoting *Singleton v. Wulff*, 428 U.S. 106, 115 (1976)). This prudential barrier is also "'lessen[ed]'" in cases involving a First Amendment attack, but only when the challenge is premised on vagueness or overbreadth. *Kowalski*, 543 U.S. at 130; *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 348 (6th Cir. 2007) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)); *Brandywine, Inc. v. City of Richmond, Kentucky*, 359 F.3d 830, 835 (6th Cir. 2004) ("[P]laintiffs may not assert third party standing in every First Amendment facial challenge; rather plaintiffs may only do so in vagueness and overbreadth challenges.").

Proposal 2 is not challenged here on grounds of vagueness or overbreadth. Rather, the right upon which the *Coalition* plaintiffs focus is the First Amendment right to academic freedom, which began to take shape in the concurring opinion of Justice Felix Frankfurter in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), where he stated:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university – to determine for itself on academic grounds who

> may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Id. at 263 (Frankfurter, J., concurring) (internal quotes omitted). In *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court noted that academic freedom embodies both a freedom among professors and students to express ideas and "somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Id.* at 226 n.12 (citing *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) and *Sweezy v. New Hampshire*, 354 U.S. at 263 (Frankfurter, J., concurring in result)). "Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of 'the four essential freedoms' of a university." *Ibid.*

Justice Powell, in providing the fifth vote to uphold the affirmative action program in *Bakke*, implied that the university's academic freedom had a constitutional dimension by emphasizing that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 312 (Powell, J.). Yet Justice Powell noted that "[a]lthough a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." *Id.* at 314. The idea of academic autonomy in the area of admissions provided an important foundational element for the majority in *Grutter v. Bollinger* in upholding Michigan Law's

affirmative action program. The Court determined that the university's interest in obtaining a diverse student body was a compelling state interest, choosing to "defer" to the "Law School's educational judgment." *Grutter*, 539 U.S. at 328.

It is plain that the First Amendment right to academic freedom in the area of admissions belongs to the universities. Yet the *Coalition* plaintiffs insist that they have standing to assert their own First Amendment right to a racially diverse education because students are the primary beneficiaries of the right to academic freedom. They argue in the alternative that to the extent that academic freedom rights are the exclusive province of universities, they have third-party standing to assert the right. Both of these positions, however, are fundamentally at odds with the academy's right to determine who may be admitted to study. In making their argument that Proposal 2 is unconstitutional because it denies *students* the right to a racially diverse educational environment, the *Coalition* plaintiffs necessarily must claim a right unto themselves to select – or at least influence – who may be admitted to the universities. However, under the First Amendment, that right does not belong to them, but to the academy. The *Grutter* Court explained:

> We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. *See, e.g., Wieman v. Updegraff*, 344 U.S. 183, 195 (1952)

> (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Board of Regents of Univ. of State of New York*, 385 U.S. at 603. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, *supra*, at 312. From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S., at 313 (quoting *Keyishian v. Board of Regents of Univ. of State of New York*, *supra*, at 603).

Grutter, 539 U.S. at 329. Consistent with this view, Justice Powell in *Bakke* and the Court in *Grutter* invoked this right as a shield for the universities against the claims of students seeking admission on equal protection grounds.

These precedents convince the Court that the *Coalition* plaintiffs do not have a personal right to a diverse student body grounded in the First Amendment. Their third-party standing argument likewise does not find support in the jurisprudence. Schools routinely are granted standing to seek redress for injuries to their students. *Runyon v. McCrary*, 427

U.S. 160, 175 n 13 (1976) ("It is clear that the schools have standing to assert these arguments [involving the student's right to privacy and free association and the parent's right to direct the child's education] on behalf of their patrons."); *Ohio Ass'n of Independent Schools v. Goff*, 92 F.3d 419, 422 (6th Cir. 1994) (holding that "schools . . . have standing to assert the constitutional right of parents to direct their children's education"). Other business enterprises may assert the rights of their costumers. *Craig v. Borden*, 429 U.S. 190, 195 (1976) (holding that vendor of alcoholic beverages may assert equal protection claims of male patrons and stating "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function"); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (holding that newsletter may assert rights of readers in first amendment challenge because readers value anonymity and may be unwilling to come forward). However, the courts have not been as willing to permit students to assert the rights of their schools. *See, e.g., Eulitt ex rel. Eulitt v. Maine*, 386 F.3d 344, 352 (1st Cir. 2004) (holding that students could not assert Equal Protection Clause rights of school because there was no showing that the school lacked the ability to assert its own rights, and because the student may not share the interest of the school). In fact, it would be ironic if the plaintiffs here are permitted to sue the universities to assert the universities' rights.

The *Coalition* plaintiffs cannot establish the grounds for third-party standing to assert a First Amendment claim for two more reasons. First, the students lack a "close relationship" with the

universities within the framework of academic freedom. *See Powers*, 499 U.S. at 413. As noted above, it is the universities that enjoy the right to chose which students to admit, a right that inherently is in tension with the interests of students and prospective students seeking to influence the admissions system. Second, the students have not established that the universities are burdened by some hindrance to the assertion of their First Amendment rights. The universities have mounted a rigorous defense of their admissions policies in the past. Even in the present case, although nominal defendants, the universities supported the initial injunction to postpone the effective date of Proposal 2 and pressed an academic freedom argument before the Sixth Circuit on appeal of that injunction. *See Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 247 (6th Cir. 2006).

Because the *Coalition* plaintiffs lack standing to assert their First Amendment claim, the Court will grant the universities' motion to dismiss Count 6 of the *Coalition* plaintiffs' amended complaint.

III. The Attorney General's Motion and the *Cantrell* Plaintiffs' Motion

Attorney General Cox has moved in the alternative to dismiss under Rule 12(b)(6) or for summary judgment under Rule 56(c). Although a party may file a motion for summary judgment that is contingent upon the court's denial of its motion for dismissal, if matters outside the pleadings are submitted, the motion more properly should be considered under Rule 56, and courts will treat the motion as one for summary judgment. Fed. R. Civ. P. 12(b) (stating that "if, on a motion . . . to dismiss for failure of the pleading to state

a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56"); *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 533 (6th Cir. 2002) (quoting *Soper v. Hoben*, 195 F.3d 845, 850 (6th Cir. 1999)). The parties have filed a number of exhibits with their motions. These documents plainly are relevant to the defendant's motion and should be examined by the Court. Therefore, the Court will treat the motion as one for summary judgment and apply the standards required by Rule 56.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The *Cantrell* plaintiffs and the defendants have filed cross motions for summary judgment, which might imply that there are no facts in dispute. Nonetheless, the Court must apply the well-recognized standards when deciding such cross motions; "[t]he fact that the parties have filed cross-motions for summary judgment does not mean, of course, that summary judgment for one side or the other is necessarily appropriate." *Parks v. LaFace Records*, 329 F.3d 437, 444 (6th Cir. 2003). Therefore, when this Court considers cross motions for summary judgment, it "must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party." *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003).

A motion for summary judgment under Fed. R. Civ. P. 56 presumes the absence of a genuine issue of material fact for trial. The Court must view the evidence and draw all reasonable inferences in favor of the non-moving party and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). When the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," there is no genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The attorney general contends that both sets of plaintiffs lack standing to sue, and, failing that, they have failed to state a claim upon which relief can be granted. The *Cantrell* plaintiffs, seeking summary judgment, argue that Proposal 2 is unconstitutional as a matter of law: first, because it singles out race while leaving various other elements of diversity untouched, thereby creating a classification that triggers Fourteenth Amendment scrutiny; and second, because Proposal 2 makes achieving race-conscious admissions policies more difficult than securing other types of beneficial legislation, thereby imposing an unequal and impermissible burden on people of color.

A. Standing

The attorney general divides his attack on the *Coalition* plaintiffs' standing to challenge Proposal 2 on equal protection and preemption grounds by categorizing these plaintiffs into two groups: organizational plaintiffs and individual plaintiffs. He

contends that the organizational plaintiffs cannot satisfy the requirements that the organization's members would have standing to sue in their own right, the interests at stake are central to the organization's purpose, and neither the claim asserted nor the relief requested dictates the participation of individual members. He says that the individual plaintiffs cannot show actual or imminent harm because the individual *Coalition* plaintiffs do not have a legally protected right to attend college or receive preferential treatment in the admissions process. And even if this were not the case, the attorney general contends, none of the plaintiffs have shown that they would be admitted in the absence of Proposal 2. With respect to the petition circulator, it is unclear what legal interest he has in the matter at all.

The attorney general also divides the *Cantrell* plaintiffs into two groups, faculty and students, and divides the latter into the subgroups of students currently attending the University of Michigan, high school students who have applied to the University of Michigan, and high school students who intend to apply there. He then posits that all of these students have failed to establish a legally cognizable injury in fact. This point overlaps the merits argument, since the attorney general reasons that the plaintiffs lack standing to pursue their political-restructuring claim because they are not and cannot be injured by an amendment that *prohibits* discriminatory treatment. He says that the faculty plaintiffs, while grounding their claim on a right to academic freedom under the First Amendment (since they are third-party beneficiaries of the universities' affirmative action

programs), have failed to satisfy the requirements for third-party standing.

Standing, of course, is "the threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). There are "three constitutional requirements for standing, *see McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 225-26 (2003) (reiterating that 'the irreducible constitutional minimum of standing' consists of 'an injury in fact, which is concrete, distinct and palpable, and actual or imminent,' 'a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of some third party not before the court,' and a 'substantial likelihood that the requested relief will remedy the alleged injury in fact') (internal quotes and citations omitted), as well as [three] prudential requirements, *see Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) (reviewing the three elements that 'a plaintiff must assert his own legal rights and interests,' the claim 'must be more than a generalized grievance,' and 'in statutory cases, the plaintiff's claim must fall within the "zone of interests" regulated by the statute in question') (internal quotes and citations omitted)." *City of Cleveland v. Ohio*, 508 F.3d 827, 835 (6th Cir. 2007).

In addition, "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v.*

Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 181 (2000) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

Applying these well-established rules, it is easy to conclude that all of the parties have standing to bring their respective claims (save the First Amendment claim) except the petition circulator and the labor unions. The *Coalition* and *Cantrell* plaintiffs both contend that they have suffered harm in that they have been hindered unconstitutionally in advancing their legal objectives through the political process. The *Coalition* plaintiffs also allege that Proposal 2 directly discriminates against them by making it more difficult for minorities and females to gain admission to Michigan's public universities. In conducting the standing analysis, the Court must take the claims as they are fairly pleaded. The claims as pleaded plainly identify injuries recognized in the law.

Similarly, the professors who call themselves plaintiffs in this case have standing because of the limited nature of their claims. There are four professor-plaintiffs who signed on to the *Cantrell* complaint. Because the *Cantrell* plaintiffs have only asserted an equal protection claim based on *Hunter v. Erickson*, the professors do not face the problem that they would if they were also asserting a conventional equal protection claim (i.e., the issue of third-party standing). Since all of the professors have asserted that they support affirmative action in the admissions process, their allegations include facts that give rise to the injury recognized by *Hunter*: heightened difficulty in securing legislation or policies, such as affirmative action, that inure primarily to the benefit of minorities.

Likewise, the professor- and student-plaintiffs also have shown that there is a causal connection between their alleged injuries and the enforcement of Proposal 2 as enacted, and the requested remedy – a declaration of unconstitutionality and an injunction against its enforcement – will bring them relief. These plaintiffs are asserting their own rights under the Equal Protection Clause, their grievances are specific, and their claims fall within the Clause's zone of interests. The challenge to their standing is not well taken.

On the other hand, it is difficult to see how the petition circulator has a stake in any of this. The sole allegation concerning this plaintiff is: "The plaintiff Joseph Henry Reed was a petition circulator *for* Proposal 2." *Coalition* Sec. Am. Compl. at ¶ 29 (emphasis added). There is no explanation in the complaint why a supporter of Proposal 2 would now seek to attack it. Without an allegation that Mr. Reed has had a change of heart and a protectable interest, there is no basis to conclude that he has standing to attack the measure. Mr. Reed will be dismissed as a plaintiff.

A closer question is presented as to the standing of the organizational plaintiffs. To show that they have standing, these plaintiffs, all of which are parties to the *Coalition* case, must show that their members would otherwise have standing to sue, the interests at stake are germane to the organizations' purposes, and neither the claims asserted nor the relief requested require the participation of individual members. *Friends of the Earth, Inc.*, 528 U.S. at 181. Most of the organizations satisfy these requirements. Apart from the labor unions, all of the organizations have the

achievement of racial equality as their stated mission, and the majority of them have the defense of affirmative action as their more specific goal. The Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), the United for Equality and Affirmative Action Legal Defense Fund (UEAALDF), the Rainbow PUSH coalition, and the Defend Affirmative Action Party (DAAP), all meet the requirement that the subject matter of the lawsuit be germane to their purposes. In addition, they satisfy the requirement that their members otherwise would have standing to sue in their own right. Although some of the members of these organizations are not prospective students, and therefore it is unlikely that they have a stake in the conventional equal protection claim, they all appear to support affirmative action and have an interest in pursuing legislation and policies incorporating such programs. Therefore, they all have standing to pursue the *Hunter* claim. Finally, the last element for associational standing is met because the nature of the claims (constitutional) and the relief sought (declaratory and injunctive) do not necessarily require the participation of their individual members in the action.

The Court does not find that the six labor unions have standing to pursue these claims, however. They fail the test for associational standing because their fundamental purpose – the advancement of their workers' rights – bears a tenuous connection to the rights claimed in this lawsuit. The only connection the unions can claim is that they have large minority memberships. Although this feature might possibly satisfy the standing requirements if the *Coalition*

plaintiffs were challenging Proposal 2 as it relates to preferential treatment in public contracting, they are not. The labor unions will be dismissed as plaintiffs.

B. "Conventional" Equal Protection Argument

The *Coalition* plaintiffs (but not the *Cantrell* plaintiffs) allege that Proposal 2 violates the Equal Protection Clause by discriminating against them on account of race. The attorney general, relying heavily on the Proposition 209 case, *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), asserts that it is simply ludicrous to contend that Proposal 2 discriminates against racial minorities and women because the terms of the provision explicitly outlaw disparate treatment on account of race and gender. As noted earlier, the attorney general acknowledges that the clear effect – if not the purpose – of Proposal 2 is to ban affirmative action programs in public university admissions, public employment, and public contracting. Although in that regard the provision implicates race, the attorney general insists that it does so in a constitutionally permissible way.

To understand the *Coalition* plaintiffs' response, the Court finds it necessary to review the ideological premise that undergirds their position. Unlike many defenders of affirmative action, who acknowledge that such programs accord unequal treatment but who justify this inequity on utilitarian grounds, the *Coalition* plaintiffs do not view affirmative action as preferential treatment. Instead, they see affirmative action as fundamentally necessary to desegregation and as a system that embodies equality by offsetting systemic handicaps (e.g., having grown up poor and having attended an underfunded school); and therefore

affirmative action is a "benign" race-conscious policy. As a corollary, they deem Proposal 2 discriminatory because it eliminates affirmative action as an "equalizer." Therefore, they implore the Court to look at the "reality of the situation" – including evidence of *de facto* segregation – and not just focus on "verbal formulas."

Following that line of thinking, the *Coalition* plaintiffs insist that a trial is required to demonstrate the need to use race-conscious admission policies in order to allow minority students to compete on an equal footing and overcome past disadvantages, which presumably result from past discrimination and social and economic privation. They contend that facts at a trial will show that affirmative action programs are the only way that universities in Michigan will remain desegregated, and university admissions policies that do not consider race are *per se* discriminatory against blacks, Latinos, and Native Americans.

Unfortunately, however, college admission at elite universities is a zero-sum enterprise, and programs that prefer some students on the basis of race must do so necessarily at the expense of other applicants not of the preferred race. That stark reality led Justice Powell to reject the proposition that race-based governmental action designed to benefit historically disadvantaged groups should be subject to a less exacting examination than "strict scrutiny," when he wrote in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U.S. at 289-90 (opinion of Powell, J.).

Although some opinions by members of the Supreme Court have advanced the idea that race-based state action designed to "remed[y] the present effects of past racial discrimination" should be allowed if it is "substantially related" to an "important governmental objective," *Fullilove v. Klutznick*, 448 U.S. 448, 518-19 (1980) (Marshall, J., concurring); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, J., concurring) – that is, under the less demanding review standard of intermediate scrutiny – that view never has commanded a majority of the Court except once, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), where the Court went slightly farther. In that case, the Court held that "benign race-conscious measures mandated by Congress – even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Id.* at 564-65. The life span of that rule was relatively short, however, since *Metro Broadcasting* was overruled five years later. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled"). Under a traditional equal protection analysis, therefore, it does not appear that the issues upon which the *Coalition* plaintiffs seek a trial will

materially impact the result in this case; and therefore they cannot forestall summary judgment on the ground of the existence of a "genuine issue as to a[] material fact." Fed. R. Civ. P. 56(c).

The Equal Protection Clause commands that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This language prohibits "official conduct discriminating on the basis of race," *Washington v. Davis*, 426 U.S. 229, 229 (1976), and its ultimate goal is to extinguish such discrimination, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Therefore, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S. at 230.

Because official discrimination can be imposed either expressly on the face of legislation or under the guise of a facially-neutral enactment, the first step in a conventional equal protection analysis is to determine whether the challenged legislation draws any classification. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997); *United Black Firefighters v. City of Akron*, 976 F.2d 999, 1007 (6th Cir. 1992). The determining factor is not whether the enactment has race as its subject matter, but whether it facially purports to accord unequal treatment across racial lines. *See Crawford v. Bd. of Education of City of Los Angeles*, 458 U.S. 527, 538 (1982) (distinguishing "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters").

Proposal 2 is facially neutral. Although it certainly *deals* with racial classifications, it declares in essence that when public bodies make official decisions to admit students, offer employment, or let contracts, no race may be burdened and no race may be benefitted. The law, therefore, points the Court to a different standard by which it must assess the *Coalition* plaintiffs' challenge: "Where facially neutral legislation is challenged on the grounds that it discriminates on the basis of race, the enactment will be required to withstand strict scrutiny only if the plaintiff can prove that it 'was motivated by a racial purpose or object,' or 'is unexplainable on grounds other than race.'" *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 368 (6th Cir. 2002) (quoting *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999)). Mere awareness of discriminatory consequences is inadequate. *Personnel Administrator of Massachusetts v. Feeny*, 442 U.S. 256, 279 (1979). The requirement of discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Ibid.* In addition, a plaintiff challenging facially neutral legislation must show disparate impact. To show disparate impact, a plaintiff must demonstrate that a facially neutral law has the effect of discrimination. *Graoch Assoc. # 33, L.P., v. Louisville/Jefferson County Metro Human Relations Comm.*, 508 F.3d 366, 371 (6th Cir. 2007). However, proving that a law has a racially disparate impact, without more, is insufficient to establish a violation of the Fourteenth Amendment. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977).

"In *Village of Arlington Heights*, the Supreme Court identified five factors that are relevant for determining whether facially neutral state action was motivated by a racially discriminatory purpose: (1) the impact of the official action on particular racial groups, (2) the historical background of the challenged decision, especially if it reveals numerous actions being taken for discriminatory purposes, (3) the sequence of events that preceded the state action, (4) procedural or substantive departures from the government's normal procedural process, and (5) the legislative or administrative history." *Moore*, 293 F.3d at 369 (citing *Village of Arlington Heights*, 429 U.S. at 266-68).

Examining intent in the context of a ballot initiative presents a unique problem due to the sheer number of individuals whose intent is relevant. The Sixth Circuit took a hard line in *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986), holding that "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." *Id.* at 574. Although this standard remains good law, the Sixth Circuit has since expressed doubts about its legitimacy. *Buckeye Comm. Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627, 638 n.2 (2001), *rev'd on other grounds* 538 U.S. 188 (2003). As the *Buckeye* panel noted, the Supreme Court's decision in *Seattle* casts doubt on the *Arthur* standard and shows that, whatever its legitimacy in other cases, it cannot be right in the case of a *Hunter* challenge to a referendum. *Buckeye Comm. Hope Foundation*, 263 F.3d at 638 n.2 (citing *Seattle*, 458 U.S. at 465). But the parties have cited no authority

that undercuts *Arthur*'s precedential application to a traditional equal protection challenge.

When a plaintiff has triggered strict scrutiny, either by showing an express racial classification or disparate impact and discriminatory purpose, the law will be deemed unconstitutional unless the State can justify it by establishing that it is narrowly tailored to serve a compelling state interest. *Johnson v. California*, 543 U.S. 499, 509 (2005).

In the Proposition 209 case, the Ninth Circuit made short work of the plaintiffs' conventional equal protection argument, observing that the measure did not classify individuals by race or gender, and therefore it could not run afoul of the Equal Protection Clause. *Coalition for Economic Equity*, 122 F.3d at 702 ("Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender."). That court held: "Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense." *Ibid.* In staying this Court's preliminary injunction, the Sixth Circuit noted that "the color-blind goal of the Equal Protection Clause is to do away with all governmentally imposed discrimination based on race," 473 F.3d at 249 (internal quotes and citations omitted), and held that "[i]n the end, a law eliminating presumptively invalid racial classifications is not itself a presumptively invalid racial classification." *Id.* at 250. Neither of these cases discussed the idea that at least one purpose

of the respective proposals was to eliminate affirmative action programs, which benefit minorities exclusively. Therefore, they did not consider the prospect that the facially neutral legislation might violate the Clause under the rationale of *Village of Arlington Heights*, *Graoch Assoc.*, and *Moore*. Neither of these cases is binding precedent, *Cross Mountain Coal v. Ward*, 93 F.3d 211, 217 (6th Cir. 1996) (holding that although "decisions of other circuits are entitled to respect, they are not binding upon us"); *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (noting that "a party is not required to prove his case in full at a preliminary injunction hearing and the findings of fact and conclusions of law made by a court granting the preliminary injunction are not binding at trial on the merits") (internal quotes omitted), and they do not obviate this Court's obligation to give the issues a fresh look.

The *Coalition* plaintiffs have offered sufficient evidence to establish a fact question on the disparate impact part of the test. The deposition testimony and affidavits of Theodore Spencer, Sarah Zearfoss, Frank Wu, William Bowen, Jeannie Oakes, Gary Orfield, and even Ward Connerly plainly show that Proposal 2's elimination of affirmative action programs will fall the heaviest on minorities while having little effect on white students. This conclusion is supported by some of these witnesses' statistics, but it also is intuitive: if affirmative action programs have had a positive effect on university admissions of minority students, eliminating them likely will have a negative effect. It is difficult to see how Proposal 2 could *not* have a disparate impact on minorities.

It is the demonstration of a discriminatory purpose that vexes the *Coalition* plaintiffs and dooms their conventional equal protection argument, since the plaintiffs must show that Proposal 2 was enacted "because of, not merely in spite of, its adverse effects upon an identifiable group." *Feeny*, 442 U.S. at 279 (quotations omitted). First, there is the hurdle presented by the *Arthur* standard, which bars "a district court [from] inquir[ing] into the electorate's motivations in an equal protection clause context" when reviewing a facially neutral law (unless "the only possible rationale [for a referendum] is racially motivated"). *Arthur*, 782 F.2d at 574. Based on the evidence presented, the Court cannot say that the only purpose of Proposal 2 is to discriminate against minorities. For instance, Ward Connerly testified that he was motivated to eliminate affirmative action programs because he thinks they are harmful to minorities, who would be better served by being forced to compete without official help with more advantaged white and Asian students. *See Cantrell* Mot. for Summ. J., Ex. K, Connerly Dep. at 120 (expressing the view "that the only way we're going to close this academic gap between black and Latino on the one hand and Asian and white on the other, is not to keep papering over it with preferences, but to apply the tough love that's necessary to get black and Latino students up to the bar"). Jennifer Gratz appears to have been motivated by the desire to gain admission to the University of Michigan herself without having to yield to a minority candidate who would take her place with the benefit of a racial preference. Whether one accepts or rejects Connerly's view that there is virtue in tossing minority students into the deep end and letting them sink or swim on their own (regardless that some might

drown in the meantime), or the more craven approach of Gratz that affirmative action deprives her of her own slice of the pie, both of these viewpoints illustrate that racial discrimination is not the only rationale behind Proposal 2.

Second, even if the *Coalition* plaintiffs could overcome *Arthur*'s strict rule, they cannot satisfy the test for discriminatory intent using the traditional factors from *Village of Arlington Heights*. The first factor courts normally consider in determining whether facially neutral legislation was motivated by a racially discriminatory purpose is the impact of the legislation on particular racial groups. *Moore*, 293 F.3d at 369 (citing *Village of Arlington Heights*, 429 U.S. at 266-68). For the reasons discussed above, that factor favors the plaintiffs. Most of the other factors, however, cut in the opposite direction. The historical background of Proposal 2 and sequence of events that preceded its passage do not suggest discriminatory intent. The public arguments made in support of Proposal 2 did not appeal to racism or amount to a call for segregation; rather, they attempted to appeal to the public's belief in fairness and just treatment. Although Ward Connerly and other major supporters of the amendment knew that Proposal 2 might *lead* to fewer minority admissions, there is no evidence that they intended this. On the other hand, the fact that fraud was committed in the process of securing Proposal 2's place on the ballot does lend some credence to the idea that ulterior motives were at work. Nevertheless, the factor of "procedural or substantive departures from the government's normal procedural process," *Moore*, 293 F.3d at 369, clearly militates against a finding of discriminatory intent when one considers the most

salient departure of all: Proposal 2 was a ballot initiative. To impugn the motives of 58% of Michigan's electorate, in the absence of extraordinary circumstances which do not exist here, simply is not warranted on this record.

To the extent that the *Coalition* plaintiffs' conventional equal protection argument is based on gender discrimination, it is even less compelling. Laws challenged under the Equal Protection Clause based on gender are subject to the less rigorous standard of "intermediate scrutiny," *Tuscon Woman's Clinic v. Eden*, 379 F.3d 531, 543 (2004), which requires "showing an 'exceedingly persuasive justification' for the classification." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). There is little evidence in this record showing that Proposal 2 will have a disparate impact on the admission of women at Michigan's colleges and universities, and virtually no evidence of an intent to discriminate against women in the historical background or procedures that led to the passage of the measure.

Because Proposal 2 is facially neutral, and the *Coalition* plaintiffs cannot show that the measure was enacted with a discriminatory intent, their conventional equal protection challenge must fail as a matter of law.

C. *Hunter/Seattle* Equal Protection Challenge

Both the *Coalition* and the *Cantrell* plaintiffs argue that Proposal 2 unlawfully restructures the political process to disadvantage minorities in achieving equal opportunity in higher education. They reason that before Proposal 2, minority groups could petition

university officials to implement affirmative action programs, or at least consider race among a host of non-academic factors in making admissions decisions. However, after Proposal 2, the only way racial minorities can secure programs that account for race in the assembly of a student body is to seek and obtain passage of another constitutional amendment. That daunting process, they contend, imposes a unique and heavy burden upon them as a class and unconstitutionally distances them from the political process when they seek what the law allows, even if what they seek can be characterized as an advantage.

The attorney general advances five arguments against the plaintiffs' challenge. First, he contends that women and racial minorities together constitute a majority of Michigan's population, and therefore Proposal 2, no matter how it is read, cannot constitute discrimination against a minority group. Second, the attorney general notes that unlike the laws in *Hunter v. Erickson*, *Washington v. Seattle Sch. Dist. No. 1*, and *Romer v. Evans*, Proposal 2 does nothing to *facilitate* discrimination; it *prohibits* discrimination. Third, the attorney general submits that the political restructuring argument requires proof of purposeful racial discrimination, which is absent here. Fourth, the attorney general states that women and racial minorities remain free to advocate practices promoting diversity as long as they do not amount to discrimination. Fifth, the attorney general posits that the university admissions process is not a political process as contemplated in the *Hunter* line of cases, since at Wayne State University the admissions criteria are formulated exclusively by a committee and students are not allowed to vote on these criteria, and

at the University of Michigan the faculty are the primary architects of the admissions policy and there is no formal process by which members of the public or prospective students can even comment on the policy.

The Equal Protection Clause affords protection against laws that grant benefits or impose burdens on the basis of racial classifications, which have been acknowledged to be inherently suspect. *See, e.g. McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964). The lesson of the *Hunter/Seattle* line of cases is that the Clause also protects equal access to the political process against different sorts of discrimination. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (observing that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense").

In *Hunter v. Erickson*, 393 U.S. 385 (1969), the citizens of Akron, Ohio amended the city charter at a referendum election to require that city ordinances regulating the use or sale of real property on the basis of race be approved by a majority of voters at a general election before such ordinances could become effective. The plaintiff unsuccessfully sought to enforce an open housing ordinance that had been adopted by the city council but not submitted to the voters. The Supreme Court held the charter amendment unconstitutional because, although the amendment "declare[d] no right to discriminate in housing" and "place[d] no ban on the enactment of fair housing ordinances," it "was an explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.* at 389. More importantly, the charter

amendment imposed more burdensome rules on those who would seek to win legislation combating race-based housing discrimination. *Id.* at 390 ("Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule [of council approval only]. . . . But for those who sought protection against racial bias, the approval of the City Council was not enough."). This constituted a classification based on race because, although the amendment applied equally to all races, it "nevertheless disadvantage[d] those who would benefit from laws barring racial . . . discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.* at 391. Further, despite the amendment's facial neutrality, there was no doubt that it discriminated against minority interests:

> [A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, *Anderson v. Martin*, 375 U.S. 399 (1964), § 137 places special burden on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.

Id. at 391. To be sure, the Court did not hold unconstitutional the mere act of conditioning legislation on the approval of the people themselves.

Rather, it was the way in which this was *selectively* done that denied equal protection:

> Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

Id. at 392-93.

In *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), the Court invalidated a statewide voter initiative that prohibited school boards from assigning students beyond the schools in their neighborhoods. The initiative contained so many exceptions that it effectively prevented desegregative busing only. In most areas concerning assignment of pupils, the school boards retained their authority, but this was not the case when it came to efforts at desegregation. As in *Hunter*, the Supreme Court held that the initiative drew a racial classification by "remov[ing] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474. That selective restructuring of school board authority burdened future attempts to integrate (and hence minority interests) "by lodging decision-making authority over the question at a new and remote level of government." *Id.* at 483. The Court noted that this was not "'the simple repeal or modification of

desegregation or antidiscrimination laws[, which], without more, never has been viewed as embodying a presumptively invalid racial classification.'" *Ibid.* (quoting *Crawford*, 458 U.S. at 539). Rather, it stacked the deck against minority interests by subjecting them "to a debilitating and often insurmountable disadvantage." *Id* at 484.

> These cases yield a simple but central principle. As Justice Harlan noted while concurring in the Court's opinion in *Hunter*, laws structuring political institutions or allocating political power according to "neutral principles"– such as the executive veto, or the typically burdensome requirements for amending state constitutions – are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." 393 U.S., at 394. Because such laws make it more difficult for *every* group in the community to enact comparable laws, they "provid[e] a just framework within which the diverse political groups in our society may fairly compete." *Id.*, at 393. Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental

> process," *id.*, at 391 (emphasis added), thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395 (emphasis added) (Harlan, J., concurring). Such a structuring of the political process, the Court said, was "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.* at 391.

Id. at 469 (alterations in original).

Drawing heavily upon this passage, the *Cantrell* plaintiffs reason that in order to make out an equal protection violation under ths line of authority, they must establish only that Proposal 2 has a racial focus, and it places an unequal impediment to achieving official action that racial minorities perceive to be in their interest. They insist that they have satisfied both those elements. First, they argue that Proposal 2 singles out race while leaving various other elements of diversity untouched, thereby creating a classification that triggers Fourteenth Amendment scrutiny. Second, they contend that Proposal 2 makes it more difficult to achieve race-conscious admissions policies than other types of beneficial legislation, thereby imposing an unequal and impermissible burden on people of color.

The Court cannot accept entirely the arguments of either the attorney general or the plaintiffs. First, contrary to the attorney general's assertion, there can be no question that Proposal 2 has a racial focus. As noted above, Proposal 2's ban against "grant[ing] preferential treatment to[] any individual or group on the basis of race" can mean nothing less than barring

affirmative action programs. Although it is true that no racial group – minority or majority – can benefit from affirmative action programs under the plain language of Proposal 2, to suppose that races other than minority races would feel the impact of such a restriction defies logic and contemporary reality. "[T]he reality is that the law's impact falls on the minority." *Hunter*, 393 U.S at 391. To that extent, the related argument that racial minorities plus women constitute a majority of the population, and therefore Proposal 2 does not discriminate against minorities, likewise borders on nonsense. The attempt to cobble together an artificial coalition of women and racial minorities in an effort to construct a numerical majority of citizens ignores the fact that affirmative action programs generally are targeted to benefit insular groups that separately have suffered from discriminatory practices in the past because of perceived traits unique to that group alone. Lumping minority groups into a contrived category does not allow any greater political influence over the process of advocating for affirmative action programs to achieve racial parity or otherwise render the process of changing the state constitution "bothersome but no more than that." *Ibid.* The Ninth Circuit accepted this premise in the Proposition 209 case. *Coalition for Economic Equity*, 122 F.3d at 705.

Second, the idea that a political restructuring claim must be based on purposeful discrimination finds no support in the cases. Rather, the Supreme Court requires only that "an inquiry into intent is necessary to determine whether the legislation *in some sense* was designed to accord disparate treatment on the basis of racial considerations." *Seattle School Dist.*, 458 U.S. at 485 (emphasis added). Proposal 2 plainly deals with

racial considerations, and it was designed, among other purposes, to prohibit programs that granted racial preferences, that is, affirmative action programs, at least according to Ward Connerly, its principal drafter. Citation to *Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527 (1982), provides no help to the attorney general's position. In that case, the Court upheld an amendment to the state constitution that limited school districts' authority to reassign and bus students to those instances necessary to remedy a violation of the Equal Protection Clause, that is, when a school district had to respond to prior *de jure* segregation. In holding "that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place," *id.* at 538, the Court made a point to distinguish that case from both *Hunter* and *Seattle School District* because the constitutional amendment in the California case did not involve political restructuring.

Third, the governance of a university, including the regulation of admissions criteria, is part of the political process. As the plaintiffs observe, the universities derive their authority from the state constitution. *See* Mich. Const. art VIII, § 5. Although the admissions criteria are not subject to a vote, prospective students have a right to ask university officials to take into consideration certain factors when they decide how to constitute an admissions class. That, after all, is how race-conscious admissions programs developed in the first place.

The clear effect of Proposal 2 is to prohibit the State and its political subdivisions – including university admissions departments – from adopting affirmative action programs; groups that would like to see such programs implemented now must seek a constitutional amendment that allows them. There is no question, therefore, that Proposal 2 makes it more difficult for minorities to obtain official action that is in their interest. However, the distinction drawn by the Ninth Circuit in the Proposition 209 case between laws that protect against *unequal* treatment on the basis of race and those that seek *advantageous* treatment on the basis of race is one yielded by precedent. As that court put it:

> Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are "equal" and "protection." Impediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.

Coalition for Economic Equity, 122 F.3d at 708 (footnote omitted).

Since *Coalition for Economic Equity* was decided, the Supreme Court has stated that it is permissible for universities to consider race among several criteria for admission, since such schools have "a compelling interest in attaining a diverse student body." *Grutter*, 539 U.S. at 328. The Supreme Court has also since reaffirmed that states have a "compelling interest [in] remedying the effects of past intentional discrimination" with race-conscious programs. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2752 (2007). It also appears that a majority of the justices agree that schools may employ race-based programs to address "the problem of *de facto* resegregation in schooling." *Id.* at 2791-92 (Opinion of Kennedy, J.) (declaring that "[i]n the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition"). But these decisions do not change the fact that affirmative action programs not mandated by the obligation to cure past discrimination are fundamentally different than laws intended to protect against discrimination.

According to the Ninth Circuit, "[e]ven a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment." *Coalition for Economic Equity*, 122 F.3d at 707. If the plaintiffs were to demonstrate that an admissions program that included racial preferences were *required* to combat racial discrimination or prevent resegregation, then perhaps Proposal 2's prohibition against racial preferences might become unconstitutional as applied, although

the measure would then be at odds with itself, since it also bars "discrimination[ion] *against* . . . any individual or group on the basis of race." Mich. Const. art. I, § 26(1). However, the *Hunter/Seattle* line of cases does not prohibit the State from banning programs that give an advantage on the basis of race as a remedy to combating other social disadvantages.

The Court believes that Michigan may limit the ability of discrete groups to secure an advantage based upon a racial classification without offending the Fourteenth Amendment. Neither *Hunter*, *Seattle*, nor *Romer v. Evans* holds otherwise. Because the political restructuring effectuated by Proposal 2 does not offend the Equal Protection Clause by distancing racial minority groups from the means of obtaining *equal* protection, the plaintiffs' challenge to the measure based on these cases cannot prevail.

D. Preemption Arguments

The *Coalition* plaintiffs' final claims allege that Proposal 2 is preempted by Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

Title VI amounts to a blanket prohibition against racial discrimination in the context of federally-funded programs, stating as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. By its terms, Title VI recognizes conflict preemption only. 42 U.S.C. § 2000h-4 ("Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter . . . [or] as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof"). The Supreme Court has explained that conflict preemption "arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Fed. Sav. and Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 153 (1982) (internal quotations and citations omitted).

Title IX is the gender-based analog to Title VI, although it is limited to educational programs that receive federal funds. 20 U.S.C. § 1681(a). Although Title IX does not contain a clause defining the scope of its preemptive effect, the plaintiffs have not argued that it occupies the entire field of legislation to which it relates. However, Title IX expressly provides that it shall not be construed to mandate preferential treatment:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or

> receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

20 U.S.C. § 1681(b).

Proposal 2 contains a failsafe provision that avoids conflicts with federal law insofar as federally funded programs (such as those ordained by Title VI and Title IX) are involved, which states that the measure "does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state." Mich. Const. art. I, § 26(4). The language in the federal statutes and Proposal 2 therefore creates a cross-ruff of sorts that deftly avoids conflicts and at once resolves conflicts in favor of federal law. If either Title VI or Title IX require certain action as a condition of federal funding, then Proposal 2 will allow that action by its own terms. And Proposal 2 is not subject to field preemption because neither federal Act purports to occupy the field.

However, the *Coalition* plaintiffs contend that Proposal 2 is nevertheless preempted because it conflicts with federal regulations promulgated pursuant to Titles VI and IX. In the case of Title VI,

the *Coalition* plaintiffs point to 34 C.F.R. § 100.3(b)(2), which states:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect of subjecting individuals to discrimination* because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. § 100.3(b)(2) (emphasis added). The validity of this regulation has been questioned to the extent it purports to condemn acts that would be permissible under Title VI. *See Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). But even if the Court assumes section 100.3(b)(2) is wholly valid, it still does not conflict with Proposal 2. Proposal 2 does not have the effect of racial discrimination any more than does a law or policy whose use of neutral criteria leads to a disparate impact. Disparate impact alone does not equate to racial discrimination; rather, illegal discrimination results in the case of neutral criteria only when the

actors are motivated by a desire to discriminate. Proposal 2 allows universities to use neutral criteria – grades, test scores, schools of origin, community geographics, economic factors, and a host of others – in the admissions process. If these factors are not suitable proxies that generate racially diverse student populations, the universities will be all the poorer, but not because of conscious discrimination.

The plaintiffs case is even weaker in terms of Title IX. With respect to that act, the plaintiffs rely on 34 C.F.R. § 106.23(a). The regulation reads as follows:

> **Nondiscriminatory recruitment.** A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 106.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 106.3(b).

34 C.F.R. § 106.23(a). To the extent this regulation *requires* preferential treatment, it may be inconsistent with Title IX itself. *See* 20 U.S.C. § 1681(b) (providing that it shall not be "interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex" over another). If affirmative action recruitment programs are required by this section to become eligible for or maintain federal funding, Proposal 2 expressly would allow such action. There is no conflict, therefore, between Proposal 2 and federal law.

IV. Conclusion

The Court finds that all plaintiffs except Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 836, AFSCME Local 1642, and AFSCME Local 2920 have standing to bring this action. The *Coalition* plaintiffs' claims against the university defendants are all properly brought in this case, except the alleged violation of First Amendment rights alleged in Count 6 of the amended complaint. The Court finds no merit in the *Coalition* plaintiffs' conventional equal protection argument, and is constrained to conclude that the plaintiffs' allegations that Proposal 2 violates the Equal Protection Clause under the theory based on *Hunter v. Erickson* and progeny must fail as well. There is no conflict between Proposal 2 and the federal funding provisions discussed above.

Accordingly, it is **ORDERED** that the motion to dismiss by the university defendants [dkt #179] is **GRANTED IN PART AND DENIED IN PART**. Count 6 of the *Coalition* plaintiffs' second amended complaint is **DISMISSED WITH PREJUDICE**.

It is further **ORDERED** that the claims of plaintiffs Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 836, AFSCME Local 1642, and AFSCME Local 2920 are **DISMISSED** for lack of standing.

It is further **ORDERED** that the attorney general's motion for summary judgment [dkt #201] is **GRANTED**.

It is further **ORDERED** that the motion for summary judgment by the *Cantrell* plaintiffs [dkt #203] is **DENIED**.

It is further **ORDERED** that the amended complaints and these consolidated actions are **DISMISSED WITH PREJUDICE**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: March 18, 2008

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on March 18, 2008.

s/Felicia M. Moses
FELICIA M. MOSES

OPPOSITION BRIEF

RECORD AND BRIEF

No. 12-682

SUPREME COURT, U.S. FILED
FEB 4 - 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,

-AND-

CHASE M. CANTRELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS CHASE CANTRELL ET AL. IN OPPOSITION

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QUESTION PRESENTED

Whether a state initiative violates the Equal Protection Clause by amending a state constitution to remove from the ordinary political process of governmental decisionmaking a constitutionally permissible topic solely because it is "racial in nature."

PARTIES TO THE PROCEEDING

Petitioner is Bill Schuette, Michigan Attorney General. Respondents are Chase Cantrell, M.N., a minor child, by Karen Nestor, Mother and Next Friend, Karen Nestor, Mother and Next Friend of M.N., a minor child, C.U., a minor child, by Paula Uche, Mother and Next Friend, Paula Uche, Mother and Next Friend to C.U., a minor child, Joshua Kay, Sheldon Johnson, Matthew Countryman, M.R., a minor child, by Brenda Foster, Mother and Next Friend, Brenda Foster, Mother and Next Friend of M.R., a minor child, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, T.J., a minor child, by Cathy Alfaro, Guardian and Next Friend, Cathy Alfaro, Guardian and Next Friend of T.J., a minor child, S.W., a minor child, by Michael Weisberg, Father and Next Friend, Michael Weisberg, Father and Next Friend of S.W., a minor child, Casey Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, Edward Kim, M.C.C., II, a minor child, by Carolyn Carter, Mother and Next Friend, Carolyn Carter, Mother and Next Friend of M.C.C., II, a minor child, J.R., a minor child, by Matthew Robinson, Father and Next Friend, and Matthew Robinson, Father and Next Friend of J.R., a minor child (together, the "Cantrell Respondents").

In the consolidated case, there is a separate group of Respondents, which includes the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), United for Equality and Affirmative Action Legal Defense Fund, Rainbow Push Coalition, Calvin Jevon Cochran, Lashelle Benjamin, Beautie Mitchell, Denesha Richey, Stasia Brown,

Michael Gibson, Christopher Sutton, Laquay Johnson, Turqoise Wiseking, Brandon Flannigan, Josie Human, Issamar Camacho, Kahleif Henry, Shanae Tatum, Maricruz Lopez, Alejandra Cruz, Adarene Hoag, Candice Young, Tristan Taylor, Williams Frazier, Jerell Erves, Matthew Griffith, Lacrissa Beverly, D'Shawn Featherstone, Danielle Nelson, Julius Carter, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Dante Dixon, Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 386, AFSCME Local 1642, AFSCME Local 2920, and the Defend Affirmative Action Party (together, the "Coalition Respondents"). Additional defendants below are the Regents of the University of Michigan, the Board of Trustees of Michigan State University, the Board of Governors of Wayne State University, Mary Sue Coleman, Irvin D. Reid, and Lou Anna K. Simon.

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INTRODUCTION

By invalidating Michigan Ballot Proposal 06-02 ("Proposal 2"), the Sixth Circuit, sitting en banc, restored to every citizen in Michigan the constitutionally guaranteed right to equal and robust political participation. Proposal 2, an amendment to the Michigan Constitution passed by voters in 2006, prohibits the State and its political subdivisions from, *inter alia*, "grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public education." As enacted, Proposal 2 manipulates the political process by imposing distinctively disadvantageous barriers upon proponents of permissible policies under the Fourteenth Amendment incorporating consideration of racial identity and background as part of a diverse student body. Proposal 2 slants the political process in a way that disfavors policies that would take race into account, but favors—indeed, mandates—policies that bar taking race into account. Stated more specifically, Proposal 2 rigs the political process *against* race-based policies that *favor* racial diversity so as to systemically *endorse* race-based policies that *disfavor* racial diversity by discriminatorily recalibrating the rules of governmental decisionmaking.

In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982), this Court acknowledged that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action," but legislation, precisely like Proposal 2, that "allocates governmental power nonneutrally, by explicitly using the *racial* nature of

a decision to determine the decisionmaking process" violates the Equal Protection Clause. *Id.* Thus, Michigan may enact a constitutional amendment that subjects *all* revisions to state universities' admissions policies to statewide ballot initiative. The Fourteenth Amendment, however, does not permit Michigan to selectively distort the decisionmaking process so that only those citizens who advocate consideration of race—as compared to those who oppose any consideration of race or those who advocate or oppose consideration of factors other than race—must clear the significant hurdle of mounting a successful campaign to amend the Michigan Constitution. Pet. App. 15a ("[T]he political-process doctrine hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course.").

To be clear, the Sixth Circuit's ruling does not concern the constitutionality of race-conscious admissions. Such programs, if properly designed, today remain constitutionally permissible under the Fourteenth Amendment but not required. Nor does the Sixth Circuit's ruling challenge the ability to repeal such programs, once instituted. Such a repeal remains constitutionally permissible. *See Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, 539 (1982). The government entities that instituted the programs may therefore repeal or modify them at anytime, and at the state level, there are ample ways to repeal or modify them without running afoul of the Fourteenth Amendment.

Proposal 2, however, is no mere repeal. The vice of Proposal 2 is that it selectively shuts off access to

the ordinary political processes for advocates of otherwise constitutionally permissible race-conscious policies—even though those ordinary political processes remain fully open and available to advocates for consideration of other non-racial factors or criteria. Proposal 2 further singles out race-conscious admissions policies for peculiarly burdensome treatment by entrenching a ban on such policies in the state constitution while leaving other admissions practices in the hands of state universities' elected or governor-appointed boards (hereinafter "Boards"), which, under Michigan law, have long enjoyed autonomy over admissions policies.

Proposal 2 effectively creates two political processes of governmental decisionmaking for higher education admissions policies: one that preserves the Boards' traditional control over whether to consider legacy status, athletics or virtually any other lawful factor in the admissions process, and another that requires a constitutional amendment before the Boards can even consider whether to adopt race-conscious admissions policies, even when such policies would pass muster under this Court's stringent Fourteenth Amendment standards. By targeting race in admissions for "peculiar and disadvantageous treatment," Proposal 2 "plainly 'rests on distinctions based on race'" and is therefore a presumptively unconstitutional "racial classification." *Seattle*, 458 U.S. at 485 ("[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." (internal quotation marks

omitted)); *see also Hunter v. Erickson*, 393 U.S. 385, 393 (1968) ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.").

Thus, strictly following the principle established by this Court in *Seattle* and *Hunter*, the Sixth Circuit held that Proposal 2 violated the Equal Protection Clause of the Fourteenth Amendment. Petitioner now seeks review before this Court, disputing the merits of the Sixth Circuit's equal protection analysis, but none of his critiques warrant this Court's review for the reasons set forth below.

STATEMENT[1]

Under its state constitution, Michigan's public universities are controlled by independent Boards, each of which has the power of "general supervision of its institution and the control and direction of all expenditures from the institution's funds." Mich. Const. art. VIII, § 5. Board members have long enjoyed autonomy over admissions policies, and they have largely delegated the responsibility to establish admissions standards, policies, and procedures to units within the institutions, including central admissions offices, schools and colleges. Students, faculty, and other individuals have always been free to lobby Michigan's public universities for or against

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[1] The en banc, panel, and district court opinions set out in more detail the undisputed facts underlying this litigation. *See* Pet. App. 7a-12a; 106a-111a; Supp. Pet. App. 270a-292a.

the adoption of particular admissions policies. They have historically done so. By the 1990s, in response to decades of robust, hard-fought political debate, admissions decisions in many of Michigan's public universities' graduate and undergraduate programs included consideration of race as one of a multitude of factors.

In 2003, this Court in *Grutter v. Bollinger* upheld as constitutional the University of Michigan Law School's holistic, race-conscious admissions policy. 539 U.S. 306, 325, 334 (2003). On the same day, the Court invalidated the admissions policy of the University of Michigan's undergraduate college as not narrowly tailored to serve the State's compelling interest in obtaining the educational benefits of student-body diversity. *See Gratz v. Bollinger*, 539 U.S. 244, 275-76 (2003).

Following *Grutter* and *Gratz*, Michigan's public universities amended their admissions policies as needed to comply with *Grutter*. After *Grutter*, for instance, the University of Michigan's undergraduate admissions officers, "[i]n the context of . . individualized inquiry into the possible diversity contributions of all applicants," *Grutter*, 539 U.S. at 341, considered race along with another "50 to 80 different categories," such as personal interests and achievements, geographic location, alumni connections, athletic skills, socioeconomic status, family educational background, overcoming obstacles, work experience and any extraordinary awards, both inside and outside the classroom. Supp. Pet. App. 283a-284a.

In response to this Court's rulings in *Gratz* and *Grutter*, a proposal to amend the Michigan Constitu-

tion was placed on the November 2006 statewide ballot. The initiative, Proposal 2, sought "to amend the State Constitution to ban affirmative action programs." *See* Notice of State Proposals for November 7, 2006 General Election, http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf, at 5 (last visited Jan. 31, 2013). It passed. Proposal 2 amended the Michigan Constitution to include the following provisions, entitled "Affirmative Action," in Article I:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or with-

> in the State of Michigan not included in sub-section 1.

Pet. App. 8a-9a (citing Mich. Const. art. I, § 26).[2] No prior constitutional amendment in Michigan had ever dealt with any matter relating to university admissions or in fact with anything related to higher education governance or affairs.

In December 2006, Proposal 2 took effect and produced for the first time two significant changes to the admissions policies at Michigan's public universities. First, Michigan's public universities were required to categorically remove "race, sex, color, ethnicity, or national origin" as potential factors in the admissions process even though the Boards and their designated admissions committees could continue to consider any and all other factors. Pet. App. 9a. Second, Proposal 2 "entrenched this prohibition at the state constitutional level, thus preventing public colleges and universities or their boards from revisiting this issue—and only this issue—without repeal or modification of [Proposal 2]." Pet. App. 9a.

On November 8, 2006, the day after Proposal 2 was approved, the Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary (the "Coalition Plaintiffs") filed suit in the United States District Court for the Eastern District of Michigan.

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[2] Michigan is home to fifteen public four-year universities and twenty-eight public two-year community colleges. *See* Michigan's Higher Education System, http://www.pcsum.org/Portals/0/docs/fsu_heguide2.pdf (last visited Feb. 1, 2013).

About a month later, the Michigan Attorney General filed a motion to intervene as a defendant, which the court granted. Pet. App. 10a.

On December 19, 2006, the Cantrell Plaintiffs, a group of students, faculty, and prospective applicants to Michigan's public universities, filed a separate suit in the United States District Court for the Eastern District of Michigan. Pet. App. 10a. The Cantrell Plaintiffs sought to prohibit Proposal 2's enforcement only as applied to university admissions, Pet. App. 10a, on the grounds that Proposal 2 violates the Fourteenth Amendment by impermissibly skewing and restructuring Michigan's political process insofar as it establishes a separate governmental decisionmaking process for higher education admissions policies that satisfy the Fourteenth Amendment and *favor* consideration of race (as opposed to those that *limit* consideration of race), thereby curtailing the same avenues of public discourse available for consideration of race-neutral policies and programs.

The district court consolidated the two cases on January 5, 2007. *See* Pet. App. 109a. After discovery, the district court denied the Cantrell Plaintiffs' motion for summary judgment and granted the Attorney General's motion for summary judgment. *See* Pet. App. 11a-12a; Supp. Pet. App. 267a-336a. The district court then denied the Cantrell Plaintiffs' motion to alter or amend its Order. Pet. App. 12a.

The Cantrell Plaintiffs appealed the district court's grant of the Attorney General's motion for summary judgment and its denial of their motion for reconsideration. Pet. App. 12a. Simultaneously, the

Coalition Plaintiffs appealed the district court's grant of the Attorney General's motion for summary judgment. Pet. App. 12a. A three-judge panel of the Sixth Circuit reversed. Pet. App. 12a, 101a-183a. Following this Court's precedent in *Seattle* and *Hunter*, the panel held Proposal 2 unconstitutional as applied to Michigan's public universities and ordered that summary judgment be entered in favor of the Plaintiffs-Appellants. Pet. App. 140a, 156a. The Sixth Circuit granted the Attorney General's petition for rehearing en banc. Pet. App. 12a.

Sitting en banc, the Sixth Circuit invalidated Proposal 2. Relying on *Seattle* and *Hunter*, the Sixth Circuit held that a political enactment denies equal protection when it (1) has a "racial focus," insofar as it targets a policy or program for selective excision from the ordinary political processes solely because, as a facial matter, it *favors* some consideration of race as a factor to be taken into account in admissions and (2) "reallocates political power or reorders the decisionmaking process" in a way that shuts off all the usual channels of discourse and debate available for similar topics not racial in nature. Pet. App. 21a-22a (citations omitted).

As the Sixth Circuit recognized, it is undisputed that after Proposal 2, the *only* recourse available to a person seeking to restore the constitutionally permissible consideration of race as one factor in higher education admissions is to mount a successful statewide electoral campaign to amend the Michigan Constitution—"an extraordinarily expensive process and the most arduous of all the possible channels for change." Pet. App. 36a. In contrast, a Michigan citizen lobbying against the consideration of race, or for

or against consideration of race-neutral factors such as legacy status, athletics or indeed any other dimension of experience or background treated as an identifying characteristic, may use any number of less burdensome avenues to change or maintain admissions policies, for example, directly engaging in discourse with the Boards or the appropriate university committees. *See* Pet. App. 35a. As the Sixth Circuit explained, "[b]ecause less onerous avenues to effect political change remain open to those advocating consideration of nonracial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to traverse a more arduous road without violating the Fourteenth Amendment." Pet. App. 37a-38a.

REASONS FOR DENYING THE WRIT

The petition should be denied.

First, Petitioner alleges that the Sixth Circuit made several errors in its application of *Seattle* and *Hunter* to the distinctive facts of this case. Such requests for error-correction are inappropriate grounds for granting certiorari. Moreover, many of Petitioner's critiques are highly fact-bound and entirely Michigan-specific. In any event, the Sixth Circuit's ruling is a proper application of this Court's established precedent in *Seattle* and *Hunter*. *See* Part I *infra*. Proposal 2 creates an impermissible race-based classification within the political process for governmental decisionmaking by singling out policies that favor race-conscious admissions for particularly disadvantageous treatment, compared to other pertinent elements of diversity that a University

may still decide whether to consider in admissions through the ordinary political processes.

Second, Petitioner argues that the Sixth Circuit's ruling conflicts with this Court's decision in *Grutter*. To the contrary, *Grutter* supports, rather than undermines, the Sixth Circuit's decision. *See* Part II *infra*.

Third, although the Sixth Circuit declined to follow the Ninth Circuit's decision to uphold a ballot initiative similar to Proposal 2, this very shallow split deserves further percolation. The Ninth Circuit's holding is unlikely to be persuasive outside its jurisdiction because it relies on reasoning that has been undermined by subsequent decisions of this Court in *Grutter* and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). In fact, the Ninth Circuit hedged its reasoning on the presumption that those cases would come out entirely the opposite way. *See* Part III *infra*.

Finally, there is no justification for this Court to grant certiorari to overrule *Seattle* and *Hunter*. *See* Part IV *infra*. In recent years, attempts to distort the political process by racial classification so as to cut off public debate and cleave certain topics from the ordinary political process because they are "racial in nature" have been fortunately rare, but the core doctrine articulated in *Hunter* and *Seattle* cannot be extracted without undermining the integrity of the Fourteenth Amendment and recasting its animating purpose. *Hunter* and *Seattle* are firmly grounded in the longstanding and incontrovertible rationale that "[t]he Equal Protection Clause of the Fourteenth Amendment guarantees . . the right to

full participation in the political life of the community." *Seattle*, 458 U.S. at 467. Indeed, the core holding of *Seattle* and *Hunter* has, if anything, been strengthened in light of the course of Fourteenth Amendment jurisprudence over the past thirty years, including such decisions as *Grutter* and *Parents Involved*.

I. THE SIXTH CIRCUIT'S STRAIGHTFORWARD APPLICATION OF *SEATTLE* AND *HUNTER* DOES NOT WARRANT THIS COURT'S REVIEW.

The political restructuring doctrine proscribing racial classifications within the political process is a bedrock tenet of Fourteenth Amendment jurisprudence, originally set forth by this Court in *Hunter* and *Seattle*. The Sixth Circuit correctly applied these longstanding precedents in striking down Proposal 2.

In *Hunter*, black and white citizens of Akron, Ohio had won passage of a local ordinance outlawing racial and religious discrimination in housing. White citizens then waged a successful campaign to amend the city charter to repeal that ordinance and to prevent the adoption of any similar ordinance until it was approved in a referendum. The Court found that the charter amendment forced those who wanted protection from racial or religious discrimination to run a gauntlet that those who sought to prevent other abuses in real estate did not have to run. The Court struck down the amendment because the "State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or

give any group a smaller representation than another of comparable size." *Hunter*, 393 U.S.at 393.

Seattle reaffirmed *Hunter*. Blacks and other citizens had won school board approval of a busing plan to lessen the *de facto* segregation in Seattle's public schools. White citizens then waged a successful campaign to pass a statewide initiative prohibiting school boards from using busing to achieve racial integration, while permitting the use of busing for a number of other purposes. The Court again held that a state could not selectively gerrymander the political process to impose more onerous political burdens on those seeking to promote racial integration than it imposed on those pursuing other policy agendas. *See Seattle*, 458 U.S. at 474-75.[3]

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[3] Given the historical contexts leading up to the articulation of this principle, it is scarcely surprising that it was initially framed in part by reference to those groups most likely to be disadvantaged from the plucking out of racial topics from the political process, whether "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), or "racial minorities," *Hunter*, 393 U.S. at 391. In *Seattle*, however, the Court held that the Constitution did not permit "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Seattle*, 458 U.S. at 467. The same is true, of course, no matter what group of persons finds itself targeted by a state law that selectively rigs the political decisionmaking process against it simply because that group seeks to advocate race-conscious policies. *Hunter*, 393 U.S. at 393 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."); *see*

Petitioner raises three critiques of the Sixth Circuit's application of *Hunter* and *Seattle* to the distinctive facts of this case. In each instance, however, the Sixth Circuit faithfully interpreted and applied these established precedents. In any event, however, these requests for mere error-correction are not sound reasons to grant the petition. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

A. Proposal 2 Has a Racial Focus.

As a threshold matter, the selective political restructuring doctrine applies here because Proposal 2 has a "racial focus." Pet. App. 26a. As the Sixth Circuit correctly ruled, Pet. App. 22a-26a, Proposal 2 surgically removes, categorically prohibits, and uniquely burdens otherwise permissible consideration of race in the ordinary political processes utilized by Michigan's elected or politically appointed Boards to fashion admissions policy at state universities. Petitioner contends that the Sixth Circuit erred in holding that Proposal 2 has a "racial focus," because it "does not burden minority interests and minority interests alone." Pet. 21. But this argument mistakes the underpinnings of the Fourteenth Amendment. Even more so in the case of Proposal 2 than with Initiative 350 in *Seattle*, for example, the stark focus is on the face of the initiative: race-conscious policies that are consistent with the Four-

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City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226-27 (1995); *Parents Involved*, 551 U.S. at 741-42.

teenth Amendment are explicitly and categorically deleted from the political process by the text of Proposal 2. *See Seattle*, 458 U.S. at 474.

The fact that Proposal 2 also prohibits consideration of sex—another constitutionally protected class—as a factor in the admission process does not defeat a valid claim of racially selective political restructuring, as *Hunter* and *Seattle* confirm. In *Hunter*, the challenged initiative burdened racial and non-racial minorities which, grouped together, constituted a majority of the electorate, but this Court found that the law nonetheless had a racial focus. 393 U.S. at 387, 390-91; *accord Lee v. Nyquist*, 318 F. Supp. 710, 716-17 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971); *Seattle*, 458 U.S. at 472 ("[W]e may fairly assume that members of the racial majority both favored and benefited from [the] fair housing ordinance [at issue in *Hunter*]."). Moreover, "[t]he history of Proposal 2 and its description on the ballot leave little doubt" that "[h]ere, as in *Hunter*, the clear focus of the challenged amendment is race." Pet. App. 26a n.4. Of course, were it otherwise, those seeking to distort the political process in the ways proscribed by this Court in *Seattle* and *Hunter* could achieve their aim merely by strategically including more than one class of policy topics in their list of taboo areas as a subterfuge. *Id.*

Indeed, *Seattle* "conclusively answers whether a law targeting policies that seek to facilitate classroom diversity, as Proposal 2 does, has a racial focus." Pet. App. 23a. Just as constitutionally permissible programs that promote racial diversity within public schools "prepar[e] minority children for citizenship in our pluralistic society, while . . teaching

members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Seattle*, 458 U.S. at 473 (internal quotation marks and citation omitted), constitutionally permissible race-conscious admissions policies at universities "promote[] cross-racial understanding, help[] to break down racial stereotypes, and enable[] students to better understand persons of different races," *Grutter*, 539 U.S. at 330 (alteration omitted) (internal quotation marks omitted).

Thus, both the enactment at issue in *Seattle* and Proposal 2 rigged decisionmaking on race-conscious policies. As a result of Proposal 2, Michigan's public universities are able to continue considering virtually *any* aspect of students' backgrounds and experiences as part of their individualized, holistic admissions process—*except* for race. While all other citizens may continue to advocate admissions policies that advance their own interests, anyone who believes that any of Michigan's public universities should restore their prior race-conscious admissions policies may now express this belief only by seeking a state constitutional amendment.

B. Michigan Admissions Policies Are Part of the Political Process.

Petitioner next argues that the Sixth Circuit erred because admissions policies in Michigan "are not part of the political process," Pet. 23, insofar as the Boards of Michigan's public universities have delegated the responsibility of establishing admissions standards to politically unaccountable admissions committees. Not only does Petitioner's argument require an exclusively fact-bound interpreta-

tion of Michigan law that does not warrant this Court's review, but it is also erroneous.

First, such delegation does not affect whether admissions decisions should be considered part of the political process. As the Sixth Circuit explained, although "rule-making powers are delegated from the President to appointed cabinet officials . . . to civil service professionals . . . [, w]ithout question, federal rule-making is part of the political process." Pet. App. 32a.

Second, as a clear matter of state law, Petitioner's argument is belied by the Michigan Constitution, state statutes, university bylaws and current practices—which, together, empower popularly elected, politically accountable governing Boards with broad authority to alter or revoke any delegation of responsibility, including that to admissions committees. *See* Pet. App. 31a-32a (summarizing Boards' authorities). Petitioner's argument is likewise contradicted by the undisputed factual record below, which demonstrates that the democratically elected Boards regularly discuss admissions practices at their monthly public meetings. *Id.* at 30a-31a (summarizing evidence). Tellingly, Board candidates include their views on race-conscious admissions policies in their platforms.[4] Thus, the Sixth Circuit correctly

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[4] *See* Pet. App. 33a (citing League of Women Voters, 2005 General Election Voter Guide, *available at* http://www.lwvka.org/guide04/regents/html (last visited Jan. 31, 2012) (noting that a candidate for the Board of Regents pledged to "work to end so-called 'Affirmative-Action,' a racist, degrading system")).

held that admissions decisions are an integral part of Michigan's political process.

Petitioner further argues that the "political gymnastics" involved in lobbying at the university level are "far worse than simply achieving a 51% vote in a statewide referendum." Pet. 24. This argument, too, is fact-intensive, Michigan-specific, and utterly flawed. The Sixth Circuit's decision does not, as Petitioner suggests, mandate that "a state may end affirmative action in higher education only through such a Byzantine route," nor is Michigan "constitutionally barred from pursuing a simpler means of addressing the issue." Pet. 24. Rather, the Equal Protection Clause bars Michigan from "allocat[ing] governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Seattle*, 458 U.S. at 469-70. Nor may Michigan "remov[e] the authority to address a racial problem—and *only* a racial problem—from the existing decisionmaking body." *Id.* at 474. Under this Court's precedents, and the Sixth Circuit's opinion, a simpler, *race-neutral* means of addressing this issue would not run afoul of the Fourteenth Amendment.[5]

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[5] Petitioner wrongly asserts that, in *Seattle*, this Court "expressly disclaimed that the political-restructuring theory would apply in this context." Pet. 17. Petitioner cites to the *Seattle* majority's response to Justice Powell's dissent, where he wondered whether, "if the admissions committee of a state law school developed an affirmative-action plan," other public university officials with arguably "greater authority under state law" might be powerless after *Seattle* to modify it. 458 U.S. at 498 n.14 (Powell, J., dissenting). In response, however, the *Se-*

In any case, these arguments are purely factual in nature, turning on Michigan law and practices, and therefore are not a basis for this Court's review.

C. The Political Restructuring Doctrine Proscribes All Racial Classifications Within the Political Process, Drawing No Distinction Between Antidiscrimination Legislation and So-Called Preferential Treatment Legislation.

Finally, Petitioner contends that the Sixth Circuit erred because the political restructuring doctrine applies "only to laws or policies that condone discrimination against minorities" rather than laws that "prohibit discrimination by precluding unconstitutional, preferential treatment." Pet. 15 (emphasis omitted). Petitioner is wrong: *Hunter* and *Seattle* permit no distinction between "the political-process rights afforded when seeking antidiscrimination legislation and so-called preferential treatment." Pet. App. 39a. Petitioner's contrary view is incompatible

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attle majority merely confirmed that its decision did not create a "vested constitutional right to local decisionmaking." *Id.* at 480 n.23. Rather, it was the "racial nature of the way in which [Initiative 350] structure[d] the *process* of decisionmaking" that the *Seattle* Court found objectionable. *Id.* Thus, "the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a *race-neutral* manner." *Id.* (emphasis added). And of course, Justice Powell's scenario is not what occurred in Michigan, where Proposal 2 foreclosed any possibility of action by university officials with regard to using race—and race alone—as a factor in admissions "by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 483.

with those cases, which constitutionally protect a fair political *process* as opposed to any particular *outcome*. As *Seattle* held, the purpose of the political restructuring doctrine, fortified by the Court's subsequent decisions, is to ensure that a state does not wall off certain racial issues in their entirety from the ordinary political process for discourse and decisionmaking.

Furthermore, *Seattle*'s facts foreclose Petitioner's argument and demonstrate that the political-process doctrine does not apply only to laws that "condone discrimination against minorities." Pet. 15. Indeed, "[t]he only way to find the *Hunter/Seattle* doctrine inapplicable to the enactment of preferential treatment is to adopt a strained reading that ignores the preferential nature of the legislation at issue in *Seattle*, and inaccurately recast it as anti-discrimination legislation." Pet. App. 39a. Petitioner does just that. Pet. 16-17 ("The *Seattle School District* referendum barred the use of busing, but only if used to combat the effects of historic discrimination."). While not a basis for this Court's review in any case, Petitioner's efforts to modify *Seattle*'s facts to support this purported distinction fail.

In *Seattle*, this Court struck down a statewide initiative that banned an inter-district busing program aimed at integrating Seattle's elementary and secondary schools, even though the busing program was not constitutionally mandated to remedy *de jure* segregation. *See* 458 U.S. at 461-64; *see also Parents Involved*, 551 U.S. at 720 (noting that the public schools in Seattle School District No. 1 were never "segregated by law" nor "subject to court-ordered desegregation"). The inter-district busing program was

thus an "ameliorative measure, and not a response to discrimination." Pet. App. 39a. "Because prohibiting integration (when it is not constitutionally mandated) is not tantamount to discrimination . . . the Court in *Seattle* did not (and could not) rely on the notion that the restructuring at issue impeded efforts to secure equal treatment." Pet. App. 39a-40a (internal quotation marks omitted).

Petitioner inaccurately attempts to recategorize the enactment at issue in *Seattle* as one which "made it more difficult for minorities to lobby for protection from discrimination." Pet. 17 (emphasis omitted). Yet, in applying the political restructuring doctrine to an obstacle impeding a policy intended to promote non-remedial voluntary integration, the *Seattle* Court drew no distinction between the equal protection rights at stake in seeking antidiscrimination legislation and those at stake in seeking what Petitioner characterizes as preferential treatment. *Cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

II. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY OTHER DECISION OF THIS COURT.

Petitioner also contends that "the Sixth Circuit's decision . . . conflicts with *Grutter*." Pet. 9. Once again Petitioner seeks mere error correction in the application of this Court's precedents and, once again, Petitioner's legal analysis is flawed.

In *Grutter*, this Court allowed universities to "consider[] race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration," a holding that the Sixth Circuit did not "address or upset." Pet. App. 7a. Indeed, as the Sixth Circuit expressly recognized, this case is *not* about the "constitutional status or relative merits of race-conscious admissions policies." Pet. App. 13a. The narrow question before the Sixth Circuit was whether Proposal 2 violates the Equal Protection Clause by distorting the political process to toughen the rules of engagement solely because the constitutionally permissible subject matter *favored racial diversity*. *Grutter* did not remotely touch, let alone address, that issue.

Petitioner further argues that the Sixth Circuit's decision conflicts with this Court's dicta in *Grutter* presuming that race-conscious admissions policies "must be limited in time." Pet. 18 (quoting *Grutter*, 539 U.S. at 342). Petitioner asserts that after the Sixth Circuit's decision, "[w]hat was merely permitted is now required." Pet. 18. Petitioner either misunderstands or misstates the Sixth Circuit's holding. The Sixth Circuit neither requires race-conscious admissions policies in Michigan, nor prevents their repeal. *See infra* Part IV. All that its decision does is to keep open the usual and otherwise available channels of political decisionmaking and discourse to debate the pluses and minuses of treating racial background and experience in the same way as universities value (or do not value) other backgrounds and experiences in the course of identifying and selecting a diverse student body. Nor does the Sixth Circuit's decision prevent Michigan from "experi-

menting with a wide variety of [race-neutral] alternative approaches," Pet. 18 (quoting *Grutter*, 539 U.S. at 342), such as, for example a statewide initiative replacing multi-factor, individualized review policies passing muster under *Grutter* with admissions policies that consider only applicants' GPA and SAT scores. And the governing Boards can certainly institute, repeal and modify admissions policies an programs as they always have.

Finally, Petitioner contends that the Sixth Circuit's decision conflicts with *Grutter*, which he claims "held that it is unconstitutional for a university to pursue a race-based admissions program that inures primarily to the benefit of minorities." Pet. 9. That was not the holding of *Grutter*. This Court did not address whether race-conscious admissions policies "inure primarily to the benefit of minorities," or have a "racial focus," for purposes of a political-restructuring claim. Rather, the Court held that public colleges and universities have a compelling interest in "obtaining the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343. And while it is certainly true that increased representation of racial minorities in higher education benefits all students, *see Grutter*, 539 U.S. at 327-33; *Seattle*, 458 U.S. at 472-73, this Court has made clear that this fact does not undermine a political restructuring claim, as Petitioner erroneously suggests. Pet. 19.

For example, in *Seattle*, this Court recognized that although "white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom," *Seattle*, 458 U.S. at 472 (internal quotation marks omitted), it was reasonable to assume

"that members of the racial majority both favored and benefited from [the] Akron[] fair housing ordinance" at issue in *Hunter*. *Id.* Moreover, the Sixth Circuit's conclusion that race-conscious admissions policies have a "racial focus" does not render such policies unconstitutional under *Grutter*. *See* 539 U.S. at 328 (internal quotation marks omitted). Petitioner's assertion to the contrary misses the meaning of *Grutter* altogether.[6]

III. FURTHER PERCOLATION IN THE COURTS OF APPEALS IS WARRANTED TO ADDRESS THE SHALLOW, AND STALE, SPLIT BETWEEN THE SIXTH AND NINTH CIRCUITS.

Petitioner is correct, Pet. 10, that the Sixth Circuit declined to follow the Ninth Circuit's decision in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), but it would be premature for this Court to resolve this split. No other court of appeals has yet addressed this issue, and this Court would benefit from further percolation insofar as the Ninth Circuit's ruling likely will be of limited persuasive value outside of its jurisdiction.

As the Sixth Circuit correctly recognized, *Wilson* is "incompatible" with this Court's more recent decision in *Grutter*. Pet. App. 40a n.8. *Wilson* is equally incompatible with *Parents Involved*, which also postdated *Wilson*. In *Wilson*, the Ninth Circuit upheld a

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[6] As Petitioner acknowledges, "[t]his case presents a different issue" from what is at stake in *Fisher v. University of Texas at Austin*, No. 11-345, which is currently pending on this Court's docket. Pet. 13 n.2.

California ballot initiative similar to Proposal 2 by manufacturing an exception to the *Hunter/Seattle* doctrine for "impediment[s] to receiving preferential treatment," such as race-conscious admissions policies. 122 F.3d at 706-09. For the Ninth Circuit, the critical distinction was that the race-conscious admissions policies banned by the California ballot initiative are "inherently invidious" whereas the desegregation programs at issue in *Seattle* simply provided equal protection against discrimination. *Wilson*, 122 F.3d at 707 n.16.

As discussed in Part I.C *supra* and explained in more depth by the Sixth Circuit, this distinction is an erroneous application of *Hunter* and *Seattle*. Equally significant, this distinction is untenable after *Grutter* and *Parents Involved*. *Grutter* established that narrowly tailored race-conscious admissions programs are not always inherently invidious. *See* 539 U.S. at 334-44. By contrast, consideration of individual students' race in the voluntary busing program at issue in *Seattle* was more than just equal protection from discrimination. *See* Pet. App. 39a ("The only way to find the *Hunter/Seattle* doctrine inapplicable to the enactment of preferential treatment is to adopt a strained reading that ignores the preferential nature of the legislation at issue in *Seattle* . . . ."). The Sixth Circuit's reasoning also is consistent with *Parents Involved*, in which this Court held that not all desegregation programs are constitutionally permissible. 551 U.S. at 722-48. And while the error of the *Wilson* court's distinction may not have been obvious in 1997, *Parents Involved* and *Grutter* plainly expose its flaws.

More recently, in *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012), a panel of the Ninth Circuit rejected another challenge to the California ballot initiative at issue in *Wilson*. Yet, as the Sixth Circuit recognized, the *Brown* decision "offered only conclusory support for the precedential decision in *Wilson*." Pet. App. 40a-41a n.8. While the Ninth Circuit in *Brown* rejected the contention that *Grutter* "overrules" *Wilson*, it failed to grapple with and recognize the extent to which *Grutter* and *Parents Involved* undermine the core distinction underlying *Wilson*. *See Brown*, 674 F.3d at 1136. Instead, the *Brown* panel simply parroted the erroneous distinction in *Wilson* in support of its "bottom line" that its prior decision "remains the law of the circuit," and, therefore, that it would be inappropriate for a panel to overrule it. *Id.*

Notwithstanding Petitioner's argument to the contrary, the California Supreme Court's decision in *Coral Construction, Inc. v. San Francisco*, 235 P.3d 947 (Cal. 2010), does not augment the case for granting certiorari. *See* Pet. 11. Like *Brown*, *Coral Construction* simply follows *Wilson* in wrongly concluding that "[i]mpediments to preferential treatment do not deny equal protection" and therefore are not subject to the *Hunter/Seattle* doctrine. *See Coral Construction*, 235 P.3d at 959 (quoting *Wilson*, 122 F.3d at 708). The California Supreme Court entirely failed to address the impact of this Court's more recent decisions in *Parents Involved* and *Grutter*.[3]

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[3] And contrary to the assertion of some of Petitioner's amici, the Sixth Circuit's decision does not conflict with the Louisi-

Because there is at most a very shallow and likely stale split on the question presented, this Court should await further percolation in the lower courts regarding application of existing and well-settled Fourteenth Amendment jurisprudence in the distinctive, and ultimately narrow, context at issue here.

IV. THERE IS NO JUSTIFICATION FOR GRANTING CERTIORARI TO RECONSIDER *SEATTLE*.

Petitioner argues that to the extent this Court reads *Seattle* as prohibiting state constitutional amendments such as Proposal 2, this Court should grant certiorari to overrule *Seattle* because "[t]he people and the states should have the option of eliminating the use of race-based preferences in higher education." Pet. 19.

Petitioner's argument reflects once more a fundamental misunderstanding of what is at issue here. As the Sixth Circuit correctly recognized, this case does not present "a second bite at *Gratz* and *Grutter*,"

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ana Supreme Court's decision in *Louisiana Associated General Contractors, Inc. v. Louisiana*, 669 So. 2d 1185 (La. 1996). *See* Br. Amicus Curiae of Pacific Legal Foundation et al. 15-17. That decision held that a state constitutional prohibition against race-conscious programs, as applied in the context of minority contracting programs, does not violate the Fourteenth Amendment. *Id.* at 1199. But the Louisiana Supreme Court did not consider the issue before the Sixth Circuit—whether such a state constitutional provision would violate this Court's precedents in *Seattle* and *Hunter* to the extent that it is applied in the higher education context to distort the State's ordinary processes for formulating admissions policy.

Pet. App. 13a. The issue is not whether "Michigan citizens may . . . no longer wish to measure every person to categorize them into a neat assignment of race or ethnicity," Pet. 20-21. As discussed above, the citizens of Michigan may choose any constitutionally permissible admissions policies for any of their public colleges and universities and then modify or repeal them as they assess the results. *See Crawford*, 458 U.S. at 539.

Proposal 2, however, is not merely a one-time repeal of permissible race-conscious admissions programs. As discussed, Proposal 2 gerrymanders the political process, relegating the topic of race-conscious admissions to a separate, distant, and far more cumbersome playing field—one that is unplayable for all practicable purposes—so as to silence debate and strip the political process of its capacity to judge policy based on individualized merit. Proscriptions on such racial classifications are in the wheelhouse of the Fourteenth Amendment.

The *Hunter/Seattle* doctrine is entirely consistent with a long line of Fourteenth Amendment cases holding that strict scrutiny is triggered when government action "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *Seattle*, 458 U.S. at 485-86 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)); *see also Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (noting that "[d]epartures from the normal procedural sequence also might afford evidence" of an Equal Protection violation); *cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (requiring heightened justification under Title VII for a public employer's racially selec-

tive restructuring of its promotion process). The Fourteenth Amendment thus prohibits not only the direct disenfranchisement of minorities, but also the deliberate and selective exclusion of consideration of otherwise permissible policies with a racial focus from the usual political process.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

February 4, 2013

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OPPOSITION BRIEF

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

Whether a state constitutional amendment violates the Equal Protection Clause by prohibiting black, Latina/o, Native American and other minority citizens from proposing through the democratic means that all other citizens may use that state university faculties and governing bodies adopt lawful, racially-conscious admissions plans in order to increase the opportunities for minority students to attend those universities?

Whether a state constitutional amendment violates the Equal Protection Clause by creating a substantive standard and an individual right of action to enforce that standard which selectively regulate and limit the state universities' ability to admit black, Latina/o, Native American and other minority students?

PARTIES TO THE PROCEEDING

The Coalition Respondents accept the listing of the parties by the Petitioner.

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JURISDICTION

The Coalition Respondents accept the Petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Constitutional provisions cited by the Petitioner, the following provisions are relevant to this case:

Article 1, Section 2 of the Michigan Constitution provides in relevant part as follows:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. . . .

Article 1, Section 26 of the Michigan Constitution provides in relevant part as follows:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.

* * *

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan's anti-discrimination law.

(7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

STATEMENT OF THE CASE

A. Introduction: the actual issues at stake.

The Coalition Respondents agree that as to admissions in higher education, there is a direct conflict between the governing decisions of the Sixth Circuit and the Ninth Circuits, agree that the issues dividing the circuits are of paramount importance, and agree with Michigan's Attorney General that this Court should grant the writ of certiorari to resolve the conflict between the Sixth Circuit's en banc decision in this case and the Ninth Circuit's decisions in *Coalition for Economic Equity v. Wilson,* 122 F.3d 692 (9th Cir. 1997)

and *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012).

The Coalition Respondents seek review, however, not because the Sixth Circuit was wrong, but because it was right. They ask this Court to extend the protections for the right to political equality recognized by the Sixth Circuit's en banc opinion to California and the other four states that have adopted constitutional amendments identical to the one at issue here.

The Coalition Respondents emphatically disagree with the Attorney General's attempt to frame the issues presented here by characterizing Article 1, Section 26 of the Michigan Constitution ("Proposal 2") as an amendment that "prohibits discrimination," "mandates equal treatment," or "eliminates preferences."

To begin with, this case has nothing to do with a state's power to ban "discrimination." Michigan adopted a constitutional ban against discrimination on account of race and national origin in 1963. MI Const 1963, art 1 sec 2. Proposal 2 repeated that ban, but only for the purpose of creating a more acceptable appearance for its real objective. MI Const 1963, art 1, sec 26(2). There is not, and never has been, a dispute over whether Michigan's preexisting ban on discrimination was constitutionally valid.

The real objective of Proposal 2—which is a word-for-word copy of California's Proposition 209—is its ban on "granting preferential treatment to" persons on account of "race, sex, color, ethnicity, or national origin..." MI Const 1963, art 1, sec 26(2); CA Const art

1, sec 31. The framers of these proposals chose the term "preferential treatment" carefully because it appealed to prejudice. But in higher education, the term "preferences" in practice has always meant disparities in the grades and test scores, whose neutrality and predictive force have long been sharply disputed.

In legal terms, Proposal 2 and Proposition 209 assert the "theory of the color-blind Constitution," which, in higher education, has meant no departures from the grade and test score criteria for the purpose of admitting minority students.

As this Court has held on many occasions, "...as an aspiration Justice Harlan's axiom [of the color-blind Constitution] must command our assent," but "[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 788 (2007)(Kennedy, J., concurring in the judgment). Despite that holding, however, the two proposals use the axiom of the color-blind Constitution as a *universal principle* to limit the *political* right of minority residents even to propose, through the procedures available to all others, the adoption of a racially-conscious admission plan and as a *universal principle* to regulate admissions at state universities including by private actions to enforce that principle.

In analyzing these proposals, we begin with the real world that the Attorney General has completely ignored. As this Court knows, and as is set forth in more detail below, Michigan's universities, like most in the nation, have adopted adjusted grade point averages

and scores on standardized tests as the baseline criteria for admissions. But over the course of decades, the universities have identified numerous factors that justify departures from those criteria. Until the passage of Proposal 2, the elected university governing boards had complete control over all admission criteria, and the state's residents could therefore add to, change, or delete any of those factors through a simple majority vote by the faculties or by the elected governing boards who supervised those faculties.

Proposal 2, like Proposition 209 before it, selectively changed that. The universities may now adopt *any* factors authorizing departures from their baseline criteria of grades and test scores for *any* purpose—*except* that they may not consider race for the purpose of admitting black, Latina/o or Native American applicants. Thus, Michigan's black, Latina/o and Native American residents may no longer even propose that the governing boards adopt the exact plan that this Court held was the only practical means by which their children could be admitted to the state's leading universities. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

The Sixth Circuit rightly decided that this selective restriction on the political rights of racial minorities—and of black, Latina/o and Native American residents in particular—violated the guarantee of political equality protected by this Court's decisions in *Hunter v Erickson*, 393 U.S. 385(1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). On that issue, *Wilson* held directly to the contrary.

Proposal 2, however, contains yet another limit on minority rights, which the Sixth Circuit majority did not need to reach, but which *Wilson* peremptorily rejected. By definition, a selective admissions system necessarily includes numerous implicit and explicit "preferences" that the university uses to determine the character and mix of the students it admits. But Proposal 2 applies its "no preferences" standard only to those alleged preferences that benefit women and racial minorities and it creates a private right of action to enforce that prohibition, a right that has not ever been granted to any other critic of the university's standards. The proponents claim that its ban is neutral, but the only explicit consideration of race is for the purpose of admitting minority students. In practice, Proposal 2 hands the opponents of minority admissions a legal sword to wield whenever and wherever a university admits what the opponents believe are too many minority students.

The Attorney General claims that it is impossible to determine who Proposal 2 actually burdens. But in the real world, there is no doubt on that question. In 2003, the University of Michigan's attorneys told this Court that eliminating affirmative action would cause a one-third fall in minority admissions at its Law School. They were too optimistic. In six years, Proposal 2 has slashed the share of black, Latina/o and Native American students in the entering classes in Michigan's undergraduate college by one third, slashed the share of those students at the Law School by 40 to 50 percent, and slashed the share of those students at the Dental and Medical Schools by 70 percent or more.

Off. of the Registrar, Univ. of Mich., Tables 843 and 844 at http://ro.umich.edu (last visited Feb. 2, 2013).

The President and Chancellors of the University of California have informed this Court that the effects in California are even worse. The number of black students in the entering classes at UCLA and Berkeley has fallen by 50 percent while Latina/o admissions have not reached pre-209 levels despite a 25 percent increase in the percentage of Latina/os in that state's high-school graduating classes. As the UC officials informed this Court, they have found no way to reverse that precipitous fall. See Brief Amicus Curiae of the Pres. And Chancellors of the Univ. of California, *Fisher v. University of Texas*, No. 11-345, at 18-19, 31-32.

Justice Blackmun once declared that this Court "dare not" adopt the theory of the color-blind constitution. *Regents of the University of California v. Bakke*, 438 U.S. 265, 407 (1978)(Blackmun, J., dissenting). That is far truer today. Half of all of the children born in the country are racial "minorities." Already, half or more of the high-school students in numerous states are black and Latina/o. But as the nation inexorably becomes a majority-minority nation, these proposals mean that it will have far fewer black and Latina/o lawyers, doctors, and leaders in all fields than it has today.

The Attorney General claims that Michigan's citizens chose this future by approving Proposal 2 by a 58 to 42 percent margin. He neglects to tell this Court that nine out of ten black citizens cast votes against it, that two out of three white citizens cast votes for it, and that it passed solely because white voters

outnumbered minority voters by six to one. R. 222-2, Dep. of Linski, Ex. 3. Even more significantly, he offers no reason for conferring upon an electoral majority the power to deny minority citizens of the right to propose through means equal to those available to others those lawful plans that are essential if their children are to be admitted to the state's universities.

If state universities, subject to review by this Court, undeniably have the right to determine under equal procedures when and whether to adopt affirmative action programs in particular circumstances, the Sixth Circuit correctly recognized that there is no state's right to ban all officials from ever considering and all citizens from ever proposing such programs.

In fact, if the state's right proposed by Michigan's Attorney General were recognized, it would allow the states, acting one by one, to force the theory of the color-blind Constitution upon the Fourteenth Amendment itself, simply by choking off any procedure by which any official or citizen could ever assert a compelling interest.

There is no dispute that two of the original purposes of the Fourteenth Amendment were to provide a federal guarantee of political equality to the newly-free slaves in all areas except voting and to eliminate the special laws that restricted the employment, education and other rights of the new black citizens. As is set forth below, Proposal 2 and Proposition 209 have the distinction of violating both of these core, original purposes of the Fourteenth Amendment itself.

B. The factual reality that the Attorney General has ignored.

From 1863 forward, the elected Regents of the University of Michigan and, later, the elected Board of Trustees of Michigan State University and Board of Governors of Wayne State University have had full discretion to establish the admissions standards for any college or school that they have established. MI Const. 1850 art 13, secs. 6-8; MI Const. 1963, art. 8, sec. 5. They have delegated some of those tasks to faculties and university administrators, but as the Sixth Circuit concluded, the governing boards have always retained the right to approve any admission standards that the faculties might adopt. Pet. App. 27-33a.

In the early 1960s, the University of Michigan and, later, the other two state universities first adopted adjusted grade point averages and standardized test scores as their baseline criteria. From the beginning, however, all three of Michigan's constitutionally-created universities departed from those criteria in order to admit veterans, poorer and working-class students, rural students, athletes, children of alumni, children of donors and politicians, and numerous other categories of applicants.

At first, none of the universities recognized exceptions for the purpose of increasing minority admissions. But the results were disastrous. In the 1960s, the University of Michigan Law School graduated 3,032 white students, eight black students, and, as far is known, no Latina/o or Asian students. R. 222-19; UM Law School Graduates. The reasons for

the virtual exclusion of minority students are rooted in the reality of how adjusted grade point averages and standardized test scores operate in the real world as it existed then—and, with important changes, as it exists today.

Six decades after *Brown*, the large majority of Michigan's black, Latina/o, and Native American students attend largely segregated elementary and secondary schools. Even though the segregation is now *de facto* rather than *de jure*, these schools still have fewer and less qualified teachers; less resources and programs; non-existent counseling programs; and so on. If the colleges adjust grade point averages upward for students who took advanced placement and similar classes, the graduates from these segregated schools simply cannot fairly compete with those who attend more privileged schools.

There has been important progress, of course, and today, significant numbers of black and Latina/o students attend integrated suburban schools or central city magnet schools that offer far greater opportunities. But even for the black and Latina/o students in those schools, equality has not been achieved. In the suburban schools, they face racial isolation and, at times, hostility. On average, their families have less material and educational resources; and they, unlike their white peers, face the pervasive stigma of inequality that still harms the hearts and minds of minority students today. Even on the criteria of adjusted grade points, they face distinct obstacles in competing with their white peers.

But the difficulty on the grade point component of the admission criteria pales in comparison with the obstacles presented by the standardized tests. As Ward Connely testified in a deposition that is part of the record of this case, black students from the richest quintile of income still score lower, on average, than white students from the poorest quintiles. The reasons for that include differences in the educational programs, how the test questions are selected, language background and difficulties, the special anxiety that minority test-takers face due to negative racial stereotypes, and a host of other factors. But the end result is beyond dispute: racial minorities are at a large disadvantage on the standardized tests.

Before the 1970s, the rigid application across racial lines of the baseline criteria meant that few in Michigan's large black and small Latina/o and Native American communities had any real hope of attending the University of Michigan, however hard they worked. But in 1970, black and white students, joined by supporters across the state, spoke, rallied and stayed away from classes in order to win increased enrollment for black and other minority students. They specifically used the political procedures that Proposal 2 has now closed to persuade the Regents to adopt the University of Michigan's first affirmative action plans.

Those plans considered race and thus departed from the grade-test score criteria in order to admit minority students. They opened the doors of the universities to the qualified minority graduates of the high schools in Michigan and in the country, and soon the proud black, Latina/o and Native American graduates from Michigan's universities joined those from other state

and national universities to form the black and Latina/o leaders who are so prominent and so important today.

When those programs were challenged because they supposedly granted unlawful "preferences" to black, Latina/o and Native American applicants, *Grutter* upheld the Michigan Law School plan because it was the only practical way to further the "paramount" national interest in assuring that the path to leadership was open to qualified black, Latina/o and Native American students.

Two days after *Grutter* was decided, the supporters of Proposal 2 announced the campaign to amend the state constitution to overrule *Grutter* by adopting a copy of California's Proposition 209. As noted, Proposal 2 deprived racial minorities of equal political rights by prohibiting the governing bodies from adopting by simple majority vote any plan that granted "preferential treatment" to minority applicants. Proposal 2 also substantively banned the universities from departing from the grade-test score criteria for the purpose of admitting minority applicants and it backed up that ban by declaring its provisions "self executing," which automatically granted a private right of action for any person who claimed to be aggrieved by this asserted "preferential treatment." Significantly, no person has ever been given such a private right of action to challenge any of the myriad of other departures from grades and test scores or of the other explicit and implicit preference in the university's admissions criteria. MI Const, art 1, sec. 26(7), Ca Const, art 1, sec. 31(7).

Proposal 2 passed by the racially-polarized vote described above. Since that day, the doors have closed to many of the black, Latina/o and Native American students who had hoped to attend the Michigan's universities, including, above all, the University of Michigan. Moreover, particular national groups among Michigan's Asian and Arab populations, who have historically been excluded for reasons analogous to those set forth in *Grutter*, can no longer even propose that the universities should adopt special admissions programs for them.

The Proposals have meant that Michigan's and California's universities may consider any form of inequality and diversity in their admissions policies except the deepest form of inequality and most important and difficult type of diversity. Proposal 2 and Proposition 209 have meant that university officials must be blind to the racial inequality that is glaringly obvious in every metropolitan area in the country.

C. The decisions below.

The Coalition plaintiffs filed this action on the day after the November 2006 general election where Proposal 2 passed. In relevant part, they asserted that Proposal 2 violated the right to political equality protected by *Hunter* and *Seattle* and the Fourteenth Amendment's ban on special laws that created standards and remedies applicable to racial minorities alone.

A month after the election, another group of plaintiffs (the "Cantrell plaintiffs") filed suit, asserting

solely a claim of unequal political rights under *Hunter* and *Seattle*. The district court consolidated the actions, and they have been joined together ever since.

At the conclusion of discovery, the Attorney General, citing *Wilson*, filed a motion for summary judgment asserting that Proposal 2 did not violate *Hunter* and *Seattle* because minorities were not entitled to political equality when they fought for "preferences" and asserting that the special restrictions and causes of action for challenging minority admissions were consistent with the Fourteenth Amendment.

On the count of political equality, the Coalition plaintiffs opposed the Attorney General's motion on the grounds that *Wilson's* "preferences" limit to equality contradicted this Court's decisions in *Hunter* and, especially, *Seattle* and that the theory of the color-blind Constitution that underlie both the proposals and the *Wilson* opinion was inconsistent with dozens of decisions by this Court.

On that count, the Coalition plaintiffs further asserted that the standards that *Wilson* implicitly adopted for determining what was a "preference" in higher education—namely, the adjusted grade point averages and test score baselines—could not possibly be used for determining rights to political equality under the Fourteenth Amendment. In particular, they asserted, it made no sense to assert that racial minorities had the right to political equality in fighting against their exclusion from the universities, but not when they asked for departures from the standards that effectuated that exclusion. The Coalition offered

evidence on those points, asserted that there was a factual dispute on them, and asked for a trial to prove the baseline standards were not suitable for determining the limits of political equality under *Hunter* and *Seattle*. R.222, Coal. Resp. Summ. Judg., at 24-34.

On their second claim, the Coalition plaintiffs asserted that Proposal 2 applied its preference standard and its private right of action only to the admissions of women and of minorities, which violated the Fourteenth Amendment.

The Cantrell plaintiffs filed a cross motion for summary judgment that asserted that *Wilson's* preferences standard was not in accord with *Hunter* and *Seattle*.

On March 18, 2009, the district court granted the Attorney General's motion for summary judgment and denied the Cantrell plaintiffs' cross motion for summary judgment on the basis that *Hunter* and *Seattle* purportedly did not prevent an unequal structure of government when racial minorities sought an "advantage based on a racial classification." Pet. App. Supp. 329a-330a, citing *Wilson*, 122 F.3d at 707. In reaching that conclusion, the district court did not address the factual evidence offered by the Coalition plaintiffs as to the nature of the criteria being used to determine "preferences" or "advantages" and whether those criteria were appropriate for defining the rights to political equality that were and were not protected by the Fourteenth Amendment. The district court rejected the Coalition plaintiffs' claim that Proposal 2 was a special law on the grounds that there was no

evidence that the electorate harbored a racial animus when it voted for Proposal 2. Pet. App. 319a.

The Coalition plaintiffs immediately appealed to the Sixth Circuit, and the Cantrell plaintiffs appealed after the district court denied their motion to alter or amend the judgment. Pet. App. 184a-193a.

On July 1, 2011, a divided panel of the Sixth Circuit reversed the district court and struck down Proposal 2's application to University admissions on the basis that it had, indeed, created an unequal structure of government in violation of *Hunter* and *Seattle*. The panel explicitly rejected *Wilson*, calling the purported distinction between "preferences" and "discrimination" "controversial" and "obfuscating" and concluding that that limit was not consistent with *Hunter* or, especially, *Seattle*. Pet. App. 141a-147a.

Judge Gibbons dissented on the basis that admissions processes were committed to the faculties and thus not a political process at all. Pet. App. 160a-178a. She expressed sympathy with *Wilson's* "preferences" limitation, but declared that it was unnecessary to reach that issue. Pet. App. 179a-181a.

The Attorney General petitioned for and was granted en banc review. On November 15, 2012, the Sixth Circuit, sitting en banc, ruled by a vote of 8 to 7 that Proposal 2 created an unequal structure of government in higher education, in violation of *Hunter* and *Seattle*, and, as a result, found that it need not address the Coalition plaintiffs' second claim. The en banc Sixth Circuit specifically affirmed the district court's conclusion that Proposal 2 had a "racial focus,"

Pet. App. 22a-26a, found that the procedure for adopting admissions standards was a political process, Pet. App. 26a-33a, and concluded that Proposal 2 violated *Hunter* and *Seattle* because it imposed on minority residents a political burden that no other citizens had to endure when they sought changes in admissions standards that furthered their interests. Pet. App. 35a-40a. The en banc panel specifically rejected *Wilson's* "preferences" limitation on political equality because it was "fundamentally at odds with *Seattle*." Pet. App. 39a.

There were five separate dissenting opinions by members of the en banc panel, which can be only briefly summarized here.

Judge Gibbons, delivering the main dissent, reiterated and elaborated her view that the admissions process was not a political process. Pet. App. 66a-78a. In contrast to her dissenting opinion on the panel, she reached the issues presented by *Wilson* and declared her view that racial minorities did not have the right to political equality when they fought for "preferences." Pet. App. 57a-66a.

Judge Boggs praised the principles announced by Proposal 2, lamented that it would take eight years to elect enough opponents of affirmative action to the governing boards, and declared his opinion that the majority was "far afield" from *Hunter* and *Seattle*. Pet. App. 51a-55a.

Judge Rogers joined Judge Gibbons' dissent and added that he believed that it was hard to see how any governmental institution that had a subordinate body

could pass a "no-race-preference" policy. Pet. App. 79a-80a.

Judge Sutton suggested that the 2006 vote meant that state officials could not thereafter assert that the state had a compelling interest for an affirmative action plan. Pet. App. 80a-81a. He declared that Proposal 2 "does not place 'special burdens' on racial minorities," Pet. App. 83a, then declared that he "does not doubt that Proposal 2 places a burden on the proponents of affirmative action," Pet. App. 88a, and finally declared that to the extent that Proposal 2 "disadvantages anyone," it disadvantages groups that "together account for a majority of Michigan's population." Pet. App. 92a. He repeated Judge Boggs' claim that it would take too long for those opposed to affirmative action to elect members of the governing boards, Pet. App. 86a-87a, and asserted that Michigan's electoral majority should have the right to end consideration of any affirmative action plans by the quickest and simplest means available to that majority. Pet. App. 86a-88a.

Finally, Judge Griffin joined Judge Gibbons' dissent, except insofar as she said the procedures for determining admissions were not a political process, and called on this Court to overrule the "ill-advised" "political structure" doctrine announced in *Hunter* and *Seattle*. Pet. App. 96a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE A DIRECT SPLIT BETWEEN THE SIXTH AND THE NINTH CIRCUITS ON AN ISSUE OF SURPASSING NATIONAL IMPORTANCE.

A. There is an open, deep, and irreconcilable split between the Sixth and Ninth Circuits.

The split between the Sixth Circuit's decision in this case and the Ninth Circuit's decisions in *Wilson* and *Brown* could not be clearer. Michigan's Proposal 2 and California's Proposition 209 are identical. But the Sixth Circuit held that *Hunter* and *Seattle* required it to strike down Proposal 2, while *Wilson* held that *Hunter* and *Seattle* did not even apply to Proposition 209. Pet. App. 38a-41a; *Wilson,* 122 F.3d at 705-708.

Wilson held that *Hunter* and *Seattle* protected minorities' right to political equality when they fought against "discrimination," but not when they fought for "preferential treatment." *Id.*, at 708. It further declared that Proposition 209 addressed race in a neutral fashion. *Id.*, at 705-707, citing *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527 (1982).

The Sixth Circuit directly rejected *Wilson's* attempt to exempt the right to equality in the fight for "so-called preferences" as "fundamentally at odds with *Seattle*." Pet. App. 39a-41a. The Sixth Circuit found that Proposal 2 specifically burdened racial minorities, Pet. App. 26a-38a, and specifically rejected the claim

that it was neutral or a mere repeal of an existing program. Pet. App., 41a-45a.

In *Coalition v. Brown,* which was decided after the Sixth Circuit panel had struck down Proposal 2, many of the organizations and individuals who are plaintiffs in this action asked the Ninth Circuit panel to hold that *Wilson* did not apply in higher education. The *Brown* panel declined because it believed it had to follow *Wilson*. *Id.*, 674 F 3d at 1135. The Ninth Circuit then denied en banc review, despite the evident conflict with the Sixth Circuit's panel decision and despite the fact that the Sixth Circuit had already heard arguments en banc. The split between the Sixth and the Ninth Circuits is thus not only deep, but also irreconcilable.

The direct split between the circuits is paralleled by a split within each circuit. Seven judges dissented from the en banc opinion of the Sixth Circuit, Pet. App. 51a-100a, and five judges dissented from the denial of en banc review in *Wilson,* declaring that Proposition 209 was unconstitutional under *Hunter* and *Seattle*. *Wilson*, 122 F.3d at 711-718 (Schroeder, Pregerson, Norris, Tashima, Hawkins, JJ, dissenting from den of reh. en banc). Even fifteen years later, Judge Tashima, sitting as a member of the *Brown* panel, declared that he still believed that Proposition 209 violated *Hunter* and *Seattle* and that he would so rule today if he did not believe that *Wilson* required him to rule otherwise. *Coalition v. Brown*, 674 F.3d at 1136.

The reasoning of the Sixth Circuit also differs sharply from a divided decision of the California Supreme Court upholding Proposition 209 as applied to

public contracting. *Coral Const., Inc. v. City and County of San Francisco*, 50 Cal.4th 315, 235 P.3d 947 (2010). However, the standards normally used to evaluate bids, the statutory authority of those who decide the successful bidder, and the interests and parameters for affirmative action in contracting differ greatly from the analogous aspects of admissions. There is not, therefore, necessarily a split between the holding of the en banc panel in this case and the Supreme Court of California, but the difference in reasoning provides a supplemental reason for granting the writ in this case.

B. The issues on which the circuits are split are of surpassing importance.

The issue upon which the circuits are split could not be more important.

The 39th Congress proposed and the states ratified the Fourteenth Amendment in order to provide a uniform, federally-enforceable guarantee of political equality for the newly-freed slaves in every area except voting, which was soon protected by the Fifteenth Amendment. Under any circumstances, a significant split between the circuits over the scope of the Fourteenth Amendment's guarantee of political equality is inherently of fundamental importance to the nation.

But the split is of even greater importance here because it involves education, which is the "the bedrock of equal opportunity and 'the very foundation of good citizenship," Pet. App. 15a, citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). The universities, in

particular, are the "training ground for a large number of our Nation's leaders" and provide the first steps on the "the path to leadership." Pet. App. 15a, citing *Grutter*, 539 U.S. at 332. If it is vital, as *Grutter* held, to keep the path to leadership open to "qualified students of all races," it is therefore vital that the procedures made available to minority citizens be kept open so that they can propose the plans that will make it possible for their children to actually walk down that path to leadership.

If anything, the years since *Grutter* have confirmed the importance to the nation of the programs at issue here. As is even more apparent today, the nation as a whole will soon be majority-minority and already is so in many states and among the youth in many more states. But these proposals have, as noted, cut the admissions of black, Latina/o and Native American students to leading universities by one-third in Michigan and by up to one-half in California. Rising numbers of minority citizens and falling numbers of minority leaders are the route to disaster. The ability to have fair and equal procedures to decide what can be done is thus of exceptional national importance.

Four states beyond Michigan and California have adopted identical amendments. The Attorney General attempts to create the false impression that there is a groundswell of support for such proposals. While that is not true, it is true that if political leaders decide to allocate the money, they can persuade electorates in other states to adopt such proposals by the same type

of racially-polarized vote that occurred in Michigan. This Court should thus decide the issue now before the nation is put through more of those divisive campaigns.

Finally, as important as the issue involved is to the nation, it is of life-altering importance for that part of the nation that is black, Latina/o, or Native American. As *Grutter* recognized—and the experience of California and Michigan has now confirmed—many well-qualified minority students can *only* gain admission to leading universities if those universities have adopted a lawful affirmative action program. Quite simply, a split over whether a state may deny a racial minority the right to fight for the adoption of programs that will allow its youth to attend the universities is of surpassing importance.

By definition, a federal Amendment designed to provide a national guarantee of political equality must have the same meaning in Michigan as it does in California. If Proposal 2 is unconstitutional in higher education, so, too, are Proposition 209 and the identical proposals in Washington, Arizona, Oklahoma and Nebraska. The Court should grant the writ because the whole country should have benefit of the rights now protected in the four states of the Sixth Circuit.

II. THE COURT SHOULD GRANT THE WRIT BECAUSE THE NINTH CIRCUIT HAS DEPARTED FROM BINDING DECISIONS OF THIS COURT AND FROM THE FUNDAMENTAL COMMANDS OF THE FOURTEENTH AMENDMENT ITSELF.

In *Hunter*, this Court struck down an Akron, Ohio charter amendment that selectively limited the powers of the City Council by requiring it to submit any proposed fair-housing amendment to a referendum of the citizens. The Court struck down the amendment because the state "...may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393.

In *Seattle*, this Court struck down a state constitutional amendment that allowed local school boards to use busing for any purpose *except* racial integration. Again, the Court did so because the amendment required "those favoring the elimination of de facto school segregation to seek relief from the state legislature or from the statewide electorate," while "authority over all other student assignment measures, as well as over most areas of educational policy, remains vested in the local school board." *Seattle*, 458 U.S. at 474.

As the Sixth Circuit held, Proposal 2 and identical proposals elsewhere fall squarely within the holdings of both *Hunter* and *Seattle*. The proposals selectively and drastically limit the otherwise plenary academic powers of the governing boards in one area alone—the

admission of minority students. The words quoted from *Seattle* in the preceding paragraph exactly describe what Proposal 2 and Proposition 209 have done in higher education.

Both *Hunter* and *Seattle* recognized that there might be an exception to the principles that they announced if a state demonstrated a compelling interest in support of that exception. *Hunter*, 393 U.S. at 562 (Harlan, J., concurring); *Seattle*, 458 U.S. at 485 n. 28. But neither *Wilson* nor the dissenters below stated, attempted to state, or much less proved such a compelling interest. They sidestepped the entire requirement simply by saying that "preferences" were exempt based on a linguistic analysis of the words "equal" and "protection."

At base, the *Wilson* opinion and that of the dissenters below rests on the notion that it is unfair for well-qualified minority students to be admitted with lower grade point averages and scores than rejected white applicants. But contrary to *Brown v. Board* and every case that followed it, they did not test that assumption against reality. Indeed, they took no note at all of the racial bias captured, reflected, and often exaggerated by the criteria that the universities use.

Beyond their unverified notions of fairness, *Wilson* and the dissenting judges below strain to find a legal justification for their attempt to exempt advocacy for *Grutter* plans from the protection of *Hunter* and *Seattle*. They cite decisions by this Court that the consideration of race in admissions is presumptively unlawful and must be subjected to strict scrutiny, but they fail even to recognize that this Court has long held

that those presumptions could be overcome by showing a compelling interest and that the plan in *Grutter* was lawful precisely because it fully met those tests.

Moreover, they offer no support—because there is none—for their assertion that the presumption and strict scrutiny standards that this Court has directed the *federal* courts to use in determining *which* plans are constitutional can be converted into a license for *state* action declaring that *all* such plans are *always* illegal.

Hunter and *Seattle* held that the Fourteenth Amendment did not allow the white majority to convert its beliefs, whether sincerely held or not, into amendments that prevented racial minorities from fighting through means available to all others for constitutionally-valid measures to lessen racial exclusion and inequality. The majority in Akron may have sincerely believed that a property owner should be able to sell or rent as he chose—but it could not prevent the minority from fighting for fair housing laws to end its exclusion from specific neighborhoods. Similarly, the majority in Washington may have sincerely believed in neighborhood schools—but it could not ban consideration of busing programs to end minorities' exclusions from particular schools. Finally, the majority in Michigan may sincerely believe in admissions based on grades and test scores—but it cannot ban racial minorities from the procedures available to others when they ask the governing boards to end their exclusion by departing from those criteria.

By keeping the channels of change open, *Hunter* and *Seattle*—and *Romer v. Evans*, 517 U.S. 620 (1996),

which was based on analogous principles—made possible great progress. And especially now, with more changes coming, the nation should not retreat from those principles.

In the end, the sole difference between the property-rights and neighborhood-school justifications found wanting in *Hunter* and in *Seattle* and the "color-blind" justification offered here is that the theory of the color-blind Constitution claims quasi constitutional justification because it is an "aspiration," *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in the judgment), and because a minority of Justices believe that it should serve as a universal principle today.

But in the strongest terms, this Court's majority has repeatedly held that the theory of the color-blind Constitution cannot serve as a "universal constitutional principle." *Id.* Least of all can it serve as a universal principle for defining the scope of political equality guaranteed by *Hunter*, *Seattle* and the Fourteenth Amendment, or for establishing essentially immutable standards for deciding who will have benefit of the training that makes possible so many opportunities.

The states have no right to declare that the Fourteenth Amendment itself is color-blind simply by eliminating the political procedures by which citizens can propose and officials can decide whether to recognize a compelling interest that justifies a *Grutter* plan. Especially in those states with small minority populations, it is vital to extend federal protection for the right of minority citizens to political equality in attempting to win approval for lawful programs that

will make it possible for their children to go to the state's universities. They may not win those fights—but the Fourteenth Amendment guarantees them the right to make those fights. The Court should grant review to correct a fundamental error that the Ninth Circuit has committed in denying that protection.

III. THE COURT SHOULD GRANT THE WRIT BECAUSE MICHIGAN'S PROPOSAL 2 HAS CREATED, FOR THE FIRST TIME IN MANY DECADES, A LAW THAT REGULATES AND LIMITS THE EDUCATIONAL OPPORTUNITIES OF A CLASS OF CITIZENS DEFINED BY THEIR RACE.

Wilson accepted as good coin Proposition 209's professions of equality and, on that basis, peremptorily rejected the claim that its substantive standard violated the Equal Protection Clause:

> Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.

Wilson, 122 F.3d at 702

Yet the question is not so simple.

In the first place, there is the question of how the court determines what is a "preference" or an "advantage." There is absolutely no basis for concluding the grade-test score baseline is a neutral standard for determining what a "preference" is. Indeed, in effectively compelling the universities to rigidly use that standard—with all its adverse effects on minority students—the amendment is actually compelling the university to perpetuate the effects of racial inequality. And a law that mandates the perpetuation of *de facto* segregation either is or is perilously close to *de jure* segregation.

Second, the grade-test score standard is particularly inappropriate for determining "preference" because there are so many exceptions to it. In *Wilson,* where the plaintiffs challenged all aspects of Proposition 209, they pressed the general point that the state granted numerous exceptions to its standards and that granting exceptions to some groups while denying them to racial minorities was a violation of the Equal Protection Clause. Much later in its opinion, the *Wilson* panel acknowledged the force of this argument by recognizing that the practice, if proved, was discriminatory:

> If the state ever prohibited women and minorities from seeking preferences on a basis available to everyone else, such as age, disability, or veteran status, the state would violate Proposition 209's prohibition against race or gender discrimination.

Wilson, 122 F.3d at 708 n. 17

But the concession directly contradicts *Wilson's* conclusion that Proposition 209 did not violate the Equal Protection Clause, because allowing exceptions for everyone except racial minorities violates not only Proposition 209, but, far more importantly, the Equal Protection Clause.

As is set forth above, in higher education, the universities routinely use plus factors to grant exceptions from their baseline criteria in order to admit the children of alumni or of donors; applicants from poor or rural backgrounds; veterans and athletes; and so on. Under Proposal 2 and Proposition 209, the universities may continue or expand any effort to achieve diversity—except diversity by race or gender.

Indeed, the public justifications offered for these proposals demonstrate the double standard that they actually incorporate. Michigan's Attorney General, like Ward Connerly before him, asserts that admissions should be determined by "merit." But their claim that black and Latina/o students lack "merit"—a claim that appeals to the darkest sentiments—rests on the unproven assumption that grades and test scores are the sole measures of merit. Even more egregiously, the Proposals demand that "merit"—so defined—should be enforced only against minority and women applicants, who are the only applicants to whom the no-preferences standard even applies.

As Justice Jackson once said, there is "...no more effective practical guaranty against arbitrary and unreasonable government [action] than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway*

Express Agency, Inc. v. New York, 336 U.S. 106, 112-113 (1949)(Jackson, J., concurring). And since Proposal 2 and Proposition 209 clearly do not do that, they should be struck down for their selective substantive standards as well.

In fact, these proposals defy another of the original purposes of the Fourteenth Amendment. As the Civil War ended, the South had passed laws that "...forbade blacks from pursuing certain occupations or professions... and, in some states, even imposed special taxes on those newly-freed slaves who dared to take jobs outside farming and domestic service." H. Hyman & W. Wiecek, Equal Justice Under Law 319 (1982); Eric Foner, Reconstruction, 199-201 Harper & Row (1988). Congress passed the Civil Rights Act of 1866 to outlaw those statutes and then the Congress proposed and the states ratified the Fourteenth Amendment in order to assure that the ban on such special laws would "be forever incorporated in the Constitution of the United States." *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948).

"Forever" turned out to be three decades. *Plessy v. Ferguson*, 163 U.S. 537 (1896). In Justice Harlan's great dissent, which was a last stand in defense of the promises of Reconstruction, he rightly demanded "candor" in recognizing that the doctrine of separate but equal was designed to subjugate black citizens and that, in time, the decision in *Plessy* would be as "pernicious as the decision made by this tribunal in the *Dred Scott* case." *Id.*, at 559.

If we speak with the candor that Justice Harlan demanded, the "no-preferences" amendments have as

their overriding purpose regulating and limiting the admission of black and Latina/o applicants to the Universities of California and of Michigan. And they have succeeded in their aim: the admission of black, Latina/o and Native American students have fallen by one third or more and minority citizens have no way to reverse that terrible toll.

Indeed, at UCLA and elsewhere, the opponents of minority admissions threaten legal action if the university decides to review qualifications beyond grades and test scores or takes any other steps that might open the doors to a few more minority students. David Leonhardt, "The New Affirmative Action," New York Times, Sept. 30, 2007. They even threatened to sue when they learned the shocking fact that admissions officials had read an applicant's essay in which she discussed her Latina heritage. Tim Groseclose, "Report on Suspected Malfeasance in UCLA Admissions and the Accompanying Coverup," available at mages.ocregister.com/newsimages/news/2008/08/CUARSGroseCloseResignationReport.pdf (last visited October 24, 2011).

The Black Codes imposed criminal penalties on the newly-freed slaves who attempted to work as skilled laborers or who attempted to leave agriculture or domestic service. Proposition 209 and Proposal 2 work indirectly by imposing legal restrictions and the threat of legal actions against the universities. If the proposals have not barred all black, Latina/o and Native American students, they have put a cap on the admissions of those students that no one has devised a way to lift.

The Sixth Circuit did not reach the question whether the substantive standards and the legal remedy created by Proposal 2 violated the Equal Protection Clause. But if the Attorney General asserts, as he does, that the state can deny political equality to minority residents, then it is vital that this Court also review whether the state may impose the substantive restrictions on minority admissions contained in these two proposals.

CONCLUSION

For the reasons stated, the Coalition Respondents ask this Court to grant the writ of certiorari so that this Court may review the issues presented and extend the rights protected by the en banc Sixth Circuit decision to Arizona, California, Nebraska, Oklahoma, Washington and any other state that might adopt equivalent amendments.

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Dated: February 4, 2013

REPLY BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
FEB 12 2013
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No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

AND

CHASE CANTRELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Michigan Attorney General Schuette cannot say it much better than the Coalition Respondents who "[1] agree that as to admissions in higher education there is a direct conflict between the governing decisions of the Sixth Circuit and the Ninth Circuit, [2] agree that the issues dividing the circuits are of paramount importance, and [3] agree with Michigan's Attorney General that this Court should grant the writ of certiorari to resolve the conflict." Coalition Br. in Opp. 2. Those sentiments are echoed by numerous *amici*, including constitutional scholars, other states, and former attorneys of the Department of Justice Civil Rights Division.

The Cantrell Respondents' view differs. They argue that the Sixth Circuit's decision is consistent with this Court's decisions in *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter* v. *Erickson*, 393 U.S. 385 (1968), and they urge the Court to let the issue presented "percolate" for some unspecified period of time. With respect to this Court's precedent, the Cantrell Respondents are wrong. In *Seattle* and *Hunter*, the Court applied the political-restructuring doctrine to laws that *condoned* discrimination. The Court has never applied the doctrine to laws that *prohibit* discrimination by requiring equal treatment. Pet. 15–19. Section 26 of Michigan's Constitution does not "impos[e] distinctively disadvantageous barriers." Cantrell Br. in Opp. 1. To the contrary, § 26 prohibits "discriminat[ion]." Mich. Const. art. I, § 26. And the fact that the en banc Sixth Circuit divided 8-7 demonstrates the deep differences of opinion over the legal issue presented.

There is also no need for further percolation. The myriad of possible viewpoints are well represented in the eight separate opinions of the en banc Sixth Circuit as well as Ninth Circuit opinions in two different cases and a California Supreme Court opinion. It would be inappropriate to allow a patchwork of laws to remain in place on such issues of significance.

More important, there is need for a quick, definitive resolution. If the Michigan Attorney General is correct, more than two million Michigan voters have been effectively disenfranchised of their choice to eliminate considerations of race in education by a one-vote-margin en banc decision. And if Respondents are correct, more than 50 million citizens are being deprived of their constitutional rights by similar provisions in Arizona, California, Florida, Oklahoma, Nebraska, New Hampshire, and Washington.

Section 26's supporters are not "appeal[ing] to prejudice," Coalition Br. in Opp. 4, nor do they "endorse race-based policies that disfavor racial diversity," Cantrell Br. in Opp. 1. Rather, they promote the idea that the government should stop the sordid business of using skin color or ethnicity as a proxy for disadvantage. Race-neutral admissions criteria like those used in Texas increase socioeconomic diversity and have resulted in improved minority-student achievement, as even Respondents admitted in the proceedings below. In short, it is not only possible to recruit a diverse, successful student body without resorting to race as an admission factor, such an approach is likely to result in higher grades and graduation rates for the minority students so selected.

Certiorari is warranted.

REPLY ARGUMENT

I. There is no serious dispute regarding the circuit split over, or the jurisprudential significance of, the issue presented.

As the Coalition Respondents explain, this case presents an "open, deep, and irreconcilable split between the Sixth and Ninth Circuits." Coalition Br. in Opp. 19. And the "issues on which the circuits are split are of surpassing importance." *Id.* at 21. "By definition, a federal Amendment designed to provide a national guarantee of political equality must have the same meaning in Michigan as it does in California." *Id.* at 23. The whole country would benefit from the Court's review and resolution of the issue presented. *Ibid.*

The Cantrell Respondents say the circuit split is "shallow" and "stale," suggesting that the Court should wait to weigh in. Cantrell Br. in Opp. 27. Such observations are cold comfort to the two million Michigan citizens disenfranchised by the Sixth Circuit's decision or the 38 million Californians who the Cantrell Respondents say are living under an unconstitutional admissions regime that "silence[s] debate and strip[s] the political process of its capacity to judge policy based on individualized merit." *Id.* 28. If the laws at issue are truly "in the wheelhouse of the Fourteenth Amendment" as the Cantrell Respondents claim, *ibid.*, it is difficult to understand why the Cantrell Respondents would countenance the Amendment's violation in numerous states outside the Sixth Circuit. Regardless of who is right, the issue presented is singularly important and should be resolved without delay.

II. *Hunter* and *Seattle* do not prevent a state from requiring equal treatment.

Respondents assert that *Hunter* and *Seattle School District* forbid the State of Michigan from singling out race, ethnicity, and sex as factors that should not be considered in university admissions. Coalition Br. in Opp. 24–28; Cantrell Br. in Opp. 12–24. In fact, the Cantrell Respondents argue that Michigan's constitutional amendment "endorse[s] race-based policies." Cantrell Br. in Opp. 1. The irony of this argument is apparent. They claim that the elimination of race-based policies is endorsing race-based policies. Cf. *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). But Michigan's amendment does not endorse race-based policies; just the opposite, it stops discrimination based on race.

The Cantrell Respondents also take their position to its logical end, arguing that once politically unaccountable university personnel make the decision to consider race and ethnicity in admissions, those decision-makers are the only individuals able to change that policy unless the state completely takes over all aspects of university-admission programs by making all admissions criteria subject to statewide referenda. Cantrell Br. in Opp. 2.

That end makes no sense and exposes the logical fallacy in Respondents' argument—*all* laws effect political restructuring, so, under Respondents' theory, *no* law may require equal treatment. As Attorney General Schuette explained in the petition, if Respondents' view of *Hunter* and *Seattle* is correct,

then the Fair Housing Act of 1968 would be unconstitutional. Pet. 21. Once Congress requires equal treatment, it is no longer lawful for minority groups to lobby state and local officials for preferential treatment in housing laws. *Ibid.*

The Cantrell Respondents also emphasize that *Hunter* and *Seattle* are designed to "constitutionally protect a fair political *process* as opposed to any particular *outcome*." Cantrell Br. in Opp. 19–20. But that is true of the Equal Protection Clause as well—it forbids processes from being infected with racial considerations by preventing discrimination based on race. Preferential treatment based on race (which necessarily means discrimination against other races) does the opposite. It focuses entirely on achieving a particular outcome (here, an admissions outcome), even at the expense of making the process discriminatory.

Hunter and *Seattle School District* did not gut the Equal Protection Clause by holding that no law can require equal treatment. Pet. 15–19. And if they had, they should be overruled to the extent they prohibit a state from enacting a constitutional amendment like § 26. *Id.* at 19–21. Either way, this Court's immediate intervention is required.

III. This Court's decisions in *Grutter* and *Parents Involved* do not support the Sixth Circuit's reasoning.

The Cantrell Respondents argue that this Court's decisions in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), vindicate the Sixth Circuit. Cantrell Br. in Op. 11, 25. Not so.

Grutter upheld a race-conscious admissions policy on the narrow ground that a diverse student body can reap educational benefits. But it said nothing about whether such policies are constitutionally required. Quite the opposite, the Court encouraged universities to draw on the most promising aspects of "race-neutral" alternatives and predicted that preferences would no longer be necessary in 25 years. *Grutter*, 539 U.S. at 342–43. It is difficult to understand how this holding can be characterized as one *prohibiting* constitutional provisions like § 26 unless a state enacts a statewide admissions policy that considers "only applicants' GPA and SAT scores." Cantrell Br. in Opp. 23.

As for *Parents Involved*, it is true that the opinion did not hold all desegregation programs unconstitutional. Cantrell Br. in Opp. 25. But the opinion began with the presumption that all governmental racial classifications are invalid. 551 U.S. at 720. And it held that where schools have never segregated on the basis of race, or have removed the vestiges of past institutional discrimination, "the way to achieve a system of determining admission . . . on a nonracial basis is to stop assigning students on a racial basis." *Id.* at 747–48. Michigan has implemented that system.

IV. Race-neutral admissions can improve both campus diversity and minority academic success.

The Coalition Respondents say that constitutional amendments like Proposition 209 and § 26 "have meant that university officials must be blind to the racial inequality that is glaringly obvious in every metropolitan area in the country." Coalition Br. in Opp. 13. But just the opposite is true. Universities in other states have used new approaches (like the Texas 10% plan) that achieve diverse student populations while offering greater opportunity to economically disadvantaged students and resulting in higher minority-student achievement. The Coalition Respondents below conceded the effectiveness of the Texas program, and it cannot be disputed that new admissions policies in California have resulted in higher minority-student grade point averages and graduation rates even while those students take more demanding science and engineering classes than pre-Proposition 209.

Start with Texas public universities, which were forced to adopt race-neutral polices in response to *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit decision that invalidated the University of Texas School of Law's use of race in admissions. In 1997, the Texas legislature enacted a law requiring the University of Texas at Austin (UT) to admit all Texas high school seniors ranked in the top 10% of their classes. By 2000, UT had returned African-American and Latino freshman-enrollment levels to those of

1996, the last year the pre-*Hopwood* policy was in effect.[1]

UT credited the race-neutral system as enabling the university "to diversify at UT Austin with talented students who succeed." The system helped "us to create a more representative student body and enroll students who perform well academically," evidenced by the fact that "minority students earned higher grade point averages . . . than in 1996 and ha[d] higher retention rates."[2]

Ironically, while continuing to insist that race-based admissions criteria are essential to minority academic achievement, Plaintiffs in this case tacitly conceded the success of UT's race-neutral system:

> The University of Texas, for example, recently discovered that students admitted from small rural and large urban high schools under the top "ten percent" plan achieved higher grades at UT than students admitted under other criteria . . . . [Coalition En Banc Supp. Br. 11.]

Now consider California. There are nine undergraduate campuses in the University of California (UC) system.[3] In 1997, the year Proposition 209 took effect, underrepresented minorities (defined as American

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[1] Faulkner, The "Top 10 Percent Law" is Working for Texas (Oct. 19, 2000), available at http://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.html.

[2] *Id.*

[3] UC Merced is excluded because it did not open until 1995. UC campuses dedicated solely to graduate-level courses are also excluded.

Indian, African American, and Chicano/Latino) received 19.6% of freshman-admission offers (7,385 total). By 2010, underrepresented minorities received 28.3% of the freshman offers (16,635 total), a 44% improvement. Admissions offers to white students declined, from 42.6% in 1997, to 30.6% in 2010.[4] The percentage of offers to underrepresented minorities was higher or the same in 2010 than 1997 on six of the eight UC campuses that had such data.[5] Data for 2011 shows the same is true for seven of the eight.[6]

Similarly, a non-UC study showed that African American enrollment at UC campuses had returned to pre-Prop 209 levels by 2002, averaging 40% above pre-Prop 209 levels by 2007-2010. Latino enrollment at UC campuses reached a new record in 2000, and by 2008, Latino enrollment was *double* its pre-Prop 209 levels:[7]

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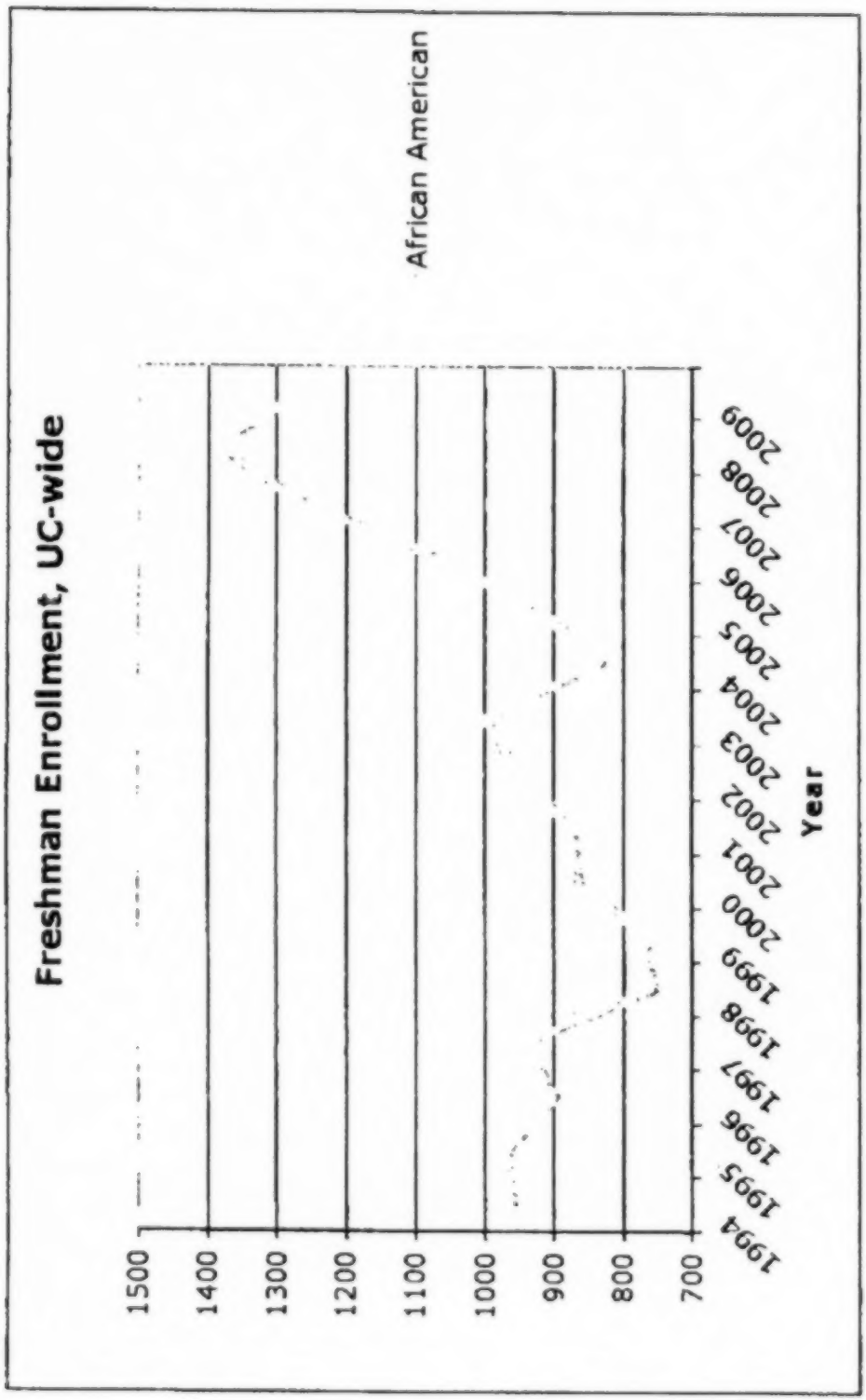
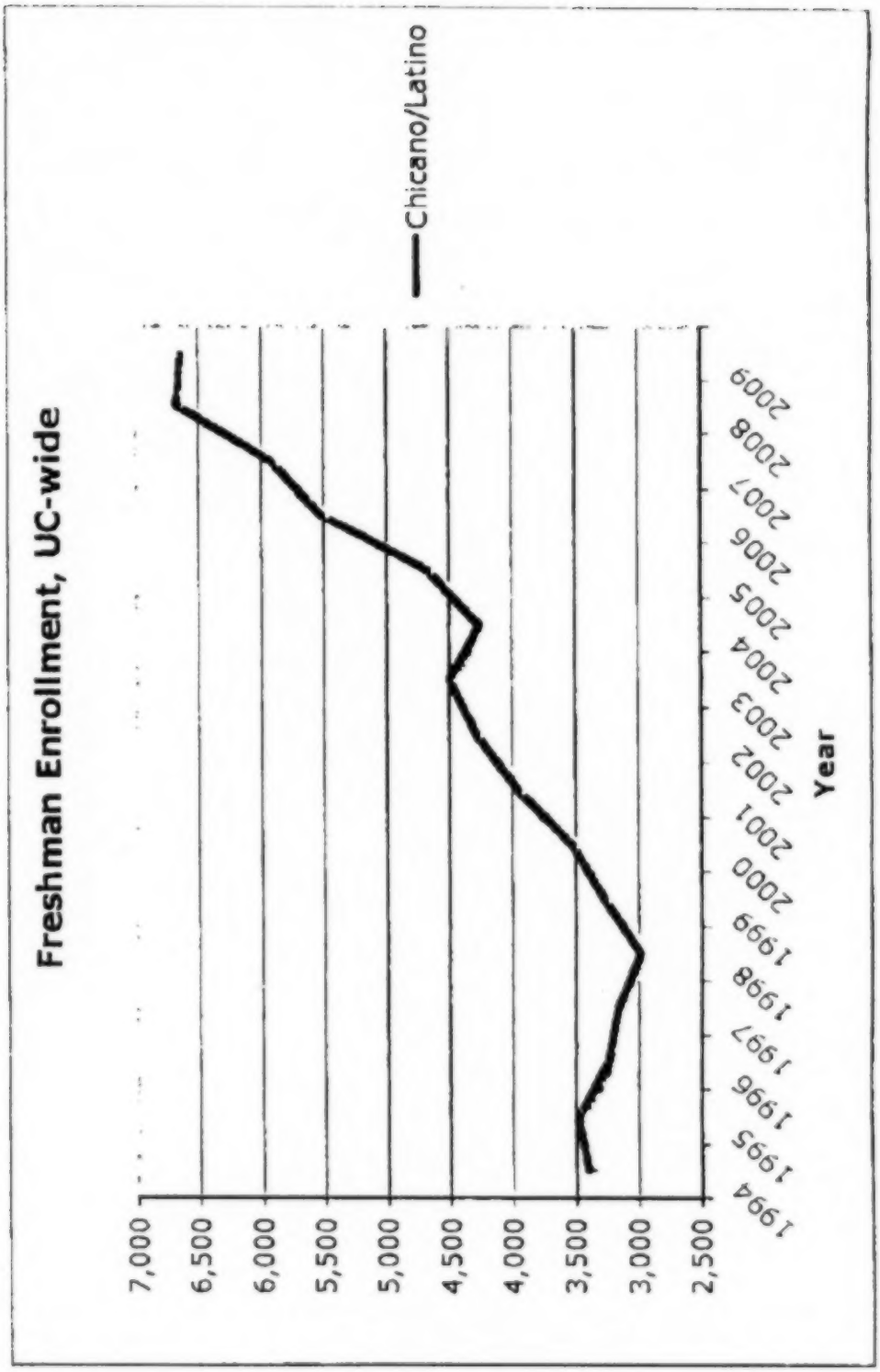
[4] Univ. of Cal. Office of the President, California Freshman Admissions for Fall 2008 (UC 2008 Admissions), Table 4, available at http://www.ucop.edu/news/factsheets/fall2008adm.html; Univ. of Cal., Office of the President, California Freshman Admissions for Fall 2010 (UC 2010 Admissions), Table 3, available at http://www.ucop/edu/news/factsheets/fall2010adm.html; Univ. of Cal., Office of the President, New California Freshman Admits Fall 1997, 1998, 1999, and 2000, Table A, available at http://www.ucop/edu/ucophome/commserv/preadm_a400.pdf.

[5] UC 2008 Admissions, Table 4, and UC 2010 Admissions, Table 3.

[6] Univ. of Cal., Office of the President, California Freshman Admissions for Fall 2011 (UC 2011 Admissions), Table 3, available at http://www.Ucop.edu/news/factsheets/fall2011adm.html.

[7] Richard Sander, An Analysis of the Effects of Proposition 209 Upon the University of California, available at http://www.seaphe.org/ working-papers/.


Freshman Enrollment, UC-wide
African American
1500
1400
1300
1200
1100
1000
900
800
700
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
Year


Freshman Enrollment, UC-wide
Chicano/Latino
7,000
6,500
6,000
5,500
5,000
4,500
4,000
3,500
3,000
2,500
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
Year

In sum, since Proposition 209 became effective in 1997, minorities continued to be offered admission to the University of California system in greater numbers, without resort to racial preferences. What's more, minority students' college graduation rates improved. Comparing the period 1992–1994 (pre-Prop 209) to 1998–2005 (post-Prop 209), African-American four-year graduation rates improved by more than half, and six-year graduation rates by one fifth. Latinos saw similar improvements. And both African-American and Latino grade point averages increased post-Prop 209, even though minority students were taking more difficult science and engineering classes.[8]

In short, Texas and California have shown it is possible to recruit a diverse student body without considering race as a factor, and that doing so may result in higher minority achievement than the race-based approach Respondents advocate.

The Coalition Defendants are also wrong when they say that compelling universities to "rigidly" use a grade-test score baseline compels the university "to perpetuate the effects of racial inequality." Coalition Br. in Opp. 29. To begin, nothing in § 26 or similar laws prohibits universities from looking at factors other than grades and test scores.

More important, such laws have had the opposite effect alleged. Laws like § 26 compel universities to stop using race as a proxy and instead adopt initiatives like the Texas 10% plan. The result is higher enrollment from the pool of top talent at our nation's most

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[8] *Id.*

poverty-stricken, inner-city high schools—institutions where historical discrimination has resulted in high concentrations of minority students. As noted above, those students have thrived in the university setting. Far from "mandat[ing] the perpetuation of *de facto* segregation," *id.* 32, laws like § 26 can ultimately promote upward socioeconomic mobility and equality.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF ARIZONA, ALABAMA, GEORGIA AND OKLAHOMA AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae, the States of Arizona, Alabama, Georgia and Oklahoma (the "Amici States") have a strong interest in eradicating discrimination in their public institutions and building diverse communities where all are treated equally, regardless of race, sex, color, ethnicity, or national origin. Accordingly, following this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), which suggested that States "can and should" look to "race-neutral alternatives" to achieve diverse student populations in state universities, some Amici States have adopted laws that bar them from granting preferential treatment or discriminating "on the basis of race, sex, color, ethnicity or national origin" in, inter alia, public education, including university admissions. *See* Ariz. Const. art. II, § 36(A); Neb. Const. art. I, § 30, Okla. Const. art. II, § 36A; N.H. Rev. Stat. Ann. § 187-A:16-a(I). These state laws are in all material respects identical to article I, Section 26 of the Michigan Constitution (Proposal 2), which the Sixth Circuit held violated the Equal Protection Clause in *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the University of Michigan*, 2012 WL 5519918, at *19 (6th Cir. Nov. 15, 2012) (en banc).

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[1] The Amici States gave notice of their intent to file this Brief to counsel for the parties on December 21, 2012. *See* Sup. Ct. R. 37(2)(a). The Amici States do not need the parties' consent to file this Brief. *See* Sup. Ct. R. 37(4).

Arizona, Michigan, and six other States—California, Florida, Nebraska, New Hampshire, Oklahoma, and Washington—have adopted laws that require them to implement race-neutral university admissions policies. One of the primary benefits of the federal system is that it allows States to be "laboratories for experimentation to devise various solutions where the best solution is far from clear." *Grutter*, 539 U.S. at 342 (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)). The Sixth Circuit's decision in *BAMN*, which conflicts with the Ninth Circuit's decision in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (*Wilson*), threatens to chill the experimentation that is crucial to developing creative solutions and working toward the time when race-based college admissions policies reach their "logical end point." *Grutter*, 539 U.S. at 342.

While the Ninth Circuit has upheld provisions like article II, section 36 of the Arizona Constitution against equal protection challenges, the chilling effect of the Sixth Circuit's *BAMN* decision will curtail innovation and limit the experimentation this Court lauded in *Grutter* in States outside the Ninth Circuit. With far fewer state "laboratories," there will be less innovation. Consequently, development of effective race-neutral university admissions policies will be harmed. As such, Amici States have a strong interest in the Court granting the Petition for a Writ of Certiorari and reversing the Sixth Circuit's decision.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Justice Harlan captured a fundamental American value in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896): "Our Constitution is *color-blind*, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." (Emphasis added). Justice Harlan also opined that "the Constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." *Id.* at 554.

President John F. Kennedy succinctly stated that "race has no place in American life or law." Pres. John F. Kennedy, Civil Rights Announcement (June 11, 1963). Reverend Dr. Martin Luther King said the same thing in the summer of 1963 in words that are familiar to most Americans.

More recently, this Court reiterated: "'[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. One*, 551 U.S. 701, 746 (2007) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995)). This Court also emphasized that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748.

The Sixth Circuit held below that Michigan's constitutional provision prohibiting discrimination, or preferences, based on race in public university

admissions decisions violated equal protection principles. This gets it precisely backward. The United States Constitution commands, it does not prohibit, that citizens be treated as individuals, rather than that they be treated based on the race they happen to have been born into. U.S. Const. Amend. XIV, § 1 (no person can be denied "equal protection of the laws").

In *Grutter*, 539 U.S. at 342, this Court held that, under limited circumstances, some race preferences can be constitutionally permissible for a limited period of time. This Court said that the States "can and should" look to "race-neutral alternatives" to achieve diverse student populations in state universities. *Id.* Arizona, Michigan, and six other States have adopted laws that require them to implement race-neutral university admissions policies. As suggested by this Court in *Grutter*, Arizona looked to race-neutral alternatives to achieve diverse student populations in state universities, and these experiments achieved similar proportions of minorities in the student body, rather than the thirty percent drop in minority participation predicted by opponents of the race-neutral policies.

The Sixth Circuit decision will hamper the States' ability to pass laws requiring race-neutral admissions policies, which in turn will hamper the experimentation and innovation in race-neutral policies that *Grutter* sought to encourage. Although in *Grutter* this Court held that the Constitution permitted limited race-conscious admissions policies in conventional equal protection analysis, it did not hold that such policies are required 539 U.S. at 342. The Sixth Circuit's holding below that the political process

doctrine prohibits Michigan from amending its constitution to eliminate race-conscious policies implemented by state university admissions committees therefore conflicts with *Grutter*. And the Sixth Circuit decision is contrary to this Court's encouragement of innovation and experimentation in the federal system. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

The Sixth Circuit decision below also conflicts with the Ninth Circuit's decision in *Wilson* that upheld California's constitutional provision barring state entities from using race and gender preferences. 122 F.3d at 707. The Ninth Circuit found that "[a] denial of equal protection entails, at a minimum, a classification that treats individuals unequally" and that the "'political structure' cases do not create some paradoxical exception to this *sine qua non* of any equal protection violation." *Id.* If this Court does not resolve the conflict, at a minimum, the States in the Sixth Circuit will be prohibited from adopting constitutional provisions that eliminate existing race-based admissions policies. But the Sixth Circuit's rationale in *BAMN* is not limited to constitutional provisions or university admissions policies. The decision therefore creates uncertainty about the constitutionality of any law that purports to eliminate preferences for race, sex, color, ethnicity, or national origin that a more local rule or policy previously had provided. This Court should grant review to provide certainty and guidance to States who wish to adopt race-neutral classifications to achieve diversity and avoid perpetuating unconstitutional classifications.

ARGUMENT

I. Federalism Allows States to Benefit from Continued Experimentation and Innovation that Achieve Student Body Diversity Using Neutral Admissions Policies.

As this Court recognized in *Grutter*, "'[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'" 539 U.S. at 341 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). The Court expressed the expectation that the race-conscious law school admissions policies it approved in 2003 would have "a logical end point" and no longer be necessary in another twenty-five years. *Grutter*, 539 U.S. at 342-43. The Court in *Grutter* also approvingly noted several States (whose laws prohibited racial preferences) that were already experimenting with race-neutral admissions policies to achieve the compelling state interest of student body diversity. *Id.* at 342.

At the time, Arizona was not among the experimenters. Arizona State University's Sandra Day O'Connor College of Law (ASU) had used race and ethnicity as positive factors in admissions decisions since *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and submitted an amicus brief supporting the similar University of Michigan Law School policy that this Court upheld in *Grutter*. Brief for the Arizona State University College of Law as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 398328 at *6 (U.S. Feb. 18, 2003) (ASU Amicus).

In its Amicus Brief, ASU represented that using its race- and ethnicity-conscious admissions policy, between twenty-three and thirty-five percent of enrolled students in the five preceding academic years self-identified as either Hispanic, American Indian, African-American, or Asian-American. *Id.* at *8. ASU also posited that if it had not considered race or ethnicity and based admission solely on applicants' grades and Law School Admissions Test (LSAT) scores, minority enrollment would have ranged from only four to eight percent in those same five years. *Id.* at *10-*11. ASU declined to use race- and ethnicity-neutral admissions policies that other States were trying and argued that only positive consideration of race and ethnicity could yield a racially and ethnically diverse law school class. *Id.* at *13.

ASU's prediction has not proven to be correct. In November 2010, Arizona voters passed Proposition 107, which amended the Arizona Constitution, just as Michigan voters amended their constitution in 2006, to prohibit programs that grant "preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting." *Compare* Ariz. Const. art. II, § 36 *with* Mich. Const. art. I, § 26. Since Proposition 107 became Arizona law, ASU and Arizona's other public law school, the University of Arizona's James E. Rogers College of Law, no longer consider race or ethnicity in admissions decisions. Stephanie Snyder, *A Year After Preferential Treatment Ban, Little Change on State Campuses* (May 5, 2012) http://azcapitoltimes.com/news/2012/05/03/a-year-after-preferential-treatment-ban-little-change-on-state%E2%80%99s-campuses.

Instead, at the University of Arizona law school after Proposition 107, admission depends on "many. . . factors," including grades and LSAT scores, but also "the applicant's educational experiences, grade trends, graduate study, significant or extracurricular activities, unique educational or occupational experiences, substantial community service, socioeconomic background, educational, and personal challenges." http://www.law.arizona.edu/Admissions/application_process.cfm. Similarly at ASU, law school admissions committees evaluate such qualitative factors as "the rigor of the undergraduate course of study, graduate study, demonstrated commitment to public service, work experience, leadership experience, extracurricular or community activities, history of overcoming economic or other disadvantage, personal experiences with discrimination, overcoming disability, geographic diversity, diversity of experience and background, maturity, ability to communicate, foreign language proficiency, honors and awards, service in the Armed Forces, publications, and exceptional personal talents." http://www.law.asu.edu/admissions/Admissions/ HowToApply.aspx.

In the first classes admitted after Proposition 107, both Arizona "law schools saw about a 3 percent drop in minority enrollment." Snyder, *supra*. That small drop was well within the range of minority enrollment percentages achieved when ASU gave preferences in admissions to race and ethnicity—and far less than the thirty percent drop that ASU predicted would result if such preferences were no longer allowed. ASU Amicus, 2003 WL 398328 at *10.

Arizona's recent experience shows that its public universities can achieve diverse student bodies without recourse to the race- and ethnicity-conscious admissions policies prohibited by state law. As stated in a Proposition 107 frequently-asked-questions sheet issued by the University of Arizona, "Proposition 107 does not prevent the University from using legally permissible means to create a diverse and high quality student body and educational environment. The University will continue to pursue diversity using factors that are race and gender neutral." University of Arizona, Office of the President, Proposition 107 FAQ, available at http://www.president.arizona.edu/node/661.

The state-specific experimentation in law school admissions policy that *Grutter* endorsed, and that Arizona recently chose to engage in, is a virtue of our federal system of government. As this Court has repeatedly recognized, "the federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond*, 131 S. Ct. at 2364 (quoting *Gregory*, 501 U.S. at 458). The Sixth Circuit's en banc decision is contrary to these federalism values and, if not overruled, will chill local experimentation and innovation that advances equal protection in university admissions. This Court should accept review of the Sixth Circuit's decision.

II. The Conflict Between the Sixth Circuit's *BAMN* Decision and the Ninth Circuit's *Wilson* Decision Harms the Innovation in Race-Neutral Policies that this Court Heralded in *Grutter* and Creates Uncertainty About the Breadth of the Political-Process Doctrine.

As the Petition for a Writ of Certiorari explains, the Sixth Circuit's *BAMN* decision conflicts with the Ninth Circuit's decision in *Wilson*. Petition at 8, 10-11. In April 2012, the Ninth Circuit confirmed that its 1997 decision in *Wilson* is the law of the circuit. *Coalition to Defend Aff. Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary v. Brown*, 674 F.3d 1128, 1135 (9th Cir. 2012).

In *Wilson*, the Ninth Circuit considered an equal protection challenge to California's Proposition 209, an initiative measure that amended the California Constitution to prohibit the State from discriminating or granting preferential treatment "on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a). The court found no violation of the Equal Protection Clause using the "conventional" equal protection analysis. *Wilson*, 122 F.3d at 702 ("A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense."). Moreover, the Ninth Circuit rejected the argument that Proposition 209 denied equal protection under the "political structure" analysis. *Id.* at 708 ("Nothing in the

Constitution suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications—race and gender—must be readily available at the lowest level of government while preferences based on any other presumptively legitimate classification—such as wealth, age or disability—are at the mercy of statewide referenda.").

Like California's Proposition 209, Michigan's Proposal 2 was a constitutional amendment adopted by voter initiative. The constitutional provision uses the same language, barring discrimination and preferential treatment "on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const. art. I, § 26(1).

A bare majority of the en banc Sixth Circuit, however, expressly declined to follow the Ninth Circuit's long-standing decision in *Wilson*. *BAMN*, 2012 WL 5519918, at *44 n.8. Instead, the Sixth Circuit held that under the political process doctrine outlined in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), Michigan's Proposal 2 deprived minority groups of equal protection because it "targets race-conscious admissions policies" and it "reallocates political power or reorders the political process in a way that places special burdens on racial minorities." 2012 WL 5519918, at *9, *10-*15.

The conflict between Sixth Circuit's decision below and the Ninth Circuit's decision in *Wilson* creates uncertainty for States with prohibitions on race-based

preferential treatment similar to Michigan's Proposal 2. This uncertainty also chills other States from engaging in the experimentation that this Court promoted in *Grutter*.

After the Ninth Circuit upheld Proposition 209 in *Wilson*, several other States adopted similar provisions. In 1998, Washington voters approved an initiative containing the same operative language as the California law. Wash. Code Ann. § 49.60.400(1). In 1999, Florida's Governor issued an executive order announcing a similar policy and directing the promulgation of rules that, inter alia, barred race-based preferences in state university admissions. Fla. Exec. Order 99-281. This Court cited these three laws with approval in *Grutter*, 539 U.S. at 342.

Following *Grutter*, Arizona and several other States—Michigan, Nebraska, and Oklahoma—used the initiative process to amend their respective constitutions to include prohibitions on race-based discrimination and preferential treatment in public employment, public education, and public contracting that are nearly identical to California's Proposition 209. Ariz. Const. art. II, § 36 (adopted 2010); Mich. Const. art. I, § 26 (adopted 2006); Neb. Const. art. I, § 30 (adopted 2008); Okla. Const. art. II, § 36A (adopted 2012). New Hampshire recently followed suit, adopting a statutory prohibition on race-based discrimination and preferential treatment in recruiting, hiring, promotion, or admission within the state college and university system. N.H. Rev. Stat. Ann. § 187-A:16-a(I) (adopted 2011). There are no reported decisions regarding the constitutionality of the Arizona, Florida, Nebraska, New Hampshire,

Oklahoma, or Washington laws, and it does not appear that any of them have been challenged on equal protection grounds.

In view of the Sixth Circuit's en banc decision in *BAMN*, the experimentation and innovation in race-neutral university admissions policies that the above-described state laws require are likely to be hampered. Neither the First, Eighth, Tenth, nor Eleventh Circuits have considered an equal protection challenge to these state laws. Therefore, courts addressing challenges to the New Hampshire, Nebraska, Oklahoma, and Florida laws are in the difficult position of deciding whether to follow the Ninth Circuit or the Sixth Circuit.

Moreover, due to the Sixth's Circuit's reliance on the political-process doctrine, States wishing to implement race-neutral policies in college admission decisions face uncertainty about how to do so constitutionally. In *Grutter*, the Court envisioned that twenty-five years after its decision, "the use of racial preferences will no longer be necessary to further the interest approved" in the decision. 539 U.S. at 343. Yet the *BAMN* decision seems to require that only the body that implemented a race preference can eliminate that preference. *See BAMN*, 2012 WL 5519918, at *18. Under the reasoning in *BAMN*, States that wish to experiment with race-neutral policies will not be able to so as part of a cohesive, statewide plan. Instead, such programs would need to be implemented in a piecemeal fashion, school by school. As such, even if there is sufficient political support for a statewide ban on race-based preferences, and the time when such preferences comport with equal protection has come to its end, it will be up to individual public colleges and

universities to end preferential treatment based on race. The Court could not have intended that its political-process cases would so hamper the States' authority to adopt uniform race-neutral policies.

Absent certainty about the constitutionality of existing laws prohibiting race-based preferences, or the permissible means to introduce race-neutral policies, other States may refrain from experimenting with race-neutral university admissions policies. With fewer experiments, there will be fewer innovations upon which all States can draw to work toward the goal set in *Grutter* to reach the "logical end point" of race-based decision making in public university admissions. 539 U.S. at 342. Accordingly, this Court should grant the Petition to resolve the conflict in the circuits and provide States the certainty they need to serve as laboratories for solving the difficult problem of fostering diverse student bodies through race-neutral admissions policies.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted this 3rd day of January, 2013.

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AMICUS CURIAE BRIEF

MOTION FILED
JAN -2 2013

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL, PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF PETITIONER AND SUMMARY REVERSAL

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MOTION AND REQUEST FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

David Boyle (hereinafter, "Counsel") respectfully moves for leave to file the attached brief as *amicus curiae*. Petitioner has granted blanket permission to *amicae/i curiae* to write briefs. As for permission from Respondents: Counsel, between December 17th and 28th, 2012, electronically mailed four times Cantrell Respondents' counsel-of-record Karin A. DeMasi (who asked for and received a 30-day extension to file response to petition) at her e-mail address listed on the Court's 12-682 docket webpage, receiving no response at all; and then also sent an e-mail, and facsimile, to the e-mail, and fax, addresses of Robert H. Baron, the managing partner of Cravath, Swaine & Moore's litigation department, to inquire after Ms. DeMasi's non-response, and again never received a response. Similarly, Counsel e-mailed BAMN Respondents' counsel-of-record George B. Washington four times between December 24th and 31st, 2012, and received no response at all. (Counsel could find no fax number on Washington's firm's currently-under-development website.) This mysterious silence, despite Counsel's giving timely notice to aforementioned persons of his intent to file a brief, contrasts greatly with Counsel's dealings with the Michigan Attorney General's office: that office was friendly, helpful, and responsive, and sent 12-682 blanket amicus-brief-filing permission to the Court.

The interest of Counsel in this case arises from, among other things, his experience with, and previous writings about, the issue of alumni-child preferences in college admissions vis-à-vis affirmative

action. In the instant case, Petitioner's petition for a writ of certiorari is highly meritorious but does not really mention that important issue, with which Counsel's brief deals. Thus, the brief Counsel is requesting permission to file will contain more complete argument on that issue, and also on other issues of note and importance to the case.

RECOMMENDATION FOR ADDITION TO SUPREME COURT RULE 37(2)

Noting the above events re difficulty obtaining permission to write a brief, Counsel politely recommends that the Court consider adding to Supreme Court Rule 37(2), words similar to, "If petitioners give blanket consent to write *amicus curiae* briefs, they should submit notice of it with their petitions for certiorari; and respondents giving blanket consent to write *amicus curiae* briefs should send notice of it to the Court shortly thereafter." If this advice were followed, then those trying to write petitioner-side amicus briefs, like Counsel, might not have to wait in suspense to see if blanket permission from Respondents is somehow put up on the Supreme Court website at the last minute. (Counsel's computer "screen shot" of the 12-682 docket page as of 2:05 p.m. Pacific Time, January 2, 2013, shows no permission from any Respondent for writing amicus briefs. Such is the situation as of this writing, even if the 12-682 docket page later shows some permission from Respondents, today or afterwards. Thus, that leaves *very* little time, too little, for potential notice to those wanting to write petitioner-side briefs, when January 3, 2013, is the deadline for submission.)

Those wanting to write petitioner-side briefs are at a natural disadvantage when trying to submit them, compared to those wanting to write respondent-side briefs, seeing there are only 30 days from time of docketing for petitioner-side writers to do so, and seeing that problems may occur: e.g., the current lack of notice, either on the Court website or in Counsel's e-mail inbox, as to whether there is permission to write a brief or not. So, Counsel wishes to help the Court rectify this disadvantage. If Rule 37(2) were updated to encourage the fastest public notice possible of blanket permission, by either side, to write amicus briefs, fairness and justice would be served well. The Court could put up petitioner-side blanket permission on the docket page at the time of docketing. Counsel, and *amici*, should not have to wait until the last minute to see if they have permission, and to print and mail their briefs. Also, Counsel would not have to take time to write this request, nor the Court have to take time to read it, had Respondents promptly let the public or Counsel know if permission was granted or not. —Counsel humbly thanks the Court for its time and consideration.

January 2, 2013 Respectfully submitted,

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* * *

AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Petitioner and Summary Reversal in Case 12-682 ("*BAMN*").[2] Amicus has actively addressed issues of alumni-child preferences in college admissions vis-à-vis affirmative action, *see, e.g.*, his amicus brief in *Fisher v. University of Texas at Austin*,[3] *passim*, and his recent Detroit News opinion article *It's time to end alumni preferences*.[4] Amicus also noted in his *Fisher* brief, *supra*, that "Just because affirmative action is *allowed*, that does not mean it is *mandatory*, and that the will of the State's people, if the people oppose affirmative action . . . means nothing[.]" *Id.* at 26. He reiterates that here.

SUMMARY OF ARGUMENT

Amicus supports certiorari in *BAMN* so that summary reversal of the Sixth Circuit opinion can promptly ensue, since the Court essentially decided the issue-at-hand in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and in *Washington v. Seattle School*

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Petitioner's amicus-brief blanket permission is on record with the Court, though Amicus has not heard back from Respondents.

[2] *Bill Schuette, Att'y Gen. of Mich., v. Coal. to Defend Aff. Action, Integration and Immigrant Rts. and Fight for Equal. by Any Means Necessary (BAMN), et al.*, Nos. 08-1387, 08-1534, 08-1389, 09-1111, 2012 U.S. App. LEXIS 23443 (6th Cir. Nov. 15, 2012) (en banc), *pet. for cert. pending* (U.S. Dec. 4, 2012).

[3] 631 F.3d 213 (5th Cir. 2011) (*cert. granted*, 80 U.S.L.W. 3475) (U.S. Feb. 21, 2012) (No. 11-345).

[4] Nov. 15, 2012, http://www.detroitnews.com/article/20121115/OPINION01/211150337.

District No. 1 ("*Seattle*"), 458 U.S. 457 (1982), as well.[5] This being so, unneeded *déjà vu* would violate judicial economy, and summary reversal is just.

ARGUMENT

The essential argument in the *BAMN* Sixth Circuit opinion, *see* 2012 U.S. App. LEXIS 23443 at *4-5, *44-46, is that because it might now be harder to advocate affirmative action in Michigan than to advocate legacy preferences in colleges (and just *who* is trying to *inaugurate* legacy preferences right now? A strange hypothetical), following the 2006 vote of Michiganders in "Proposal 2", 58%-42%, to amend their constitution (adding Section 26 to Article I) to end publicly-granted race and other (e.g., gender) preferences: this is, at least re public education, an unfair political constraint which violates the Fourteenth Amendment's Equal Protection Clause. But this is a grossly strained argument which has excited derision from many sources, as maybe it should.

First, we shall look at *Grutter* to see whether that landmark ruling addresses the issue. It does. Justice Sandra Day O'Connor mentions in her opinion, "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law . . . . Cf. *United States* v. *Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ('[T]he States may perform

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[5] By the way, *BAMN*'s eponymous Respondents have previously pled to the Court re Proposal 2, *see, e.g.*, The Ctr. for Individual Rts., *U.S. Supreme Court denies BAMN's motion*, http://www.cir-usa.org/releases/90.html (last updated Jan. 19, 2007) (mentioning the Court's denying BAMN's motion to reinstate injunction against enforcing Proposal 2), and now seek another try.

their role as laboratories for experimentation to devise various solutions[.]')" *Grutter*, *supra*, at 342.

Where is the slightest hint, in the passage just quoted, that affirmative action cannot be "prohibited by state law", *id.*? And Justice O'Connor makes clear that the *States* are laboratories: which dispels the idea that subparts of the State, such as universities, can perform "laboratory experiments" when not just the legislature, but the permanent primary sovereign, the People, have amended a State's central legal charter, its Constitution, to prohibit such experimentation. So the Court has already long since decided, or confirmed, in *Grutter*, that a State's banning race preference is proper and constitutional.

And there are few "political barriers" to voting Section 26 (or the part of it regarding public education) back out of Michigan's Constitution. *See, e.g.*, Ballotpedia,[6] revealing, *see id.*, that Proposal 2's opponents spent over 2 and ½ times as much money as proponents did. With that lavish funding, there may still be plenty of resources left to overturn Proposal 2 the regular way: by popular vote, not by the courts.[7]

See U.S. Const. art. IV, § 4, "The United States shall guarantee to every State . . . a Republican Form of Government", *id.*, i.e., a democratic republic where the people reign. But the Sixth Circuit opinion largely precludes majoritarian democracy. The Court would set bad precedent either by upholding it, or by treating it seriously enough to grant oral argument.

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[6] *Michigan Civil Rights Amendment, Proposal 2 (2006)*, http://ballotpedia.org/wiki/index.php/Michigan_Civil_Rights_Amendment,_Proposal_2_(2006) (as of Nov. 16, 2012, at 19:47 GMT).

[7] Amicus is for affirmative action, and would not mind seeing Proposal 2 ended...but only by the will of Michigan's people.

And when the law is clear, summary reversal may be meet, *see, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 567 U. S. ____ (2012) (per curiam) (summarily reversing obsolete Montana political-speech controls).

The law here has seemed quite clear for three decades, *see Seattle* (June 30, 1982), *supra*, calling it "evident" that divisions of power among administrative bodies over affirmative action "have nothing to do with the ability of minorities to participate in the process of self-government", 458 U.S. at 480 n.23 (Blackmun, J.).[8] And *see*, also from June 30, 1982, and from the same Justice, *Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, offering the Kafkaesque scenario, "[R]uling for petitioners[, who lost,] on a *Hunter* [*v. Erickson*, 393 U.S. 385 (1969), i.e., political-process] theory seemingly would mean that statutory affirmative-action . . programs never could be repealed[.]" *Crawford*, *supra*, at 546-47 (Blackmun, J., joined by Brennan, J., concurring). "Kafkaesque" may not help Respondents' case much.

As well, if *BAMN* is seen as a frivolous defense of affirmative action, it may needlessly cause *Fisher* to be decided against affirmative action, by an "unpleasant cousin" effect.[9] So that the Court may have

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[8] So, political-rights cases like *Seattle* are still good law and need not be revisited; they can be kept "in the bag" in case some draconian affirmative-action ban comes one day, e.g., poll-taxing the ban's opponents. Proposal 2 has no such evil feature.

[9] Moreover, *BAMN* may also taint the struggle for voter rights. Respondents' baseless "political powerlessness" claims, if the Court reviews *BAMN* any longer than it has to, may embarrass, by unwanted association, the more legitimate claims in *Shelby County v. Holder* (679 F.3d 848 (D.C. Cir. 2012) (*cert. granted*, 81 U.S.L.W. 3264) (U.S. Nov. 9, 2012) (No. 12-96)) re, *see id.*, Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c). Fortunately, *BAMN* may not need long consideration.

more time and resource to consider the momentous issues in *Fisher*, summary reversal in *BAMN* would be wise, lest that nexus of confusion from the Sixth Circuit excessively absorb the Court's attention.

Around the time of the Whiskey Rebellion, George Washington noted, "If the laws are to be trampled upon with impunity, and a minority . . . . is to dictate to the majority, there is an end put, at one stroke, to republican government."[10] While last month's *BAMN* decision may not literally let a minority dictate to a majority, it does void the will of the majority, in highly inappropriate fashion. And although *BAMN* plaintiffs may mean well, a thirst for social justice cannot justify ignoring law and common sense. To overturn Proposal 2 "by any means necessary" does not comport with our great Nation's rule of law.

CONCLUSION

Amicus respectfully asks the Court to grant certiorari to reverse summarily the court of appeals' judgment, so upholding *Grutter* and *Seattle*; and humbly thanks the Court for its time and consideration.

January 2, 2013 Respectfully submitted,

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[10] *George Washington: A National Treasure* (Smithsonian Inst.), http://georgewashington.si.edu/life/chrono_presidential.html.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

FILED
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No. 12-682

In the

Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CALIFORNIA ASSOCIATION OF SCHOLARS AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

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INTEREST OF AMICI CURIAE[1]

An affiliate of the National Association of Scholars, the California Association of Scholars ("CAS") is an organization devoted to higher education reform. It is committed to rational discourse as the foundation of academic life in a free and democratic society.

Many CAS members have been active in the various campaigns to pass voter initiatives that prohibit state-sponsored discrimination on the basis of race, color, sex, ethnicity or national origin—especially in the original campaign for the California Civil Rights Initiative (known as "CCRI" or "Proposition 209"), codified at Cal. Const. Art. I, § 31. Indeed, it would not be an exaggeration to say that CAS was the soil from which the idea for CCRI and its progeny sprang.

The Michigan Civil Rights Initiative, Mich. Const. Art. I, § 26 ("MCRI"), which is the subject of this lawsuit, is among CCRI's progeny. The texts of both initiatives are nearly identical. Both prohibit their respective states from "discriminat[ing] against, or grant[ing] preferential treatment to,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice of the *Amici Curiae*'s intention to file in support of certiorari at least 10 days prior to the due date. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

any individual or group on the basis of race, sex, color, ethnicity, or national origin ...." Among other things, they prohibit state colleges and universities from engaging in race-preferential admissions.

The experience of CAS's members puts it in a useful position to inform the Court about the legal issue presented in this case, which has been raised and resolved in CCRI's favor by both the U.S. Court of Appeals for the Ninth Circuit and the Supreme Court of California. See *infra* at Section IIIA(i).

Moreover, CAS is in an especially useful position to inform the Court about the importance of this case. As a result of the *en banc* decision of the U.S. Court of Appeals for the Sixth Circuit, the movement to pass voter initiatives that prohibit state-sponsored discrimination of this kind has come to a near standstill. Already-existing initiatives have been placed in legal jeopardy.

This threatens to put the cause of higher education reform back several decades. There is now considerable evidence of the positive effects these initiatives have on the education of affirmative action's so-called beneficiaries. See *infra* at Section IIIB. CCRI in particular has been the subject of significant empirical research since its passage in 1996; CAS is in an excellent position to bring it to the Court's attention. This evidence is crucial to understanding how, for good or ill, the Court's decision in this case will strongly affect the future of American higher education and of the academic success of minority students in particular.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Insti-

tute for the Study of Statesmanship and Political Philosophy, the mission of which is to advocate for the principles of the American founding. The CCJ advances that mission through participation in the litigation of cases of constitutional significance, including cases such as this in which the core principle of individual equality is at stake.

SUMMARY OF ARGUMENT

Amici believe that the Petition for a Writ of Certiorari is in keeping with the legal profession's admirable traditions of restraint and civility. Still, the job must fall to someone to call the *en banc* decision of the Sixth Circuit by its true name. As an association of ordinarily mild-mannered college and university professors and a center staffed by forbearing academic lawyers, *Amici* are not noted for a tendency toward hyperbole. When we call something a travesty of justice, as we do here, it is because we view it as exactly that.

In 2006, a strong majority of Michigan voters elected to adopt MCRI. These voters took to heart MCRI's core provisions concerning the need for state and local governments, including state colleges and universities, to refrain from preferential treatment on the basis of race, sex, color, ethnicity, or national origin.

The Sixth Circuit's conclusion that a provision that bans race discrimination is unconstitutionally racially discriminatory is profoundly counter-intuitive. When the same argument was made with the respect to CCRI, California's then-Attorney General Dan Lungren called it "Alice in Wonderland." George Skelton, *Making a Case that*

the People Have Spoken, Los Angeles Times (December 16, 1996). And indeed, it has been rejected twice in California. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997); *Coral Construction, Inc. v. City of San Francisco*, 235 P.3d 947 (Cal. 2010).

But that is only one among many problems with the Sixth Circuit's decision. For reasons *Amici* will elaborate upon at greater length below, the principal case upon which majority relies—*Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) ("*Seattle School District*")—in fact provides no support at all. See *infra* at Section IIIA. In this summary, it is enough to point out that *Seattle School District* was a 5-to-4 decision and that the one and only thing that all nine members agreed upon was that the argument adopted by the Sixth Circuit should be rejected.

In his dissent, Justice Powell expressed fear that the logic of the majority's decision could lead to absurd results. Significantly, the absurd result that he envisioned is precisely what the Sixth Circuit has now embraced:

> [I]f the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that higher authority traditionally dictated admissions policies .... If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder wheth-

> er—under the equal protection components of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.

Seattle School District, 458 U.S. at 499 n.14 (Powell, J. dissenting, joined by three other Justices).

The majority denied Justice Powell's assertion and made it clear that their intent was emphatically not to cover laws like MCRI: "These statements evidence a basic misunderstanding of our decision .... It is evident ... *that the horribles paraded by the dissent* ... are entirely unrelated to this case." *Id.* at 480 n.23 (emphasis added).

Note Justice Powell's hypothetical: It is precisely what happened in this case. The "affirmative action plan" of a "state law school" "came under fire." When this Court declined to take action in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a "higher authority"—the people of Michigan—intervened. Note also that the majority rejected Powell's concerns as a "parade[ ]" of "horribles" that were "entirely unrelated to this case." No one would claim that the limiting principle behind *Seattle School District* is easy to discern from the majority opinion. But the one thing that all Justices agreed on is that it would be absurd to outlaw measures like MCRI.

What should be clear is that neither *Seattle School District* nor *Hunter v. Erickson*, 393 U.S. 385, 391 (1969), the case upon which it was based, was intended to apply to laws that *forbid* race discrimination (as opposed to *facilitate* race discrimination). See *infra* at Section IIIA(i). Significantly, if the political re-structuring logic employed in

those cases were applied to laws that forbid race discrimination, it would likely find them all unconstitutional. See *infra* at Section IIIA(ii). The Sixth Circuit's notion that decisions regarding racial preference must be made at low governmental levels rather than in state constitutions is unsupported by law and insupportable under our legal traditions. See *infra* at Section IIIA(iii).

It would be especially unfortunate if the Sixth Circuit's decision were allowed to stand given the considerable evidence that initiatives like MCRI work to improve the academic performance and graduation rates of minority college students. They also increase the number of minority students who major in science and engineering and who go on to advanced degrees in graduate and professional school. See *infra* at Section IIIB. This is not just the wishful thinking of theoreticians. All of this happened in California following CCRI's passage. The Sixth Circuit's decision has put a cloud over one of the few bright spots in education today. *Amici* hope the cloud will be lifted as swiftly and unequivocally as possible.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Erred in Holding MCRI to Be a Constitutional Violation.

A. The Logic of *Hunter* and *Seattle School District* Can Be Applied Only to Laws that Promote Discrimination, Not Laws that Forbid It.

Anyone who argues that the Equal Protection Clause of the U.S. Constitution forbids voters from prohibiting the state from engaging in discrimination based on race faces an uphill battle. The "'central purpose'" of the Equal Protection Clause "'is the prevention of official conduct discriminating on the basis of race.'" *Seattle School District*, 458 U.S. at 484 (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)); *see also Hunter*, 393 U.S. at 391 ("[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinction based on race."); *Loving v. Virginia*, 388 U.S. 1, 10 (1967); *Ex Parte Virginia*, 100 U.S. 339, 344-45 (1879); *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879); *The Slaughter-House Cases*, 83 U.S. 36, 71 (1872).

Indeed, at least four members of this Court over the past several decades—Justices Douglas, Stewart, Scalia, and Thomas—have taken the position that the Equal Protection Clause is a flat ban on race discrimination. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment); *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting);

DeFunis v. Odegaard, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting). For the Sixth Circuit to be right, these justices would have to be not just wrong, but very wrong. The Constitution would have to protect specially the very thing that they believed it prohibited.

Two courts have already rejected precisely the argument the Sixth Circuit now embraces. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997); *Coral Construction, Inc. v. City of San Francisco*, 235 P.3d 947 (Cal. 2010).[2] Judge O'Scannlain put the point well in *Coalition for Economic Equity*: "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." 122 F.3d at 709.

The core of the Sixth Circuit's decision to the contrary appears to be this: By enshrining a policy against race discrimination in a state constitution, that state is discriminating against racial minorities who might wish to lobby the state legislature, a state agency or a local government for preferential treatment. Other interest groups—veterans, public employees, etc.—can lobby a governmental entity for special treatment without restraint. But a racial group can do so only if it first successfully lobbies to repeal the state constitutional provision. Such a "political restructuring" is unconstitutional race discrimination—or so the Sixth Circuit held.

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[2] In addition, the same argument was rejected by a Sixth Circuit panel when this case came up at the preliminary injunction stage. See *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006).

In arriving at its decision, the Sixth Circuit relied on the so-called "political re-structuring" cases—*Hunter* and *Seattle School District*. Attempting to apply those cases to MCRI, it held that individual state colleges and universities are the traditional decision-makers on matters of admissions policy. Because MCRI makes it impossible for racial minorities, but not tennis players, to lobby these schools for preferential treatment, its adoption constitutes unconstitutional race discrimination.

This reflects a fundamental misunderstanding of the Constitution and MCRI. MCRI does not discriminate against racial minorities. It discriminates against *race discrimination*—just like the doctrine of strict scrutiny discriminates against race discrimination. Members of racial minorities are as free as anyone (including members of racial majorities) to lobby for preferential treatment. They just can't lobby for it based on their race, sex, etc. Nor can they be disadvantaged on those bases. MCRI is a two-way street.[3]

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[3] The Sixth Circuit apparently believes that racial minority members are already protected against discrimination in college and university admissions and hence MCRI has only downside potential for them. As Asian American applicants know only too well, this is untrue. See Thomas Espenshade & Alexandria Walton Radford, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (2009) (noting large disparities between the academic credentials of Asian Americans who are offered admission to elite schools and other such applicants). Indeed, diversity admissions policies have potential downsides for all groups, including African Americans and Hispanics. Under *Grutter v. Bollinger*, 539 U.S. 306 (2003), a college or university may discriminate on the basis of race in order to reap whatever educational benefits racial diversity may have for

Hunter provides no support for the Sixth Circuit's holding, since the initiative at issue there did not prohibit state discrimination, but rather encouraged private race discrimination among private citizens. By repealing a local fair housing ordinance and making its re-promulgation difficult, the charter amendment at issue in *Hunter* thwarted the city of Akron's efforts to discourage racial discrimination by private citizens, thereby lending aid and encouragement to those private discriminators.

Seen in this light, *Hunter* resembles a less controversial case, *Anderson v. Martin*, 375 U.S. 399 (1964). In *Anderson*, this Court struck down a Louisiana law requiring that election ballots specify each candidate's race. Like the charter amendment in *Hunter*, the Louisiana statute was facially neutral, although it explicitly dealt with race. Like *Hunter*, the Louisiana statute's purpose appeared to be sinister: It appeared to be intended to facilitate voters' private racial animosity and thereby reduce the number of African Americans elected to office. In both cases, the Court's decision can be seen as an attempt to prevent states from affirma-

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its students. An institition that is largely African American (as historically black colleges and universities frequently are) is thus presumably free to discriminate in *favor* of whites and *against* African Americans. MCRI on the other hand would prevent that. Interestingly, in the area of sex, non-traditional affirmative action preferences for men have become common. See Gail Heriot & Alison Somin, *Affirmative Action for Men?: Strange Silences and Strange Bedfellows in the Public Debate over Discrimination Against Women in College Admissions*, 12 Engage 14 (2011). MCRI would protect against that too—as well as against other shifts in political and constitutional fashion.

tively encouraging its citizens to engage in racial discrimination.

Seattle School District, too, involved a voter initiative that attempted to facilitate private discrimination rather than end public discrimination. The school board in that case had adopted mandatory school busing in order to alleviate the problem of racial isolation brought on by decades of private housing discrimination. The initiative in that case prohibited school districts from assigning students to a school that is not the closest (or next closest) to the student's home unless exceptional reasons applied. The exceptional reasons did not include a desire to integrate the schools or to reduce the incentives for individuals to discriminate in the sale and rental of homes. Like the initiative in *Hunter*, *Seattle School District's initiative* was not a prohibition on race discrimination. To the contrary, it was intended to shore up Seattle's segregated housing patterns and thus to facilitate private discrimination and allow its effect to continue long into the future.

MCRI is in no way intended to encourage either public or private race discrimination; nor will it encourage such. Instead, it is a strong ban on state-sponsored discrimination. Neither *Hunter* nor *Seattle School District* has any application, therefore. It should be noted that no one seriously claims that the kind of race discrimination MCRI prohibits is constitutionally justified as a remedy for past discrimination. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of University of California v. Bakke*, 438 U.S. 265, 307-10 (1978) (Opinion of

Powell, J.) (rejecting societal discrimination as a permissible justification for race-preferential admissions policies).

B. All Laws Work a "Political Re-Structuring" of the Kind the Sixth Circuit Condemns; That May Be Among the Reasons this Court has Quietly Declined to Follow *Hunter* Even in Cases in which it Arguably Could Be Applied.

If MCRI works a "political re-structuring," then all laws do, no matter what level at which they are promulgated. Take, for example, the Equal Credit Opportunity Act, Pub. L. 94-239, 90 Stat. 251 (1974). Under its provisions, 15 U.S.C. sec. 1691 *et seq.*, it is illegal to discriminate on the basis of race in the provision of credit. When Congress passed that law in 1974, it effectively pre-empted the Michigan legislature from passing legislation that might have required banks to give African Americans credit at a preferential rates. If African Americans in Michigan had wanted such a statute, they would have been required to first lobby to repeal the federal legislation that mandates equality.

That would not end the matter. In turn, if the Michigan legislature had enacted a mandatory one-point preferential rate, it would have pre-empted a state agency from adopting regulations requiring lenders to give African Americans a two-point preferential rate. Again, repeal would be necessary to secure the greater advantage. Indeed, since lenders traditionally set their own rates, this argument could continue to still lower levels of government. See also Gail Heriot, *California's Proposition 209*

and the United States Constitution, 43 Loy. L. Rev. 613 (1998).

In the end, one would be hard-pressed to come up with a single enactment concerning race relations that would not violate the Sixth Circuit's interpretation of *Hunter* and *Seattle School District*. Even the doctrine of strict scrutiny itself is unconstitutional under it.

It is thus no wonder that this Court has shied away from such a broad application of *Hunter*. In the most recent case that potentially concerned the issue, *Romer v. Evans*, 517 U.S. 620 (1996), this Court conspicuously avoiding reliance on *Hunter*. *Romer* concerned Colorado's Amendment 2, which repealed ordinances that prohibit discrimination based on "homosexual, lesbian or bisexual orientation" and prohibited future legislation designed to ban discrimination on that basis. In contrast to the case at bar, therefore, *Romer*'s facts were reasonably analogous to *Hunter*'s. A Colorado trial court issued a preliminary injunction against the enforcement of Amendment 2 and the Colorado Supreme Court affirmed relying on *Hunter* and *Seattle School District*. In affirming those courts, this Court explicitly stated that it was relying "on a rationale *different* from that adopted by the State Supreme Court" and cited the two cases only in describing the decisions below. *Romer*, 517 U.S. at 624 (emphasis added). Justice Kennedy, writing for the majority, instead relied upon the conclusion that "the amendment seems inexplicable by anything other than animus." *Id.* at 632.

Justice Scalia explained in his dissent why the "political landscape alternation" rationale in

Hunter would be an unsuitable foundation for the Court's decision:

> [I]t seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e. by that state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors .... Once such a law is passed, the group composed of relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection ....
>
> The same 'rational basis' (avoidance of corruption) which renders constitutional the substantive discrimination against relatives ... also automatically suffices to sustain what might be called the electoral-procedural discrimination against them .... [A] law that is valid in its substances is automatically valid in its level of enactment.

Romer, 517 U.S. at 630-31 (Scalia, J., dissenting).

The majority in *Romer* evidently took Justice Scalia's criticisms to heart, since the majority opin-

ion relied on an animus theory rather than *Hunter*. *Romer* thus has no application to this case. Even the originators of the political re-structuring argument against CCRI, law professors Evan Caminker and Vikram Amar, concede that an argument against the initiative based on racial animus would be inappropriate.[4]

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[4] See Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019, 1023 (1996) ("Such a showing of invidious intent or motive behind ... CCRI would, we feel, be very hard to make"). The authors cite to several non-invidious reasons that could motivate a voter to support CCRI from notions of fundamental fairness to concerns for economic efficiency to a desire to avoid stigmatizing affirmative action beneficiaries. No fair-minded CCRI opponent argues that it was motivated primarily or even substantially by malice. While no statewide election has ever been conducted anywhere in which no voter was motivated by malice, those who supported CCRI overwhelmingly did so conscientiously. Presidential candidate Robert Dole, Governor Pete Wilson, and a host of other officeholders endorsed it, as did newspapers like the San Diego Union Tribune, the Orange County Register, UC-Berkeley's Daily Californian, UCSD's Daily Guardian, and San Diego State University's Daily Aztec. It is difficult to imagine that they were all simply spewing hatred. Indeed, CCRI could not have passed without millions of votes from women and minorities—the very persons that its opponents argued would be victimized by it.

C. The Sixth Circuit's Notion that Questions of Preferential Treatment for Racial Minorities Must be Left at a Low Level of Government is Contrary to Law.

The Sixth Circuit takes the novel position that since admissions policy-making is generally entrusted to individual state colleges and universities, the discretion to grant preferential treatment to racial minorities must also remain there. Local is evidently better under this approach. Generally, however, the nation has the opposite policy with regard to state-sponsored race discrimination. The primary authority to deal with it has resided at the highest level rather than the lowest. *See* U.S. Const. amend. XIV; *see also* Federalist No. 10 at 77 (Madison) (Rossiter ed. 1961) (arguing that an important virtue of a strong union is "its tendency to break and control the violence of faction"). The notion that the grey areas that (per *Grutter*) arguably fall just short of the Fourteenth Amendment's prohibition must be entrusted to the most local level of government is nonsensical.

II. Voter Initiatives Like MCRI Hold the Key to Improving the Academic Success of Under-Represented Minority Students.

For years, colleges and universities operated under the assumption that when they engaged in affirmative-action preferences in admissions, minority students were receiving a valuable benefit. The evidence indicates, however, that this is error. The recipients of preferences must often struggle to succeed at institutions where their entering aca-

demic credentials put them well below that institution's median. Many are worse off.

How can this be? No one should be surprised to learn that affirmative action beneficiaries tend to earn low grades at the colleges and universities that recruit them. While some students will outperform their entering academic credentials just as some students will under-perform theirs, most students perform in the general range that their entering credentials suggest. See, e.g., Richard H. Sander & Stuart Taylor, Jr., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012) ("MISMATCH"). Even affirmative action advocates concede that minority student grades are "startlingly low." See Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1807 (2005) (referring to first-year law-school grades).

What some do find surprising is that students who attend a more prestigious school on a preference (and who hence earn low grades) have been repeatedly shown to be less successful than students with precisely the same entering academic credentials who attend a school where those entering credentials put them at or somewhat above the median (and who hence earn higher grades). The so-called "beneficiaries" of affirmative action are less likely to graduate than their academic peers attending somewhat less prestigious schools. MISMATCH at 106-08. They are less likely to graduate with a degree in science and engineering. *See, e.g.*, Rogers Elliott, *et al.*, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective*

Institutions, 37 Res. Higher Ed. 681, 692-93 (1996). In law schools, they are less likely to graduate and pass the bar. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004). They are less likely to aspire to become college professors. *See* Stephen Cole & Elinor Barber, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH ACHIEVING MINORITY STUDENTS (2003).

Nevertheless, all is not lost—not yet anyway. While CCRI has been consistently opposed by university administrators, it has been a shining example of how these problems can be turned around. To begin with, CCRI greatly increased the academic performance of under-represented minority students—*i.e.* it has increased the rate at which they earn honors and decreased the rate at which they wind up in academic jeopardy.

Take, for example, the case of the University of California at San Diego ("UCSD")—a highly selective institution, but not quite as selective as the UC's Berkeley campus. *Amici* have firm data on UCSD. In 1997, only one African-American student at UCSD had a freshman-year GPA of 3.5 or better—a single African-American honor student in a freshman class of 3,268. In contrast, 20 percent of the white students had such a GPA. Failure rates were similarly skewed. Fully 15 percent of African-American students and 17 percent of American Indian students at UCSD were in academic jeopardy (defined as a GPA of less than 2.0), while only 4 percent of white students were. Other under-represented minority students hovered close to

the line.[5] *See* Gail Heriot, *The Politics of Admissions in California*, 14 Academic Questions 29 (2001).

This was not because there were no other African-American students capable of doing honors work at UCSD. The problem was that such students were often at Stanford or Berkeley, where often they were not receiving honors. Similarly, white students were not magically immune from failure. But those who were at high risk for it had not been admitted in the first place. Instead, they were at less competitive schools where their performance was more likely to be acceptable. *Id.*

Then came CCRI. CCRI went into effect in time to affect the undergraduate admissions decisions for the entering class of 1998, causing Berkeley's offers of admission to African Americans, Hispanics and American Indians to go from 23.1 percent of the total offers to 10.4 percent. *Id.*

Of course, the minority students who would have attended Berkeley in the past had not simply vanished. They had been accepted to somewhat less highly ranked campuses–often UCLA and UCSD–based on their own academic record rather than race. In turn, students who previously would have been admitted to UCLA or UCSD on a preference had usually been admitted to schools somewhat less competitive UC campuses. UC-Riverside and UC-Santa Cruz both posted impressive gains

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[5] Since UCSD didn't keep separate statistics for those minority students who needed a preference in order to be admitted and those who would have been admitted regardless, it is impossible to say exactly how high the failure rate was for preference beneficiaries in particular.

in minority admissions. At Riverside, for example, Black and Latino student admissions shot up by 42 percent and 31 percent respectively. UCSD reported mixed results. Black enrollment there was down 19 percent, but Filipino and Latino enrollment was up by 10 percent and 23 percent. *Id.*

At UCSD, the performance of Black students improved dramatically. No longer were African-American honor students a rarity. Instead, a full 20 percent of the African-American freshmen were able to boast a freshman-year GPA of 3.5 or better. That was higher than the rate for Asians (16 percent) and extremely close to that for whites that year (22 percent). Suddenly African-American students found themselves on a campus where achieving academic success was not just a "white thing" or an "Asian thing." *Id.*

The sudden collapse in minority failure rate was even more impressive. Once racial preferences were eliminated, the difference between racial groups all but evaporated at UCSD, with Black and American Indian rate falling to 6 percent. Consequently, average GPAs all but converged. UCSD's internal academic performance report announced that while overall performance has remained static, "underrepresented students admitted to UCSD in 1998 substantially outperformed their 1997 counterparts" and "the majority/majority performance gap observed in past studies was narrowed considerably." *Id.*

"Narrowed" was understatement. The report found that for the first time "no substantial GPA differences based on race/ethnicity." A discreet footnote makes it clear that the report's author

knew exactly how this happened: 1998 was the first year of color-blind admissions. *Id.*

Granted, UCSD had twelve fewer African-American freshmen in the first year of CCRI's implementation, forced as it was to reject students who did not meet its regular academic standards. But it also had seven fewer African-American students with a failing GPA at the end of that year. Meanwhile, those twelve students probably attended a school where their chances of success were greater. *Id.*

Some argued that CCRI would discourage qualified minorities from even applying to the UC system. But the evidence shows just the opposite. African-American and Hispanic students with competitive academic credentials were actually *more* likely to apply to the UC once CCRI went into effect. *See* David Card & Alan Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 416 Indus. Lab. Rel. Rev. 58 (2005); *see also* MISMATCH at 131-42 (arguing that Card & Krueger's methodology may have *understated* CCRI's "warming effect" on applications by competitive minority students).

CCRI's critics have been loath to admit it, but the big news following CCRI's implementation was skyrocketing minority graduation rates. As Sander & Taylor reported:

> Minority graduation rates rose rapidly in the years after [CCRI], and on-time (four-year) graduation rates rose even faster. For the six classes of black freshman who entered UC

> schools in the years before race-neutrality (i.e., the freshman classes of 1992 through 1997), the overall four-year graduation rate was 22 percent. For the six years after [CCRI's] implementation the black four-year graduation rate was 38 percent. Thus, even though the number of black freshman in the UC system fell almost 20 percent from 1997 to 1998, the number of black freshman who obtained their degrees in four years barely dipped for this class,[6] and the entering class of 2000, four years later, a record number of blacks graduating on time.

MISMATCH at 146.

Not all of this astonishing increase is provably traceable to CCRI. But Duke University researchers have found that about 20% of the overall increases in graduation rates of UC minority students is. And if CCRI had been implemented with greater rigor, it would have contributed even more. *See* Peter Arcidiacono, *et al.*, *Affirmative Action and University Fit: Evidence from Proposition 209*, Nat'l Bur. of Eco. Res. Working Paper No. 18523 (November 1, 2012). In a world in which steps forward in education, when they occur at all, are rare and incremental, that is a stunning victory.

And it is not just grade-point averages and graduation rates. Between 1997 and 2003, the number of African-American and Hispanic students graduating with a degree in science or engineering

---

[6] Note that the black students who didn't attend the UC once race preferences were eliminated almost certainly attended another college or university. Their numbers should be added to the total, which would bring the number of total black graduates higher.

rose by about 50%. Not unrelatedly, the number of African-American and Hispanic students majoring in ethnic studies and communications fell by 20%. MISMATCH at 150-54. Academic self-confidence was growing among minority students.

Note the Triple Crown: (1) Grade-point averages of under-represented minority students and (2) graduation rates of such students were improving at the same time that (3) they were increasingly majoring in science and engineering. Ordinarily, these three goals would be difficult to achieve at the same time. For example, grading curves are traditionally lower in science and engineering departments than they are in the rest of the university, so it is remarkable that grade-point averages would be going up alongside increases in the number of science and engineering majors. Combine those victories with an increase in graduation rates. When graduation rates increase it is generally because some weaker students, who might have dropped out in an earlier time, are managing to make it to the end. One would thus expect increasing graduation rates to have a depressive effect on grade-point averages and/or on the proportion of students majoring in science and engineering. But instead improvements were made in all three areas. It is as if Ford had come up with a new automobile that was both more luxurious and better on gasoline mileage—and cheaper too.

Why is all this evidence being ignored by affirmative action advocates? Perhaps Leo Tolstoy has some wisdom to impart on this subject:

> I know that most men, including those at ease with problems of the greatest complexi-

> ty, can seldom accept even the simplest and most obvious truth if it be such as would oblige them to admit the falsity of conclusions which they have delighted in explaining to colleagues, which they have proudly taught to others, and which they have woven, thread by thread, into the fabric of their lives.

MISMATCH at x (quoting Leo Tolstoy).

To be sure, over the years since then, the UC has developed techniques that allow it to circumvent CCRI in part while still enabling it to argue publicly that it is in compliance. As a result, its benefits have been diluted somewhat. But it has not eliminated them. A long as CCRI remains the law, there is reason for optimism. Students in Michigan should not be denied the same opportunities that MCRI offers to them.

CONCLUSION

The "parade[ ]" of "horribles" scoffed at by the majority in *Seattle School District* is alive and well and marching over the rights of Michigan voters. *Id.* at 480 n.23. At a time that nearly all Americans earnestly wish to increase the likelihood that students from under-represented racial minorities will be academically successful, this ugly and ill-informed parade is reducing that likelihood. Amici urge this Court to grant the Petition and reverse.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* FORMER ATTORNEYS OF THE DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION IN SUPPORT OF MICHIGAN ATTORNEY GENERAL BILL SCHUETTE

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INTEREST OF THE *AMICI CURIAE*

Each of the individuals submitting this brief as *amici curiae* has worked as a career attorney or, in one instance, a political appointee in the Department of Justice, Civil Rights Division. Accordingly, each has a significant and longstanding interest in civil-rights and voting-rights matters in general, along with a specific interest in the particular issues raised in this case.[1]

Hans A. von Spakovsky is the former Counsel to the Assistant Attorney General for Civil Rights at the Department of Justice, a former Commissioner on the Federal Election Commission, and a former member of the Virginia Advisory Board of the U.S. Commission on Civil Rights. He has extensive experience in the area of civil rights and the enforcement of Federal voting-rights law.

Karl S. "Butch" Bowers, Jr. served as Special Counsel for Voting Matters in the Civil Rights Division of the United States Department of Justice from 2007–2008. In his role, Mr. Bowers oversaw the activities of the Voting Section of the Justice

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[1] Pursuant to Rule 37.2, counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intent to file this brief. The parties have consented to the filing of this brief, and correspondence from each counsel granting that consent is being filed with the Clerk's office along with this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made such a monetary contribution to its preparation or submission.

Department's Civil Rights Division and provided legal and policy counsel on Federal election-law matters to senior officials in the Justice Department. Mr. Bowers is also former Chairman of the South Carolina State Election Commission.

Mr. Bowers is currently in private practice with the law firm of Womble Carlyle in Columbia, South Carolina, where he focuses on public policy matters including constitutional issues, election and voting law, campaign finance law, and legislative and regulatory matters.

H. Christopher Coates served in the Voting Section of the Justice Department's Civil Rights Division from 1996 through 2009, and was Chief of the Voting Section from 2007-2009. Mr. Coates was lead attorney for the Department of Justice in numerous voting-rights cases brought on behalf of African-American, American Indian, and Hispanic voters, as well as in *United States v. Ike Brown*, the Civil Rights Division's first case filed under the Voting Rights Act challenging racial discrimination by minority election officials against white voters. In 2007 he was awarded the Walter Barnett Memorial, the Civil Rights Division's second-highest award, for excellence in advocacy.

From 1976 to 1985, Mr. Coates was a staff attorney in the American Civil Liberties Union's Voting Rights Project in Atlanta, Georgia. He was in private practice from 1985-96 in Milledgeville, Georgia, where he continued his civil-rights practice and was awarded the Thurgood Marshall Decade Award by the Georgia

NAACP, and the Environmental Justice Award by the Georgia Environmental Organization.

J. Christian Adams served as an attorney in the Voting Section of the Department of Justice's Civil Rights Division from 2005 to 2010. In that capacity, Mr. Adams brought a wide range of election cases to protect African-American, Asian, and other minorities in States throughout the south, in matters involving vote-dilution, redistricting, and other issues. Mr. Adams also litigated cases involving military voting protections and voter intimidation, including the case against the New Black Panther Party in Philadelphia, and, with Mr. Coates, successfully litigated *United States vs. Ike Brown* under the Voting Rights Act.

Prior to joining the Department of Justice, Mr. Adams served as General Counsel to the South Carolina Secretary of State, and was in private practice in Virginia. He currently is Legal Affairs Editor for PJMedia.com, and also writes for the Washington Examiner, Washington Times, and other publications.

SUMMARY OF THE ARGUMENT

The Sixth Circuit's invalidation of Michigan's constitutional ban on racial preferences in university admissions opens up a stark circuit split on issues going to the heart of both Equal Protection and democratic self-government, that this Court should address. Additionally, changed circumstances in the decades since this Court articulated the "political process" Equal Protection theory on which the Sixth Circuit relied, compel the re-examination and retirement of that doctrine.

ARGUMENT

I. The Sixth Circuit's ruling creates a square and irreconcilable conflict with the Ninth Circuit and California Supreme Court interpretations of identical constitutional language.

Article I, § 26 of the Michigan Constitution, adopted by voters in 2006, replicates nearly verbatim a provision adopted by California voters a decade earlier, and upheld by both the Ninth Circuit and the California Supreme Court against "political process" Equal Protection challenges. Yet the Sixth Circuit now has found Michigan's version repugnant to Equal Protection, and acknowledged the stark contrast with both of those courts. Pet. App. 40a n.8. Moreover, the court's decision came in an *en banc* opinion (by the barest of majorities) eliminating any chance of self-correction. The disagreement between these courts, on such a question of fundamental national importance, certainly merits review. *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003).

Article I, § 31 of the California Constitution, proposed as the California Civil Rights Initiative, states in pertinent part:

> **§ 31. Affirmative action**
>
> **(a)** The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of

> public employment, public education, or public contracting.
>
> * * *
>
> (f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.....

It was adopted by a 54-46 margin of nearly 9 million California voters on November 5, 1996, and became the subject of litigation the next day.

Article I, § 26 of Michigan's Constitution, proposed as the Michigan Civil Rights Initiative, provides in relevant part:

> Sec. 26. (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual

> or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in subsection 1....

Article I, § 26 was adopted on November 7, 2006 by a 58-42 margin of nearly 4 million Michigan voters. It, too, was challenged in court the next day.

The Ninth Circuit rejected the challenge to California's constitutional ban on race- and gender-based preferences under the "political process" doctrine of *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (1997). More recently, the California Supreme Court did the same. *Coral Construction, Inc. v. San Francisco*, 235 P.3d 947 (Cal. 2010). In the Ninth Circuit's view, the provision passed constitutional muster for the simple reason that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Wilson*, 122 F.3d at 706, *quoting Crawford v. Board of Ed. of the City of Los Angeles*, 458 U.S. 527, 538 (1982).

> *Hunter* and *Seattle*, in [plaintiffs'] view, foreclose the authority of states to withdraw local jurisdiction to enact race and gender preferences unless the state also withdraws local jurisdiction to enact preferences based on any other criteria. Such an extraordinary position hardly follows from *Hunter* and *Seattle*. [*Id*].

But the Sixth Circuit now has found that "extraordinary position" in fact is *compelled* by *Hunter* and *Seattle*. In that court's view, Michigan's constitutional ban on preferences fails precisely because it does not outlaw preferences based on other criteria. The centrality of that notion to its analysis is evidenced by the opening lines of the en banc opinion:

> A student seeking to have her family's alumni connections considered in her application to one of Michigan's esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state's constitution. The same cannot be said for a black student seeking the adoption of a constitutionally permissible race-conscious admission policy. That student could do only one thing to effect change: she could attempt to amend the Michigan Constitution – a lengthy, expensive and arduous process – to repeal the consequences of Proposal 2. The existence of such a comparative structural burden

> undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change. We therefore REVERSE the judgment of the district court on this issue and find Proposal 2 unconstitutional....Pet. App. 6a.

In the Sixth Circuit's view, Article I, § 26 "targets a program that 'inures primarily to the benefit of the minority' and reorders the political process in Michigan in a way that places special burdens on racial minorities." Pet. App. 22a, *citing Seattle*, 458 U.S. at 467, 472 and *Hunter*, 393 U.S. at 391. In its view, Michigan's voters have "rigged the game" against racial minorities. Pet. App. 16a.

But the Ninth Circuit noted that a constitutional prohibition on special treatment hardly constitutes a stacking of the deck:

> The controlling words, we must remember, are "equal" and 'protection." Impediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms. *Wilson*, 122 F.3d at 708 (footnote omitted).

Leaving aside for now which view of the Equal Protection clause is correct, the Ninth and Sixth Circuits cannot both be right. Either a State's electorate is entitled to amend its Constitution to outlaw race and gender preferences in public higher education, or it is not.

The Sixth Circuit also distorted *Grutter* in defining admissions preferences as "minority objectives," i.e. "*legislation that is in their interest*." Pet. App. 39a-41a & n.8, *quoting Seattle*, 458 U.S. 474 (emphasis added by Sixth Circuit). To the Sixth Circuit, a central issue in the *Hunter/Seattle* analysis "is whether *racial minorities* are forced to surmount procedural hurdles in reaching *their objectives* over which other groups do not have to leap." Pet. App. 41a (emphasis added). But *Grutter* upheld a race-conscious admissions policy precisely under the theory that such things benefit society as a whole – and reaffirmed that setting aside a numerical quota solely for the benefit of a particular racial or ethnic group would be "patently unconstitutional." 539 U.S. at 329-333, *citing, inter alia, Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.). Given that a system of racial or gender preferences simply cannot be deemed an objective solely of, or something benefitting, a single group, a statewide electorate's decision to do away with it cannot be invalidated on the basis that "minority objectives" are being attacked.

Prudentially, this Court has advised that before reviewing the constitutionality of a State initiative, a Federal court should ask, "Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (citation omitted). Given the

Sixth Circuit's divergence from the decisions of the California Supreme Court and Ninth Circuit refusing to invalidate functionally identical language under the "political process" doctrine, the answer to that preliminary inquiry plainly is, yes. The petition should be granted.

II. The Court should retire the "political process" doctrine.

The challenge to Michigan's constitutional guarantee of equal treatment readily fails without the benefit of *Hunter/Seattle*'s "political process" argument, since Article I, § 26 easily passes traditional Equal Protection analysis. Pet. App. 78a (Gibbons, J., dissenting); *see also Wilson*, 122 F.3d at 701-702; *Coral Construction*, 235 P.3d at 957. *Hunter* and *Seattle* thus are necessary preconditions to the Sixth Circuit's analysis, and while its misapplication of them permits this Court simply to reverse, circumstances suggest it also is time to revisit *Hunter* and *Seattle*.

Hunter was issued only five years after passage of the 1964 Civil Rights Act; *Seattle* barely a decade later. Both predate by at least 20 years the Court's decision in *Grutter*, a ruling that not only led directly to the California and Michigan Civil Rights Initiatives, but sparked confusion over what effect, if any, the *Hunter/Seattle* "political process" doctrine has or should have in the area of university admissions.

In reviewing Equal Protection challenges, "[c]ontext matters." *Grutter*, 539 U.S. at 327. And the substantial changes to the Nation's demographic and political makeup post-*Seattle* provide backdrop that

should be considered in determining the "political process" doctrine's continued validity. *Amici* have dedicated large portions of their professional careers to safeguarding the voting rights of all Americans, including African-Americans, and it is noteworthy that, three decades after *Seattle*, an electorate consisting of 77.5-percent non-Hispanic whites, and only 12 percent blacks, has elected and now re-elected a black President. *See* U.S. CENSUS BUREAU, *Hispanic Voter Turnout Reaches Record High for Congressional Election*, available at http://www.census.gov/newsroom/releases/archives/voting/cb11-164.html (accessed January 1, 2013). Whatever need there may have been for the "political process" doctrine in 1969 or 1982, today it has become a shopworn, paternalistic vestige, serving only as a tool with which the elites of the grievance industry may continue their self-serving, socially corrosive plunder.

Racial line-drawing was at the very heart of Jim Crow, the dark period in our Nation's history in which similarly situated individuals were subjected to the most odious, unjust treatment due solely to their race. Traditional Equal Protection analysis rejects the perpetual enshrinement of preferences as merely the flip side of that debased coin, and would dispose of it using the most fundamental of analytical frameworks: two wrongs don't make a right. *See*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J., concurring) ("The way to stop discrimination based on race is to stop discriminating based on race"), *Id.* at 780-781 (Thomas, J., concurring) ("If our history has taught us anything it has taught us to beware of elites bearing racial theories"), *citing Dred Scott v. Sandford*, 60 U.S. 393

(1857). As the Sixth Circuit opinion demonstrates, the only thing propping up that continued line-drawing in the public-university admissions context – and only in the four States of that Circuit – is the "political process" doctrine. This Court should re-examine and retire it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORDS AND BRIEFS

No. 12-682

In The
Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE MICHIGAN REPUBLICAN PARTY AS *AMICUS CURIAE* SUPPORTING PETITIONER

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The Michigan Republican Party respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus Michigan Republican Party (the "MRP") is an unincorporated association that actively and extensively participates in campaigns, elections, and public policy debate. The MRP is a state organization of the Republican Party, and exists in large part to aid in fostering political debate and the exchange of ideas among its members and the public, and in expressing, promoting, and supporting its members' political beliefs and ideas with respect to public policy issues. An election is the cornerstone of the MRP's activities; consequently, when the results of an election are jeopardized, the MRP must act to preserve the will of the voters.

In this case, the Sixth Circuit Court of Appeals struck a portion of the Michigan Constitution approved by the majority of Michigan voters in 2006.

---

[1] Pursuant to Sup. Ct. R. 37.2, counsel of record for all parties received notice of the *amicus*' intention to file this brief at least 10 days prior to the due date. All parties have consented to the filing of this brief. Pursuant to Sup. Ct. R. 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

But the Ninth Circuit Court of Appeals upheld California voters' approval of an essentially identical provision in their California Constitution, which has been in effect there since 1996. The MRP is interested in protecting the rights of Michigan voters to amend their state constitution and ensuring that voters in the Sixth Circuit have the same powers as voters in the Ninth Circuit.

SUMMARY OF ARGUMENT

In the 2006 general election, Michigan voters exercised their power to amend the Michigan Constitution by majority vote. Fifty-eight percent of Michigan voters approved a constitutional amendment requiring equality in public employment, education, and contracting. The Sixth Circuit's decision to find this equality amendment in violation of the Equal Protection Clause directly conflicts with the Ninth Circuit, which upheld an essentially identical voter-enacted amendment to the California Constitution. The state constitutional amendments approved by Michigan and California voters require equal protection of the laws. By striking Mich. Const. art. I, § 26, the Sixth Circuit thwarted the will of millions of Michigan voters, and deprived them of power enjoyed by voters of the Ninth Circuit. The MRP supports the petition for a writ of certiorari.

ARGUMENT

I. The Sixth Circuit Struck a Michigan Constitutional Amendment Approved and Made Law by 58% of Michigan Voters.

Michigan's Constitution begins by stating: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Mich. Const. art. I, § 1. In the Michigan Constitution, the people allocated certain portions of their inherent powers to the branches of government, but also reserved certain powers to themselves. The people reserved the right to amend their Michigan Constitution by petition and popular vote. Mich. Const. art. XII, § 2. Amendments may be proposed by petition signed by registered electors of the state equal in number to at least 10% of the total vote cast for all candidates for governor in the last preceding general election at which a governor was elected. Mich. Const. art. XII, § 2. If such a petition satisfies timing and other requirements, the proposed amendment may be placed on the ballot at the next general election. Mich. Const. art. XII, § 2. If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the Michigan Constitution. Mich. Const. art. XII, § 2.

Michigan voters exercised their amendment powers on November 7, 2006, and approved Proposal 06-02, now Mich. Const. art. I, § 26, by a 58% to 42% margin of votes. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, ___ F.3d ___, 2012 WL 5519918, *1 (6th Cir. 2012). The

majority of Michigan voters approved the following amendment to the Michigan Constitution:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. [Mich. Const. art. I, § 26(1)-(2).]

The Sixth Circuit Court of Appeals struck this voter-approved amendment, holding that its prohibition of discrimination and preferential treatment violated the Equal Protection Clause of the Fourteenth Amendment. *Coalition to Defend Affirmative Action*, 2012 WL at *1. The Sixth Circuit relied upon a "political-process doctrine" to find the amendment unconstitutional and did not use the "traditional analysis" of the Equal Protection Clause. *Id.*, 2012 WL at *15, 19. The Sixth Circuit's decision relies upon only two cases setting forth the "political-process doctrine;" Judge Griffin's dissent points out that only three other cases have ever applied this

doctrine. *Id.*, 2012 WL at *5, 41. By failing to follow the "traditional analysis" of the Equal Protection Clause, the Sixth Circuit majority did not properly find an express or implied Equal Protection violation. Justice Black's passionate dissent in *In re Winship*, 397 U.S. 358 (1970) warned the judiciary about the danger of impairing the "most fundamental individual liberty of our people – the right of each man to participate in the self-government of his society" as follows:

> Our Federal Government was set up as one of limited powers, but it was also given broad power to do all that was 'necessary and proper' to carry out its basic purpose of governing the Nation, so long as those powers were not exercised contrary to the limitations set forth in the Constitution. And the States, to the extent they are not restrained by the provisions in that document, were to be left free to govern themselves in accordance with their own views of fairness and decency. Any legislature presumably passes a law because it thinks the end result will help more than hinder and will thus further the liberty of the society as a whole. The people, through their elected representatives, may of course be wrong in making those determinations, but the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights. The liberty of government by the people in my opinion, should never be denied by this Court except

> when the decision of the people as stated in laws passed by their chosen representatives, conflicts with the express or necessarily implied commands of our Constitution. [397 U.S. 358, 384-85 (Black, J., dissenting).]

Justice Black's warning becomes even more important to the circumstances of the present situation since it was the people of Michigan themselves that adopted Mich. Const. art. I, § 26. The Sixth Circuit decision stripped Michigan voters of their power to mandate equality in public employment, education, and contracting.

II. In Contrast, the Ninth Circuit Court of Appeals Upheld the Constitutionality of an Essentially Identical California Constitutional Amendment Approved by the Majority of California Voters.

Like the Michigan Constitution, the California Constitution reserved the right of California voters to amend their state constitution by vote. Cal. Const. art. XVIII, §§ 3-4. California voters exercised their amendment powers on November 5, 1996, and approved Proposition 209, now Cal. Const. art. I, § 31(a), by a 54% to 46% margin of votes. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 696-97 (9th Cir. 1997), cert. den., 522 U.S. 963 (1997). The majority of California voters approved the following amendment to the California Constitution, which is essentially identical to the 2006 Michigan amendment:

> The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. [Cal. Const. art. I, § 31(a).][2]

The Ninth Circuit Court of Appeals concluded "as a matter of law, Proposition 209 does not violate the United States Constitution." *Coalition for Economic Equity*, 122 F.3d at 711. The Ninth Circuit specifically considered and rejected the analysis of the "political-process doctrine" relied upon by the Sixth Circuit. 122 F.3d at 703-709. This Court denied the Coalition's petition for writ of certiorari regarding the Ninth Circuit decision. 522 U.S. 963 (1997). Recently, the Ninth Circuit affirmed dismissal of an Equal Protection challenge to Cal. Const. art. I, § 31. *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1131-32 (9th Cir. 2012). The Ninth Circuit held that *Grutter v. Bollinger*, 539 U.S. 306 (2003) did not overrule the 1997 decision to uphold the California

---

[2] Using their legislative power reserved by Wash. Const. art. II, § 1(a), on November 3, 1998, Washington voters passed Voter Initiative 200, which enacted a Washington state statute providing "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Wash. Rev. Code § 49.60.400(1) (1999). This voter-enacted statute (which is essentially identical to the Michigan and California amendments) remains good law in Washington.

Constitutional amendment. *Coalition to Defend Affirmative Action*, 674 F.3d at 1136.

Thus, the Ninth Circuit allows California voters to bar the state from discriminating or granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin. But in this case, the Sixth Circuit struck Michigan voters' same action as unconstitutional. The Sixth and the Ninth Circuits directly conflict with one another on a matter of utmost importance -- the meaning of the Equal Protection Clause of the Fourteenth Amendment and voters' power to mandate equal treatment of individuals and groups. As it stands today, voters in the Ninth Circuit have greater power to amend their state constitutions than voters in the Sixth Circuit. Voters in the Ninth Circuit may require equal treatment while voters in the Sixth Circuit cannot. The MRP asks this Court to grant the petition for a writ of certiorari to address this circuit split on the same important matter. Sup. Ct. R. 10(a).

III. By Their Plain Language, the Amendments Approved by Michigan and California Voters Require Equal Protection of the Laws.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. This Court has established that the Equal Protection Clause's purpose and meaning is to

stop racial discrimination in the United States. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Equality has been the long-sought goal in our country. In the words of Justice Harlan, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). "Over the years, this Court has consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quotation omitted).

Because the Constitution requires equal treatment, state-made racial distinctions are inherently suspect and subject to strict scrutiny. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality opinion of Powell, J.) (quotation omitted). "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995). "It is by now well established that 'all racial classifications reviewable under the Equal Protection Clause must

be strictly scrutinized.'" *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quoting *Adarand*, 515 U.S. at 224). "[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007) (citation omitted).

Gender classifications are also subject to heightened judicial scrutiny. "Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men)." *United States v. Virginia*, 518 U.S. 515, 532 (1996) (internal footnote and citation omitted).

Given the Equal Protection Clause's requirement of equality, its purpose to stop racial discrimination, and this Court's imposition of heightened scrutiny on state-made racial or gender classifications, the Sixth Circuit's decision that a *voter-enacted* equal treatment mandate was unconstitutional is out of step with established Fourteenth Amendment jurisprudence. As this Court wrote, "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982).

Under the plain language of the Fourteenth Amendment's Equal Protection Clause, a neutral

statute mandating equality on the basis of race, sex, color, ethnicity, and national origin, approved by a majority of voters, should pass constitutional muster. It is state action that distinguishes on racial grounds – not state action requiring equality – that must satisfy strict scrutiny. "While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997), cert. den., 522 U.S. 963 (1997). "When the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender." *Id.*, 122 F.3d at 702. "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

This Court has not mandated unequal state treatment or preference on the basis of race – a step the Sixth Circuit's decision now makes. "[I]n the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits and what it requires." *Shaw*, 509 U.S. at 654. "*Grutter* upheld as *permissible* certain race-based affirmative action programs." *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1136 (9th Cir. 2012) (citation omitted; emphasis original). "It did not hold that such programs are

constitutionally *required*." *Id.* (citation omitted; emphasis original). *Grutter* wrote: "We are mindful . . . that '[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'" *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). "Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." *Id.*, 539 U.S. at 342.

The Sixth Circuit's decision enshrines state-made distinctions on the basis of race as required constitutional law. Chief Justice Roberts wrote that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007). Michigan and California voters exercised their voting rights to approve amendments to their state constitutions requiring equality on the basis of race, sex, color, ethnicity, and national origin.

IV. The Sixth Circuit's Decision to Strike an Amendment Approved by 58% of Michigan Voters Undermines the Democratic Process.

The Sixth Circuit's decision to strike down an equality amendment to the Michigan Constitution made law by 58% of the state's voters in a general election, in conflict with the Ninth Circuit, is at

minimum troubling to our democratic process. As the Ninth Circuit wrote when upholding the California amendment, "[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy." *Coalition for Economic Equity*, 122 F.3d at 699. "Fundamental principles of democratic self-government preclude the judiciary from substituting its judgment for that of the people." *In re Proposals D&H*, 417 Mich. 409, 423, 339 N.W.2d 848, 854 (Mich. 1983). "The people are presumed to know what they want, to understand the proposition submitted to them in all of its implications, and by their approval vote to have determined that this proposal is for the public good and expresses the free opinion of a sovereign people." *Id.* (quotation omitted). The people of Michigan reserved the power to amend their Constitution by popular vote. Mich. Const. art. XII, § 2. The people of Michigan exercised that power when they enacted Mich. Const. art. I, § 26 during the 2006 general election. The MRP asks this Court to consider the Sixth Circuit's decision thwarting the will of millions of Michigan voters.

CONCLUSION

Amicus Michigan Republican Party respectfully asks this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: January 3, 2013

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AMICUS CURIAE BRIEF

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No. 12-682

In the

Supreme Court of the United States

BILL SCHUETTE, Michigan Attorney General,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS FOUNDATION, WARD CONNERLY, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF), American Civil Rights Foundation (ACRF), Ward Connerly, and Center for Equal Opportunity (CEO) respectfully submit this brief amicus curiae, in support of Petitioner, Bill Schuette, Michigan Attorney General.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases involving discrimination on the basis of race, including *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF attorneys have been involved in every Equal Protection Clause challenge to Article I, § 31 (Proposition 209), of the California Constitution, the sister initiative to Article I, § 26 (Proposal 2), to the Michigan Constitution. *See, e.g., Coalition to Defend Affirmative Action v. Schwarzenneger*, No. 10-641 SC,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

2010 U.S. Dist. LEXIS 129736 (N.D. Cal. Dec. 8, 2010), *aff'd*, *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012), *reh'g, reh'g en banc denied*, No. 11-15100 (9th Cir. May 11, 2012) (*Brown*); *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996) (*Wilson I*), *rev'd*, 122 F.3d 692 (9th Cir. 1997) (*Wilson II*), *cert. denied*, 522 U.S. 963 (1997); *Coral Construction, Inc. v. City & County of San Francisco*, 235 P.3d 947 (Cal. 2010).

ACRF is a nonprofit public benefit corporation, with members nationwide, including in Michigan, created to monitor and enforce laws that preclude the use of race, sex, or ethnicity in public contracting, public education, or public employment. Ward Connerly, a coauthor and sponsor of Proposal 2, which became Article I, § 26, to the Michigan Constitution (Proposal 2 or § 26), is a member of the Board of Directors of ACRF and President of the American Civil Rights Institute. He was chairman of the California Civil Rights Initiative Campaign which officially supported the California Civil Rights Initiative, Proposition 209, the progenitor of Proposal 2.

The Sixth Circuit recognized Ward Connerly's and ACRF's significant interest in defending Proposal 2 in several decisions below. *See Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.*, __ F.3d __ (6th Cir. 2012), 2012 U.S. App. LEXIS 23443, at *6 (*Coalition II*) ("Ward Connerly, a former University of California Regent who had championed a similar proposition in California . . . mobilized to place" Proposal 2 on Michigan's November, 2006, statewide ballot.); *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 780 (6th Cir. 2007) (citation omitted) ("It would not be unreasonable to posit that

[Proposal 2] would not have reached the ballot without their efforts."). ACRF continues to defend Proposal 2 as amicus curiae. ACRF filed a brief amicus curiae at the district court in *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 243 (6th Cir. 2006), to support motions to dismiss and/or for summary judgment on January 18, 2008; in the Sixth Circuit where the decision was reversed, *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607 (6th Cir. 2011) (*Coalition I*); and on rehearing *en banc.*, *Coalition II*.

CEO is a nonprofit research, education, and public advocacy organization. CEO devotes significant time and resources to the study of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. It educates the American public about the prevalence of discrimination in American society. CEO publicly advocates for the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. CEO has participated as amicus curiae in numerous cases relevant to the issues raised here, including *Coalition II*, 2012 U.S. App. LEXIS 23443; *Grutter*, 539 U.S. 306, and *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011).

Amici curiae consider this case to be of special significance in that it concerns the ability of voters to embrace color-blind policies and end, once and for all, state sponsored discrimination and racial classifications. Amici respectfully request that this Court grant the petition of the Michigan Attorney General for writ of certiorari, and reverse the decision of the Sixth Circuit in *Coalition II*.

INTRODUCTION AND SUMMARY OF ARGUMENT

Few petitions for writ of certiorari concern a case as worthy of review as the one filed in this matter. Compelling reasons exist to justify review in this case that satisfy several factors listed in Supreme Court Rule 10, Considerations Governing Review on Certiorari. First, the Sixth Circuit's decision below invalidating § 26 under equal protection grounds, created an irreconcilable split in the circuits, implicating Rule 10(a). The Sixth Circuit's decision conflicts with two Ninth Circuit decisions on the same important matter, specifically, the correct application of the "political structure" equal protection theory articulated by this Court in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982). In *Wilson II*, the Ninth Circuit upheld an amendment to California's Constitution, nearly identical to § 26, against an equal protection political restructuring challenge. This Court denied the challengers' petition for writ of certiorari in *Wilson II*. Recently, in *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, the Ninth Circuit affirmed the dismissal of an as-applied equal protection political restructuring challenge to California's prohibition of race-conscious college admission policies.

Second, in holding that Michigan may not amend its constitution to adopt a race neutral policy with respect to education, the Sixth Circuit decided an important federal question in a way that conflicts with decisions by the California and Louisiana supreme courts. In *Coral Construction, Inc. v. City & County of San Francisco*, 235 P.3d 947, the California Supreme

Court held that California's statewide ban on discrimination and preferences does not violate the federal Equal Protection Clause under a political restructuring analysis. In *Louisiana Associated General Contractors, Inc. v. Louisiana*, 669 So. 2d 1185 (La. 1996), the Louisiana Supreme Court held that a constitutional ban on race-conscious affirmative action does not violate the federal Equal Protection Clause. Thus, review is further warranted under Supreme Court Rule 10(a), because the Sixth Circuit's decision, with far reaching implications, conflicts with decisions of two state courts of last resort.

Finally, the Sixth Circuit's decision is likely to lead to further conflict with additional state and federal court decisions because voter initiatives prohibiting discrimination and preferences based on race in public education have passed and become law in four states besides Michigan and California: Washington (1998), Nebraska (2008), Arizona (2010), and Oklahoma (2012). Two other states have adopted a statewide position of strict racial neutrality by legislation and executive order. The New Hampshire legislature outlawed racial preferences in public college admissions in 2011, and Florida banned racial preferences in the state's higher education admission decisions by executive order in 1999.

Review is needed to resolve issues of constitutional law and public policy that are of national importance as our society becomes increasingly multi-racial. Amici respectfully request that the Court grant the petition, reverse the decision of the Sixth Circuit below, and hold that Article I, § 26, of the Michigan Constitution does not violate the Equal Protection Clause by prohibiting race- and sex-based

discrimination or preferential treatment in public university admissions decisions.

REASONS FOR GRANTING THE PETITION

I

THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT AND OF TWO STATE SUPREME COURTS ON AN IMPORTANT MATTER OF CONSTITUTIONAL LAW

The critically important issue at the heart of this matter is whether states may adopt a position of strict racial neutrality in areas of public education, employment, and contracting. The Ninth Circuit and the supreme courts of California and Louisiana all say yes. But the Sixth Circuit says no, holding that the Fourteenth Amendment gives racial groups the right to pursue racial preferences. *Coalition II*, 2012 U.S. App. LEXIS 23443, at *24 n.2, *54. The Court should grant the petition to resolve the conflict about whether states may implement a uniform ban on discrimination and preferences, thereby affording their citizens greater protection than that provided by the Fourteenth Amendment.

A. In *Coalition for Economic Equity v. Wilson*, the Ninth Circuit Upheld a California Voter Initiative Practically Identical to the Michigan Initiative Invalidated by the Sixth Circuit

On November 5, 1996, California voters passed the California Civil Rights Initiative "Proposition 209" by 55% of the vote, amending the California

Constitution to prohibit the state and its subdivisions from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public contracting, and public education. Cal. Const. art. I, § 31(a). Proposition 209 defines "state" to include the public university system. Cal. Const. art. I, § 31(f). As the Sixth Circuit correctly observed, Proposal 2 and Proposition 209 are nearly identical: "Indeed, by design, Proposal 2 tracks the language of Proposition 209." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d at 780.

Upon passage of Proposition 209, proponents of racial preferences filed a lawsuit against the California Governor, the State Attorney General, and the University of California President, among others, because the university had taken steps "to discontinue the use of race and gender preferences in admissions." *Wilson I*, 946 F. Supp. at 1495, 1510 n.35. In their 1996 complaint for declaratory and injunctive relief, the plaintiffs invoked the "political structure" equal protection theory articulated by this Court in *Hunter*, and advanced in *Seattle*. Plaintiffs argued that Proposition 209 restructured the political process by erecting unique political hurdles for those seeking legislation intended to benefit women and minorities.[2] *Wilson I*, 946 F. Supp. at 1489-90.

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[2] Plaintiffs in *Wilson* also alleged that Proposition 209 violated the Supremacy Clause with respect to Titles VI and VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. *Wilson I*, 946 F. Supp. at 1489-90. The Ninth Circuit rejected these claims. *Wilson II*, 122 F.3d at 709-11.

Wilson II examined whether Proposition 209 would restructure the political process as applied to race-conscious affirmative action programs in public contracting, public employment, and all levels of public education. *Wilson II* reviewed de novo *Wilson I's* findings, *Wilson II*, 122 F.3d at 701, which specifically included plaintiffs' claims that Proposition 209's prohibition on racial preferences would affect college admissions. *Id.* at 698.

Unlike the Sixth Circuit's analysis of § 26 in the decision below, the Ninth Circuit analyzed Proposition 209 under both a "conventional" equal protection analysis, and a "political structure" equal protection analysis. *Compare id.* at 701-02 (Ninth Circuit's "conventional" equal protection analysis), *and id.* at 703-09 (Ninth Circuit's "political structure" analysis), *with Coalition II*, 2012 U.S. App. LEXIS 23443, at *59-60 (Sixth Circuit foregoing "traditional" equal protection analysis). In its conventional equal protection analysis, *Wilson II* found that the language of Proposition 209 makes no racial classifications. "A law that prohibits the State from classifying individuals by race or gender a fortiori does not classify individuals by race or gender." 122 F. 3d. at 702. In fact, the Ninth Circuit questioned whether such a claim could even seriously be made given Proposition 209's blanket prohibition on discrimination and preferences based upon race:

> Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal

> Protection Clause teeters on the brink of incoherence.

Wilson II, 122 F.3d at 702. Plaintiffs' "conventional" equal protection claim was soundly rejected.

The Ninth Circuit then held that Proposition 209's uniform, statewide ban on racial discrimination and racial preferences does not alter the structure of government in violation of *Hunter* or *Seattle*. The court distinguished Proposition 209 from the measures invalidated in *Hunter* and *Seattle*. *Wilson II*, 122 F.3d at 701, 703-09. Those measures discriminated on the basis of race, while Proposition 209—and so, too, its sister amendment in Michigan, Proposal 2—commands equal treatment by prohibiting both discrimination and preferences on the basis of race. Cal. Const. art. I, § 31(a); *see* Mich. Const. art I, § 26 (same).

The voter referendum in *Hunter* not only repealed an antidiscrimination housing ordinance, but expressly provided that any such measure in the future had to be approved by the voters. This Court consistently described that repeal as one that burdened "those groups who sought the law's protection against racial, religious, or ancestral discriminations." 393 U.S. at 390. *See also id.* (the law burdened those "who sought protection against racial bias"); *id.* ("[o]nly laws to end housing discrimination" were implicated by the offending ordinance); *id.* at 391 (the offending ordinance "disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations"). The charter amendment invalidated in *Hunter* thus discriminated against racial minorities by placing a special burden on them in their efforts to enact antidiscrimination housing laws. *Hunter*,

393 U.S. at 390-91. The effect of the restructuring—restructuring that was explicit in the challenged amendment—was to make it more difficult for minorities "to obtain protection against unequal treatment in the housing market." *Wilson II*, 122 F.3d at 707. The Sixth Circuit's decision in *Coalition II* omits this analysis of the challenged measure in *Hunter*. *Coalition II*, 2012 U.S. App. LEXIS 23443, at *49-50.

In *Seattle*, this Court relied upon *Hunter* to invalidate a state initiative that banned mandatory busing to desegregate schools. "[D]espite [the initiative's] facial neutrality there [was] little doubt that the initiative was effectively drawn for racial purposes." *Seattle*, 458 U.S. at 471. *Seattle* placed great weight on the fact that the "District Court found that the text of the initiative was carefully tailored to interfere only with desegregative busing." 458 U.S. at 471; *see also id.* (noting that the offending law "was enacted because of, not merely in spite of, its adverse effects upon busing for integration (internal quotations omitted)); *id.* at 474 (noting that the offending law burdened those seeking "elimination of de facto school segregation"). The Sixth Circuit claims the busing program repealed by the challenged measure in *Seattle* had a "preferential nature." *Coalition II*, 2012 U.S. App. LEXIS 23443, at *49-50. But the Ninth Circuit held that "[i]n *Seattle*, the lawmaking procedure made it more difficult for minority students to obtain protection against unequal treatment in education." *Wilson II*, 122 F.3d at 707. Thus, to reconcile the *Hunter* and *Seattle* decisions with the Equal Protection Clause, the Ninth Circuit interprets those cases as invalidating measures that place burdens in the way of

minorities seeking protection against discrimination and equal treatment—not preferences.

Wilson II held that Proposition 209 does not impede protection against discrimination, but rather prohibits preferential treatment. *Wilson II*, 122 F.3d at 708. "The controlling words, we must remember, are 'equal' and 'protection.'" *Id.* Thus, the Ninth Circuit held that Proposition 209 is constitutional in all respects, including as applied to college admissions, because a prohibition on racial preferences does not offend the Constitution. *Id.* at 701. The Constitution itself "erects obstructions to preferential treatment by its own terms." *Id.* at 708. California appellate courts have applied Proposition 209 to numerous government programs since the Ninth Circuit decision.[3]

B. In 2012, the Ninth Circuit Rejected Another Political Restructuring Challenge to Proposition 209 in *Coalition to Defend Affirmative Action v. Brown*

The Sixth Circuit's decision below also conflicts with a recent Ninth Circuit decision that affirmed the holding of *Wilson II*. In 2010, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by any Means Necessary filed a complaint in the District Court for the Northern District of California, alleging the same claims as those

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[3] For example, declaratory judgments and permanent injunctions have issued against government agencies in *Coral Construction*, 235 P.3d 947; *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000); *C&C Construction, Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App 4th 284 (Cal. 2004); and *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (Cal. 2002).

dismissed in *Wilson II*. *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d at 1135. The plaintiffs argued that Proposition 209 is unconstitutional under a conventional equal protection analysis and a political restructuring analysis as applied to the repeal of race-conscious University of California admissions policies. *Id.* In affirming the decision of the district court that dismissed these newer claims, the Ninth Circuit noted that, "[o]ur prior decision in *Wilson II* dealt with and rejected both of these arguments." *Id.*

In an attempt to avoid *Wilson II*'s binding precedent, plaintiffs in *Brown* argued that *Wilson II* is irreconcilable with *Grutter*, 539 U.S. at 325, which held that a diverse student body is a compelling state interest and that the Constitution permits narrowly tailored race-based admission policies. The Ninth Circuit disagreed, finding that *Wilson II* and *Grutter*, are easily reconciled. *Brown*, 674 F.3d at 1135-36. In *Grutter*, this Court cited to race-neutral alternatives used by "'Universities in California, Florida and Washington state, where racial preferences are prohibited by state law.'" *Id.* at 1136 (quoting *Grutter*, 539 U.S. at 342). Because *Grutter* spoke only to whether race-based affirmative action programs are permitted, and not to whether they can be prohibited as was the case in *Wilson II*, "it is impossible to hold that *Grutter* overrules *Wilson II*." *Id.*

The Ninth Circuit in *Wilson II* and *Brown*, and the Sixth Circuit in *Coalition II*, examined identical state initiatives under a *Hunter* and *Seattle* equal protection political structure analysis, but reached opposite conclusions. As a result, in the jurisdiction of the Ninth Circuit, which includes the states of Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon,

and Washington, the citizens of each state are free to amend their state constitutions to adopt policies of strict racial neutrality in the areas of public education, employment, and contracting. But voters in states within the jurisdiction of the Sixth Circuit, which includes Kentucky, Michigan, Ohio, and Tennessee, may not.

C. The Sixth Circuit's Decision Directly Conflicts with the California Supreme Court's Decision in *Coral Construction v. City & County of San Francisco*

The conflict between the federal circuits is not the only justification for review in this case under Supreme Court Rule 10(a). The Sixth Circuit's decision invalidating § 26 also conflicts with the decision of the California Supreme Court in *Coral Construction, Inc. v. City & County of San Francisco*, 235 P.3d 947. *Coral Construction* involved a challenge to a local ordinance that required the City and County of San Francisco (San Francisco) to grant race- and sex-based preferences in the operation of public contracting to minority-owned business enterprises and women-owned business enterprises. Construction companies not entitled to San Francisco's racial preferences challenged the ordinance as violating Proposition 209. Resorting to the same arguments used by the plaintiffs in *Wilson II*, and in *Coalition II* with respect to § 26, San Francisco claimed Proposition 209 was unconstitutional under the *Hunter* and *Seattle* political structure doctrine. *Coral Construction*, 235 P.3d at 956. In 2010, the California Supreme Court "exercising [its] independent judgment on the matter," concluded in a 6-1 decision that Proposition 209 does

not violate the Equal Protection Clause under a political structure analysis. *Coral Construction*, 235 P.3d at 959.

In *Coral Construction*, San Francisco argued that with the passage of Proposition 209, minority groups seeking race- or gender-based preferences in public education, employment, and contracting must first overcome the obstacle of amending the state constitution, while groups that seek preferences on other bases (e.g., disability or veteran status) need not. *Coral Construction*, 235 P.3d at 958. The court, according "great weight" to the Ninth Circuit's decision in *Wilson II*, found that the "political structure doctrine does not invalidate state laws that broadly forbid preferences and discrimination based on race, gender, and other similar classifications." *Coral Construction*, 235 P.3d at 958 (citing *Wilson II*, 122 F.3d at 708-09). The court found nothing in *Hunter* or *Seattle* that defined "beneficial legislation" to include race- or gender-based preferences. *Coral Construction*, 235 P.3d at 959. Following the Ninth Circuit's decision in *Wilson II*, the court held: "'Even a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment.'" *Id.* at 960 (quoting *Wilson II*, 122 F.3d at 707). But instead of burdening the right to equal treatment, the court concluded that Proposition 209 directly serves the principle that "all governmental use of race must have a logical end point." *Coral Construction*, 235 P.3d at 960.

Thus, the California Supreme Court stands with the Ninth Circuit in holding that the political structure doctrine does not invalidate a state's constitutional provision which declares that the state, including its

political subdivisions, "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a); *Coral Construction*, 235 P.3d at 953.

D. The Sixth Circuit's Decision Conflicts with the Louisiana Supreme Court's Decision in *Louisiana Associated General Contractors, Inc. v. State of Louisiana*

The Sixth Circuit's decision also merits review because it conflicts with the Louisiana Supreme Court's decision in *Louisiana Associated General Contractors, Inc. v. Louisiana*, 669 So. 2d 1185 (*La. AGC*), to the extent it prevents the State of Michigan from amending its constitution to ban all forms of government racial discrimination.

Louisiana's current constitution was adopted at a constitutional convention in 1974, and ratified by the voters of Louisiana on April 20, 1974. The Louisiana equal protection clause does not contain the same language as the federal Equal Protection Clause. Article I, § 3, of the Louisiana Constitution provides in pertinent part that "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations." La. Const. art. I, § 3. In other words, like California, government classifications based on race are absolutely prohibited in Louisiana. *La. AGC*, 669 So. 2d at 1197 (citing Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 6 (1974); *see Wilson II*, 122 F.3d at 702 ("Rather than classifying individuals by race or

gender. Proposition 209 prohibits [California] from classifying individuals by race or gender.").

In *La. AGC*, the Louisiana Supreme Court reiterated its holding from *Sibley v. Board of Supervisors of Louisiana State University*, 477 So. 2d 1094 (La. 1985), "that when a law discriminates against a person by classifying him or her on the basis of race, it shall be repudiated completely, regardless of the justification behind the racial discrimination." 669 So. 2d at 1198. *La. AGC* further explained that the 1974 constitutional provision prohibits state race-conscious affirmative action programs. A program that "does not discriminate against anyone, but only discriminates in favor of certain races to remedy past discrimination" is prohibited. *Id.* at 1199 n.12. Under the Louisiana Constitution, racial preferences are forbidden, because "discrimination in favor of one race is necessarily discrimination against members of another race. . . ." *Id.* The court explained that "the Framers and citizens of this state" insured "the evils of past discrimination would not recur by providing that there can never be any discrimination against minorities." *Id.* This is "a protection minorities do not have under the strict scrutiny of federal equal protection analysis." *Id.*

The Louisiana Supreme Court rejects the notion that the state has a constitutional duty under the Fourteenth Amendment to engage in race-preference programs to cure the effects of past discrimination. "Our review of the jurisprudence convinces us the United States Supreme Court has never interpreted the Fourteenth Amendment to require discrimination on the basis of race for any reason whatsoever." *Id.* at 1199. The *La AGC* court concluded that "although a

state has the authority to participate in race preference programs under the Fourteenth Amendment, that same provision does not mandate that it do so." *Id.*

Thus, according to the Louisiana Supreme Court, "a state constitution which prohibits a state from enacting [race preference programs] is not in violation of the Fourteenth Amendment." *Id.* at 1199 (citing *Associated General Contractors of California v. San Francisco Unified School District*, 616 F.2d 1381, 1386, 1387-88 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980). The Sixth Circuit's contrary holding, that Michigan's statewide constitutional ban on race discrimination and race preference programs is unconstitutional, leads to the absurd situation where Louisiana and California may ban race preference programs, but Michigan may not.

Courts should not interpret the Fourteenth Amendment to prevent voters from prohibiting all government discrimination. In terms of procedure and structure, making it more difficult to engage in such discrimination and preferential treatment is the purpose of the Fourteenth Amendment. The very existence of the Equal Protection Clause shows that that this is precisely the sort of discrimination that must not be left to everyday politics, and the voters in Michigan agreed. The United States has seen institutionalized discrimination in favor of whites replaced by institutionalized discrimination against whites (and Asians) in less than a generation, and racial spoils will always be attractive to politicians and other state and local actors. Thus, the Equal Protection Clause itself is clear that racial

classifications are certainly not a subject to be left to politics as usual.

Furthermore, § 26, and measures like it, vindicate the purpose of federal law as well. The people of the United States guaranteed "the equal protection of the laws" in 1868 with the passage of the Fourteenth Amendment, and Congress forbade any recipient of federal money from engaging in racial or ethnic discrimination in 1964 with the passage of the Civil Rights Act. Congress also clearly banned such discrimination in 1866, 1870, and 1991, with the various enactments of 42 U.S.C. § 1981. Congress can hardly make any of these laws clearer. *See Bakke*, 438 U.S. at 412 (Stevens, J., concurring in part and dissenting in part); *see also* Lino A. Graglia, *The "Remedy" Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 Suffolk U. L. Rev. 569 (1988); Curtis Crawford, *Does Title VI of the 1964 Civil Rights Act Permit Racial Preference in Admissions by a University Receiving Federal Funds*.[4] Certain courts have been repeat offenders in thwarting the constitutional and statutory mandates of equality. In particular, it is only by ignoring the plain text of federal laws prohibiting discrimination that the courts made it necessary to pass § 26 in the first place.

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[4] *Available at* http://www.debatingracialpreference.org/BAKKE-Brennan+Rebuttal.htm.

II

THE SIXTH CIRCUIT'S DECISION PREVENTS MICHIGAN VOTERS FROM ENFORCING THE SAME UNIFORM STATEWIDE BAN ON RACIAL DISCRIMINATION AND PREFERENCES THAT HAS BEEN PASSED AND UPHELD IN OTHER STATES

The Sixth Circuit's decision prohibits Michigan voters from enforcing an amendment to their state constitution, even though identical amendments are being enforced by voters in other states. Currently, in addition to California and Louisiana, described *supra*, voters from four other states have amended their state constitutions to "adopt[] a position of strict neutrality." *Hunter*, 393 U.S. at 395 (Harlan, J., concurring). Two other states have passed legislation prohibiting racial preferences in college admissions. Review by this Court is thus necessary to prevent widespread voter disillusionment, hopelessness, apathy, and eventual anger caused by inconsistent judicial decisions on nationally important issues of constitutional law and public policy.

A. The Sixth Circuit's Decision Prevents Michigan Voters from Enforcing Their Constitutional Amendment, While Voters in Other States Enforce Nearly Identical Amendments

On November 3, 1998, the people of the State of Washington passed Initiative Measure 200 by 58% of the vote. Measure 200 declares that "the state shall

not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Wash. Rev. Code § 49.60.400(1). The application of this new law has been discussed in at least four appellate decisions, none of which doubted the provision's constitutionality. *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1192 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1*, 72 P.3d 151 (Wash. 2003); *Becker v. Wash. State Univ.*, 266 P.3d 893 (Wash. Ct. App. 2011); *Dumont v. City of Seattle*, 200 P.3d 764 (Wash. Ct. App. 2009).

In November of 2008, Nebraska voters passed the Nebraska Civil Rights Initiative 424, which amended the state constitution to prohibit the state from discriminating against, or granting preferential treatment to, "any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Neb. Const. art . I, § 30 (2012). It passed with 58% of the vote. The Nebraska Supreme Court mentioned this amendment with approval in *Nebraska v. Henderson*, 762 N.W.2d 1, 15 (Neb.), *cert. denied*, 557 U.S. 921 (2009).

On November 2, 2010, Arizona voters approved the Arizona Civil Rights Initiative, Proposition 107, which amended the state constitution to prohibit the state from "grant[ing] preferential treatment to or discriminat[ing] against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education

or public contracting." Ariz. Const. art. II, § 36 (2012). Proposition 107 passed with 60% of the vote.

The most recent state Civil Rights Initiative passed by 59% of the voters in Oklahoma. On November 6, 2012, the Oklahoma electorate passed State Question 759, which like all of the initiatives previously mentioned, declares that "the state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of race, color, sex, ethnicity or national origin in the operation of public employment, public education or public contracting."[5] Okla. Const. art. II, § 36A (2012).

The voters in Michigan and in the states mentioned above were entirely correct that, in the 21st century, the government *must* ban government discrimination on the basis of skin color. The 2010 U.S. Census shows that America is more and more a multiracial and multiethnic country.[6] Over one in four Americans now claim they are something other than white, and Latinos are the largest minority group. Both blacks and whites are the slowest growing populations. Since the last census, the Latino population has grown by 43.0%, and the Asian population has grown by 43.3%. The black population has grown by only 12.3%, and the white population by

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[5] Not all attempts to implement statewide bans on racial preferences have been successful. The Colorado Civil Rights Initiative, Amendment 46, was narrowly defeated with 51% of the vote in November 2008. It is significant that the outcome of that election was settled by the voters, and not by court intervention.

[6] U.S. Census Bureau, *available at* http://2010.census.gov/2010census/#/panel-1 (last visited Dec. 18, 2012).

only 5.7%. The number of Americans who identify themselves as belonging to "two or more races" has grown by 32.0%.

In such a country governed by documents grounded in fundamental principles of equality, it is not permissible for the government to classify and sort people on the basis of race, and to treat its citizens differently—some better, some worse—depending on which box is checked on the census form. In the United States, the only viable racial policy is one where the government plays no favorites. Anything else leads to division, strife, and balkanization.

B. The Sixth Circuit's Decision Conflicts with Other State Actions Prohibiting Racial Preferences in College Admissions

The Sixth Circuits' decision to invalidate § 26 denies Michigan voters the opportunity to adopt a statewide policy of strict racial neutrality, even though other states have accomplished this through legislation or executive order. During the 2011 session, the New Hampshire legislature passed House Bill 623, "[a]n Act prohibiting preferences in recruiting, hiring, promotion, or admission by state agencies, the university system, the community college system, and the postsecondary education commission." H.B. 623, 162d Leg. (N.H. 2011). The amendment provides: "There shall be no preferential treatment or discrimination in recruiting, hiring, or promotion based on race, sex, sexual orientation, national origin, religion, or religious beliefs." N.H. Rev. Stat. Ann. § 21-I:52 (2012). This legislation removes the authority of local governments to deal with racial

matters, and allows New Hampshire to adopt statewide race-neutral college admission policies.

In November, 1999, Florida Governor Jeb Bush signed Executive Order 99-281, the "One Florida Initiative," ending the use of race/ethnicity or gender in the state's employment, contracting, and higher education admission decisions. *NAACP v. Fla. Bd. of Regents*, 822 So. 2d 1, 2 (Fla. Dist. Ct. App. 2002), *quashed, remanded on standing issues*, 863 So. 2d 294 (Fla. 2003), *dismissed on mootness*, 876 So. 2d 636 (Fla. Dist. Ct. App. 2004). Section 3 of the Executive Order is titled "Non-Discrimination in Higher Education." In paragraph (b) of that section, the governor "requested that the Board of Regents implement a policy prohibiting the use of racial or gender set-asides, preferences or quotas in admissions to all Florida institutions of Higher Education, effective immediately." *Id.* To comply with the governor's request, the Board of Regents adopted amendments to its rules in 2000, setting general requirements for student admissions, admission requirements for entering freshmen, and admission requirements for entering or transferring graduate and professional students. 876 So. 2d at 2. The Board of Education approved the amendments on February 22, 2000. The Board of Governors, which replaced the Board of Regents, came into existence on January 7, 2003, Fla. Const. art. XI, § 5(d), and adopted all of the race-neutral rules established by the Regents. 876 So. 2d at 639.

The Sixth Circuit would no doubt classify the above legislation as political restructuring in violation of the Fourteenth Amendment. *See Coalition II*, 2012 U.S. App. LEXIS 23443, at *56 (calling Michigan's § 26

the "reallocation of decisionmaking authority at a 'new and remote level of government'"). Section 26 would also have prohibited government discrimination and preferences based on race, but the Sixth Circuit has taken the extreme position that a state ban on unequal treatment denies members of certain races equal protection of the laws.

CONCLUSION

For the foregoing reasons, Amici Curiae Pacific Legal Foundation, American Civil Rights Foundation, Ward Connerly, and Center for Equal Opportunity respectfully request that this Court grant the petition for a writ of certiorari.

DATED: January, 2013.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

BILL SCHUETTE Attorney General of Michigan,

Petitioner,

vs.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS, AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* FOR XIV FOUNDATION; MARC SCHNIEDERJANS, NEBRASKA CIVIL RIGHTS INITIATIVE; RACHEL ALEXANDER, ARIZONA CIVIL RIGHTS INITIATIVE; LEON DROLET, MICHIGAN CIVIL RIGHTS INITIATIVE; GARY HOPPER, NEW HAMPSHIRE HOUSE OF REPRESENTATIVES; GLYNN CUSTRED, AUTHOR, CALIFORNIA CIVIL RIGHTS INITIATIVE; SEN. JOE HUNE, MICHIGAN SENATE; SEN. DAVID B. ROBERTSON, MICHIGAN SENATE; REP. PETE LUND, MICHIGAN HOUSE OF REPRESENTATIVES; LARRY P. ARNN, FOUNDING CHAIRMAN, CALIFORNIA CIVIL RIGHTS INITIATIVE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

One by one in the pursuit of genuine racial equality that has eluded the Republic since its founding, states are promulgating in their constitutions and statutes laws that strip government agencies and their subdivisions – in this case, universities, with respect to their admissions policies – of the ability to use racial preferences; in reviewing those laws, lower courts are extending and applying this Court's "political process" doctrine with results that are markedly different; as such, Petitioner's application for review by this Court as to the application, clarity, and proper reach of the doctrine is of the greatest urgency. Should this Court grant Petitioner's application for Writ of Certiorari?

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INTEREST OF *AMICI CURIAE*[1]

The *amici* represented in this brief are citizens and elected officials of their states who have championed a quantum leap forward to achieve the dreamed-of society that is conscious only of one's character, irrespective of race, sex, color, ethnicity, or national origin. They have worked diligently within their respective jurisdictions to convince their fellow citizens that discrimination based on race, sex, color, ethnicity, or national origin with respect to, *inter alia*, college admissions, ultimately harms all of humanity – the purpose or good intentions of such discrimination notwithstanding. The *amici*, therefore, represent the collective voices of millions of Americans who want their governments to practice in law what the *amici* and their fellow citizens do in their own daily lives.

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[1] Pursuant to Rule 37 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

This case represents a waypoint with two distinct characteristics: First, it posits a marker upon the legal landscape of Fourteenth Amendment jurisprudence and, in so doing, represents a stark departure from the determination in *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692 (9th Cir 1997), its progeny, and those courts that have followed its reasoning with respect to the relationship between this Court's political-process doctrine and the Fourteenth Amendment's Equal Protection Clause. This legal marker is no small matter: While Western history is repleat with animus between peoples separated by religious identity or socio-economic class, this Republic stands alone in its struggle to come to terms with its racial identity and the equal protection of the law to all persons. Therefore, the applicability, proper reach, and perhaps even the continued viability of the political-process doctrine laid out by this Court in *Hunter* v. *Erickson*, 393 U.S. 385 (1969) and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), and applied by the court below in this case, matters greatly in this struggle to achieve the dreamed-of society, wherein the content of one's character obliterates any consideration by government of a person's race, sex, color, ethnicity, or national origin. Such disparate application of the doctrine will continue to vex the public policy direction of this country unless and until this Court acts decisively on the issues raised in Petitioner's application.

The second marker occasioned by this case is far more subtle but just as notable as the first: the people of the Republic have "moved on" in their attitudes, norms, and practices with respect to race, sex, color, ethnicity, and national origin; moreover, their perceptions and treatment of one another along those classifications has evolved far more quickly than the speed or dexterity with which our courts – including this Court – have. So while our courts toil among the thistles of predecent and the jurisprudential history of law and race in America, the citizens themselves have moved far beyond the current legal horizon and walk with a determination of their own toward the dreamed-of Republic that is racially tolerant and discrimination-free. In a nutshell, the ground below the legal landscape has shifted.

In this case, the pilgrimage toward equality is embodied by Michigan's Civil Rights Initiative, now MICH. CONST. art. I, § 26, and *amici* respectfully call upon this Court to grant Petitioner's application and address the legal questions raised below.

ARGUMENT

I. Lower courts' application of the political-process doctrine with respect to alleged violations of the Fourteenth Amendment's Equal Protection Clause has been narrow, and applied to only *avoid* illicit government discrimination, never to mandate it, as the result below would require; as such, this Court should grant Petitioner's request for Writ of Certiorari.

This Court should grant Petitioner's application because lower courts need firm, clear direction as to the applicability of the political-process doctrine to citizen-led efforts, where the effort is one which seeks to amend the state's laws to prohibit, *inter alia*, racial discrimination. Without such clarity, states and federal courts will continue to struggle with race and gender equity and, in so doing, stymie citizen-led progress toward racial equality.

Indeed, applicability of the doctrine has proven to be somewhat vexatious for courts as the ground below the legal landscape of the doctrine has continued to shift.

Under the political-process doctrine, a state "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size," *Hunter*, at 393. In *Hunter*, the City of Akron, Ohio, sought to enact a fair-housing scheme to

ameliorate substandard housing, which also acted as an agent of racial segregation. As this Court in *Hunter* observed, the scheme was:

> [P]remised on a recognition of the social and economic losses to society which flow from substandard, ghetto housing and its tendency to breed discrimination and segregation contrary to the policy of the city to assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin. A Commission on Equal Opportunity in Housing was established by the ordinance in the office of the Mayor to enforce the anti-discrimination sections of the ordinance through conciliation or persuasion if possible, but, if not, then through such order as the facts warrant, based upon a hearing at which witnesses may be subpoenaed, and entitled to enforcement in the courts.

Hunter at 386. [Internal citations omitted.]

Akron voters, though, subsequently approved an amendment to the city's charter which prohibited the city from enacting any ordinance regulating "the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry (without first being) approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective." *Hunter* at 387. The amendment, Akron City Charter § 137, was

also retroactive such that it directly affected the city's ameliorative fair-housing scheme.

The result in *Hunter*, an 8-1 decision, was that this Court determined the charter amendment violated the Equal Protection Clause because the amendment stripped government of an ability (the fair-housing scheme) to thwart discrimination in housing, which discrimination was racially based.

More than a decade later in a much closer decision (5-4), this Court in *Seattle* extended application of the political-process doctrine to a statewide initiative approved by the state of Washington's voters, Initiative 350, that proscribed any school district's use of mandatory assignments of students outside of their local districts to achieve racial integration in schools.[2]

The *Seattle* court relied almost entirely in its decision on *Hunter* to extend the doctrine to the initiative's prohibitory effect and declared it unconstitutionally violative of the Equal Protection Clause.

> [B]y specifically exempting from Initiative 350's proscriptions most nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly

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[2] The provision at issue read: "[N]o school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student. . . ." *Seattle* at 462.

> requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action. As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government. In a very obvious sense, the initiative thus "disadvantages those who would benefit from laws barring *de facto* desegregation as against those who . . . would otherwise regulate" student assignment decisions; the reality is that the law's impact falls on the minority.

Seattle at 474-475, citing *Hunter* at 391.

In this case the court below extended *Hunter* and *Seattle* into the realm of using race as a "plus factor" in college admissions as though the use of race were *mandatory* to achieve a compelling governmental interest (racial diversity of the student body), relying on this Court's decision in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003).

As the Sixth Circuit framed the issue,

> the sole issue before us is whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even *consider* using race as a factor in admissions decisions – something they are specifically allowed to do under *Grutter*.

Coalition to Defend Affirmative Action, Integration & Immigrant Rights, et al. v. *Regents of Univ. of Michigan*, 08-1387, 2012 WL 5519918 (6th Cir. Nov. 15, 2012) (emphasis original).

This Court determined in *Grutter* that the University of Michigan's use of *multiple* criteria – not just race alone – justified the university's use of race as a "plus" factor to achieve a diverse law student population.

> The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld in *Grutter* was only as part of a "highly individualized, holistic review."

Parents Involved in Community Schools v. *Seattle School District No. 1, et al.*, 551 U.S. 701, 722-723 (2007), quoting *Grutter* at 337. Thus, whereas in *Hunter* and *Seattle*, race was the *only* consideration when applying the political-process doctrine, the court below ignores the "holistic" character of *Grutter*'s reasoning.

Therefore, *amici* ask this Court to grant Petitioner's application to settle the question of the extent to which *Grutter* – if at all – affects the political-process doctrine and determine that the doctrine is not applicable to MICH. CONST. art. I, § 26.

II. Without this Court's guidance to resolve the dispute among the circuits, colleges and would-be students face the menace of misapplication of the political process doctrine as more states approve of measures to end racial preferences.

This Court should grant Petitioner's application because numerous states, including those within and without the Ninth and Sixth Circuit courts,[3] have already approved measures to end racial preferences; as such, without this Court's guidance, other circuit courts are highly likely to apply (or misapply) the political-process doctrine and thus cause disparate treatment of college applicants based on race. As such, Petitioner's application raises a timely, important question of law.

This Court will review important questions of law arising in separate cases decided differently among the circuits. See *Tapia* v. *United States*, 564 U.S. ___ (2011), resolving a split among circuit courts to determine whether sentencing courts can impose prison sentences longer than normal in order to provide drug treatment; *AT&T* v. *Hulteen*, 556 U.S. 701, 707 (2009), resolving a split to determine whether reliance on a certain pension benefit rule constituted a violation of Title VII; *Irizarry* v *United States*, 553 U.S. 708 (2008), resolving a split to determine whether

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[3] See Petitioner's brief, at 3.

FED. R. CRIM. P. 32(H) applies to sentencing variations.

In this case, Petitioner asks that this Court resolve the distinct split between the Ninth Circuit's decision in *Coalition for Economic Equity* v. *Wilson* and the Sixth Circuit's decision below, especially with respect to the reach of the political process doctrine and in light of this Court's decision in *Grutter* and the Ninth Circuit's recent decision in *Coalition to Defend Affirmative Action* v. *Brown*, 674 F.3d 1128 (9th Cir. 2012), which reaffirmed its holding in *Wilson*.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask that this Court grant Petitioner's application for Writ of Certiorari.

Respectfully submitted,

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JOINT APPENDIX

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION,
INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR
EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, et al,
Plaintiffs,
vs. Case No. 06-15024
Hon. David M. Lawson

JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES of any other public college or university, community college or school district,
Defendants,
and
CONSOLIDATED CASES:
CHASE CANTRELL, et al,
Plaintiffs,
vs. Case No. 06-15637
Hon. David M. Lawson

JENNIFER GRANHOLM, in her Office Capacity as Governor of the State of Michigan,
Defendant.

The Confidential Deposition of SARAH ZEARFOSS, Taken at 350 South Main Street, Suite 300, Ann Arbor, Michigan, Commencing at 10:10 a.m., Tuesday, July 17, 2007, Before Denise M. Kizy, CSR-2466, RPR, CRR.

[Page 208]
{Q. Mr. Potchen}
{A. Witness Sarah Zearfoss}

A. Well, the '07 policy is the one that's currently in effect, yes.

Q. And that's where I'm going to find what the criteria is considered for students being admitted to the law school?

A. Well, what you'll see there is a rather general description of the type of class we hope to matriculate. You won't find a list of particular criteria. In general, I would say we consider everything in the universe that's not illegal for me to consider.

Q. Okay. That does answer one of my questions ahead, but after the policy is set, what is the process for changing the policy?

A. The faculty committee could choose to initiate a change to the policy. If I was unhappy or worried about the way the policy was being effectuated, I would go to the committee or to the dean and suggest that we do that, or the dean himself could ask that the faculty committee consider a new policy.

Q. Okay. So the decision can be made by the faculty committee?

A. Mm-hmm.

Q. You can go to the faculty committee and ask them to change it; correct?

[Page 209]
A. Yes.

Q. The dean can go to the faculty committee and ask them to change it?

A. Yes.

Q. You can't change it on your own or the dean can't change it on their own; correct?

A. Correct.

Q. Does the law school have a procedure to allow individuals who are not part of that faculty committee to petition the faculty committee to change the policy?

A. We have no set procedure, no.

Q. Has anyone ever gone to the faculty admissions committee to ask them to include a specific factor in their admissions policies?

MR. WASHINGTON: Objection. You're speaking as -- when you say ever, I'd object to foundation.

BY MR. POTCHEN:
Q. Okay. Since you have been the director of admissions, at least since 2001, has anyone ever petitioned the faculty admissions committee to include a specific factor in the admissions policy?

A. Other law faculty have approached members of the faculty committee and me since Proposal 2 was voted

[Page 210]
upon suggesting various approaches that we should take.

Q. How many people have done that?

A. I could think of three off the top of my head, and there very well could be more whom I'm forgetting.

Q. And those would be three faculty members; correct?

A. Yes.

Q. Has any student or prospective student gone and requested the faculty admissions committee to consider a factor in their admissions policy?

A. Students have indicated, you know, that they want us to do certain things with regard to the policy, yes, I guess they have. Never in writing, usually in meetings that I can recall.

Q. Since Proposal 2 has passed, are students barred from going to the faculty admissions committee and seeking a change in the policy?

A. No.

Q. Since Proposal 2 has passed, are faculty barred from going to the faculty admissions committee to seek a change in the policy?

A. No.

Q. And you said some proposals were presented to you by faculty members to change the policy?

A. Yes.

[Page 211]
Q. What were those proposals?

A. Oh, they're really complicated. Ideas that people had that weren't particularly practical. I recall that one person said that they basically didn't view Proposal 2 as changing anything, that if I recall the logic it was that race, you know -- the language of Proposal 2 I think uses preferential treatment on the basis -- is that right, preferential treatment? And her logic was that race was one of many factors, and, therefore, wasn't being preferred, and, therefore, there was no reason whatsoever to change the policy in the wake of Proposal 2. So that was one proposal, and then there are various -- there are variations on that theme.

Q. Has Proposal 2 changed anyone's ability to petition the faculty admissions committee to include a specific factor in the admissions policy?

A. Not that I can think of, no.

Q. If the law school declines to include a specific factor in its admissions policy, is there some sort of an appeal process?

A. Well, there's no formalized process for any of this, so we could keep getting e-mails over and over on the same subject, for example.

Q. If someone saw this new policy, Exhibit No. 1, this

[Page 212]
March 23, 2007 policy, and they felt that it was -- that there should be a factor included in it; let's say, for example, you should include people missing a limb or something like that, and the faculty admissions committee didn't agree with them, could they appeal to a higher body and say, hey, I want that policy changed or I want to include a factor?

MR. NIEHOFF: Joe, I'm going to interpose an objection just based on the word appeal because I don't know whether by that you're signifying a formal process, or whether you're asking is there some other body that they could go to that could order the faculty committee to do it. I don't know whether it makes any difference, but the word appeal has several connotations to me and I'm just not sure which one you mean.

MR. POTCHEN: I can appreciate that objection.

BY MR. POTCHEN:
Q. I guess that is my question, though. If somebody wasn't happy with the policy, could they go to another higher body and seek a change in the policy?

A. I would imagine they could ask anybody, right. The dean, you know, has authority over the faculty in many ways, and he himself doesn't change the policy, but he

[Page 213]
does have authority over faculty, and so he I guess is a higher body from that context.

Q. Okay. Who could change the policy other than the faculty admissions committee?

A. No one that I -- well, the faculty itself. I mean the faculty admissions committee would propose something to the faculty and the faculty would vote upon it. You know, I should caution that in the, you know, the minutia of faculty governance. I'm sure there are exceptions, so if there was some change that was required that was very minor, I think the dean and the faculty committee might say we're comfortable just doing this without taking it to the faculty for a vote. You know, we'll just make this small change that involves making sure that someone's name is stamped on a file four times or something like that. I don't know. Just something that doesn't have much to do with substance --

Q. But I'm looking more toward substantive change.

A. But of substance, the whole faculty has to vote on it, yes.

Q. Okay. Now let's say the faculty votes on it and someone is unhappy with that decision. Could they bring it to a higher authority for a change?

MR. NIEHOFF: Let me interpose --

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, et al,
Plaintiffs,
vs. Case No. 06-15024
Hon. David M. Lawson

JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES of any other public college or university, community college or school district,
Defendants,
and
CONSOLIDATED CASES:
CHASE CANTRELL, et al,
Plaintiffs,
vs. Case No. 06-15637
Hon. David M. Lawson

JENNIFER GRANHOLM, in her Office Capacity as Governor of the State of Michigan,
Defendant.

The Confidential Deposition of FRANK H. WU, Taken at 150 West Jefferson Avenue, Suite 100, Detroit, Michigan, Commencing at 10:28 a.m.,
Tuesday, August 9, 2007,
Before Denise M. Kizy, CSR-2466, RPR, CRR.

[Page 188]
{Q. Mr. Potchen}
{A. Witness Frank H. Wu}

A. In the past 10 years, yes, I can answer that. In 1997, and then at the December faculty meeting, and then again in the April faculty meeting, so --

Q. Other than that --

A. -- that would be three times.

Q. -- are you aware of any changes?

A. No, none.

Q. Sorry to be cutting off, but we can move quicker.

A. That's fine.

Q. As I understand the current process for many of the law school admissions standards, a law school faculty member can make a written motion that will be voted on at a meeting of the faculty members; correct?

A. That is correct.

Q. And there's about 42 faculty members, or 40 or 42; correct?

A. There are to be precise 32 or 33 tenured faculty members, not counting myself, there are five legal research writing instructors, and there are two clinical faculty. So whatever that adds up to.

Q. Okay. And then about you said 75 to 90 percent attend these meetings of faculty members?

A. That is correct.

Q. And at this meeting there's a representative of the law school board of governors; correct?

[Page 189]
A. At least one.

Q. And I know that you've identified this, but does this person, the law school board of -- student board of governors representative or representatives vote on decisions to amend the admissions standards?

A. I said I couldn't quite recall, but we could find that easily enough by consulting the bylaws.

Q. Other than individuals from the law school student board of governors, are there any other students who would participate in any decision to amend the admissions standards?

A. By participate do you mean vote on or comment on?

Q. That's correct, vote on.

A. Vote on, no.

Q. And before Proposition 2 was passed, could members of the public make a formal motion to be considered by the faculty at this faculty meeting?

A. I don't believe members of the public are entitled to make motions at the faculty meeting at which admissions policy is set.

Q. Who is entitled to make motions for the faculty to consider at these meetings?

A. Leaving aside this ambiguity that I just don't recall, it's the student board of governors, members of the faculty who are entitled to vote.

[Page 190]
Q. So nonstudent board of governor students can't move to amend the law school admissions standards; correct?

A. Did you say can or cannot?

Q. Cannot.

A. That is correct.

Q. And prospective students cannot -- could not before Proposition 2 move to amend the law school admissions standards; correct?

A. That is correct.

Q. And during the meeting of the faculty members where the admissions standards are reviewed and voted on, members of the public can attend and comment; correct?

A. They can attend. They must give notice if they wish to comment.

Q. And they do that by submitting a card or something to the board where they say I want to speak?

A. To me.

Q. Okay.

A. Right.

Q. And you say okay?

A. That's right. There was no individual of whom I am aware who -- there's no individual I am aware of who wished to speak who was denied that opportunity.

Q. That was my next question.

However, the ultimate decision whether to

[Page 191]
change admissions standards rest with the faculty alone; correct?

A. That is correct.

Q. And only the faculty at the law school has the authority to create and approve the admissions policy; correct?

A. Create and approve, yes, that is correct.

Q. But members of the public can speak as to their opinions as to what the board should consider; correct?

A. By board you mean faculty?

Q. What the faculty group should consider.

A. Yes, that is correct.

Q. The law school's admission policy is not subject to approval of the provost or president of Wayne State University; is that correct?

A. That is correct.

Q. And is the law school admissions policy subject to approval by Wayne State University Board of Governors?

A. Not to my knowledge.

Q. If the law school included a factor in its admission criteria, or did not include a particular factor in its admission criteria, would the Wayne State Board of Governors be able to alter that decision?

MR. WASHINGTON: Objection to speculation

[Page 192]
and legal conclusion.

MR. NIEHOFF: I'm going to join in the objection to the extent that I take the question to be one of legal authority, and so I think you're asking him -- you can ask him what his understanding is.

BY MR. POTCHEN:
Q. I'm just going to amend it in that way. To your understanding, if the law school included a factor in its admissions criteria or did not include a factor in its admission criteria, would the Wayne State Board of Governors be able to alter that decision?

A. I would imagine that if that were to occur, or if an attempt of that nature were to occur, at Wayne State University Law School, as at most other leading academic institutions of which I'm aware, it would precipitate a constitutional crisis.

Q. And what do you mean by that?

A. The faculty would be -- the faculty and the dean, not just myself, but I imagine whoever occupies that office, would be astonished were that to occur.

Q. If that by that you mean by the Wayne State Board of Governors altering the decision?

A. That's right.

Q. If a student or prospective student was upset with the law school faculty's decision to change the law

[Page 193]
school's admissions policy, is there some sort of internal appeal process within Wayne State to appeal that decision?

A. I'm sorry, you mean as to the policy or as to that individual student's application for admission?

Q. I'm sorry, to the policy.

A. To the policy?

Q. Yes.

A. They could certainly ask the student representatives on the admissions committee to agitate for change, they could ask for a meeting with me, they could meet informally with members of the faculty, but if you're asking is there a formal appeals mechanism that would allow a student to come and present complaints about the admissions policy, no, there is not.

Q. And that is before and after Prop 2, correct, there was no formal appeal process?

A. There was no formal appeal process. I would imagine that if someone had come before Prop 2, we would have allowed them to speak. If someone were to come after Prop 2, we would allow them to speak. Before Prop 2, they could have offered a variety of viewpoints. After Prop 2, they could still offer a variety of viewpoints, but it would be futile for them to agitate for the inclusion of race or gender as a factor.

ROBERT RUIZ AUGUST 17, 2007
CONFIDENTIAL - ANN ARBOR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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CONSOLIDATED CASES

-and- (continued on next page)

CHASE CANTRELL, et al,
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v. Case No. 06-15637
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JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan,
Defendant.

Deposition of ROBERT RUIZ taken before Erin Stilman, CSR-3588, RPR-019261, and Notary Public for the County of Oakland, acting in the County of Washtenaw, pursuant to the Federal Rules of Civil Procedure for the United States District Court pertaining to the taking of depositions, at 350 S. Main Street, Suite 300, Ann Arbor, Michigan, commencing at 10:16 a.m on the 14th day of August, A.D. 2007.

* * *

[Page 89]
{Q. Ms. Nelson}
{A. Witness Robert Ruiz}

Q. Okay. All right. Can you tell me or describe for me the process by which revisions to the September 19th, 2002 Admissions Policies and Procedures resulting in this current document would take place, what's the process?

A. To make sure I understand, are you referring to the process prior to September 19th, 2002?

Q. No. I want to know the process that was utilized or, utilized to make the revisions to this particular, to the policy, as reflected in this current copy May 24th, 2007.

A. The process to change or update Admission Policies and Procedures is for the AEC to recommend any changes or updates to the Assistant Dean of Admission who would carry them forward to the Associate Dean for Student Programs, who would carry them forward to the Executive Committee for their input and subsequent approval.

Q. Is there a process available by which individuals, including students or organizations, might suggest to the AEC or at any other level you've described, the Assistant Dean of the Medical School, or the Dean of Students, or ultimately the Executive Committee, changes to the Admissions Policies And Practices?

MR. NIEHOFF: I'm actually going, I think the question is a compound question. And it might be

[Page 90]
useful, Margaret, also if you clarified whether by process you mean an official written policy or are you including in that informal processes?

MS. NELSON: Sure. Let's stick with formal processes at the moment, because then I'm ask him with respect to informal.

MR. NIEHOFF: Sure.

Q. (Continuing): Is there a formal process by which individuals, including students, potential applicants, organizations, and by that I would mean medical, you know, hospitals, undergrad programs and so forth, can suggest to the Medical School -- and again I'm speaking at any of these levels that you've identified-- changes to the Admissions Policies and Procedures?

A. I'm having difficulty with the question--

Q. All right.

A. -- because of the definition of formal process.

Q. Uh-huh.

A. It is the case that there are vehicles available, often exercised by a variety of constituencies, to provide feedback, suggest changes to the admission process.

Q. All right. But you said you were having difficulty by use of the word or term "formal process." Why does that cause difficulties?

A. It causes difficulty from the standpoint of a formal

[Page 91]
process is one that I interpret, interpret as a mechanism similar to one speaking to the Board of Regents which requires a written petition and appointment and so on.

Q. All right.

A. The admission operation does not have that kind of formal process.

Q. All right. So can you describe for me the vehicles available to provide feedback and to suggest changes in the Medical School's Admissions Policies and Procedures?

A. I can. The admission officials, specifically the Director of Admission, the Assistant Dean of Admission, and the Admission Committee Membership is public information posted to our admission site, and as a result inquiries are sometimes directed through multiple or any of those individuals.

Q. Is there any particular form or format subscribed or required for these inquiries or feedback?

A. No.

Q. So it could be an e-mail, it could be a memo, it could be a letter?

A. Correct.

Q. It could be verbal?

A. Correct.

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Q. It could be written?

A. Correct.

Q. All right. Once some communication is received by an official at the Med School either with feedback or suggesting a change, tell me what the process is or how the vehicle moves forward to address those issues.

A. The process is for the Executive Admission Committee to convene at the close of each admission cycle where they would take up proposals, suggestions, recommendations for changes to subsequent processes.

Q. All right. Is that, is that done, if you will, on a formal basis, like an agenda item in a meeting, a specific time set aside to address those issues?

A. It is done as part of the review process. I would not say there's specificity given to an agenda time.

Q. Is there at any time during this process where these, the feedback or these suggestions are being considered, is there a public discussion, an open meeting with respect to these potential changes or suggestions?

A. No.

Q. Is there ever a public comment allowed or invited with respect to the feedback that's been received or suggestions that have been received with respect to the admissions practices?

A. I would suggest that the public often comments on our

[Page 93]
process.

Q. In a manner that's similar to what you've just described, some form of written communication or verbally?

A. Yes.

Q. Is, to your knowledge is the AEC subject to the Open Meetings Act?

MR. NIEHOFF: I'm going to object because that calls for a legal conclusion, but the witness can state his understanding of whether they're expected to comply with it.

MS. NELSON: And that's all I'm asking.

A. I'm sorry, I can't answer the question, I don't have an understanding.

Q. (Continuing): All right. In your experience has the AEC ever convened in an open meeting?

A. Yes.

Q. All right. How often does that typically happen in your experience?

A. One to two times per year in an eight to nine meeting schedule per year.

Q. If a particular change that has been suggested through this process, that I'm going to refer to as a process that you've just described, can you tell me, you know, once the, if I understand it the AEC would essentially

[Page 94]
be the first to formally review and consider it, would it then be a case where the AEC would make a recommendation whether to proceed with it, consider it worthwhile or not?

A. Correct.

Q. All right. If the AEC determines that it's not valid or somehow would not be an appropriate change, does that recommendation go to somewhere, go somewhere, or is it over with?

A. If the AEC recommends not to pursue any further discussion it is carried no further.

Q. If the AEC determines that this might be a valid change or something worth looking at further, what would be the next step in the process?

A. The next step would be for the Assistant Dean of Admission to act on that recommendation.

Q. Is it fair to say that this process -- and by "this" I mean the process you've just described, the various

vehicles by which feedback and changes are suggested and the review process -- is the same today post Proposal 2 as it was prior to the implementation of Proposal 2?

A. Yes.

Q. Now when you indicated that you have many constituencies -- by "you" I mean the Medical School --

UNITED STATES DISTRICT COURT
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Defendants.

CHASE CANTRELL, et al,
Plaintiffs,
vs. Case No. 06-15637
Hon. David M. Lawson

JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan,
Defendant.

The Confidential Deposition of THEODORE SPENCER, VOLUME II, Taken at 350 South Main, Suite 300, Ann Arbor, Michigan, Commencing at 11:38 a.m., Monday, September 17, 2007,
Before Marie M. Puchel, RMR, CRR, CSR-0212

* * *

[Page 234]
{Q. Ms. Nelson}
{A. Witness Theodore Spencer}

{Theodore Spencer}role of this mission statement and how did it come together, it is certainly our role and the overall role of the university to achieve diversity. Our role would be to do the following things that you see there on the mission statement.

BY MS. NELSON:
Q. My question is more specific than that, Mr. Spencer. In this Exhibit 7 that's previously been marked in your deposition, a mission statement that applies in general to the university, or is it specific to a school, such as LS&A or the engineering school?

A. This part of the admissions process mission statement would apply to the university, in general.

Q. Mr. Spencer, can you tell me, does the -- at the undergraduate level for the LS&A program, is there a process by which groups or individuals may provide information or make suggestions as to admissions criteria to be considered?

A. Well, certainly anyone who would like to do that has that opportunity. It's very rare, however, that those kind of situations occur, at least for me. My experience has been that I have not had groups of people who have come to me to request changing of the overall mission statement of LS&A or engineering.

Q. All right. And what about with specific to criteria

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to be considered for purposes of reviewing admissions applications?

A. Well, that -- no, I've not had that experience. That has not been my experience.

Q. Is there a process in place that the -- that the -- for example, LSA school utilizes for purposes of providing for that type of admission?

A. Well, of course, the LS&A faculty, they are the primary architects of all of the things that we do to admit their students. And so whatever processes they use within LS&A to determine what they consider -- what they think should be factors for consideration for students, certainly they have a -- I'm certain they must have something in place to do that.

Q. So your answer is you don't know of any specific process that may be in place for individuals outside of the university to submit requests to be considered?

A. No, I don't know of one -- any.

Q. Are you aware of any groups outside the university that submitted information or suggestions for purposes of evaluating admissions criteria after the adoption of Proposal 2?

A. If you're referring to the committee that was put together by the President, the Blueprint Committee, that's the only committee that I'm aware of.

DECLARATION OF WILLIAM G. BOWEN
Cantrell v. Granholm, No 06-15637 (E.D. Mich.)

1. My name is William G. Bowen. I have agreed to serve as an expert witness in this matter on behalf of the Plaintiffs. I submit this declaration in support of the Plaintiffs' Motion for Summary Judgment. If asked to do so, I will submit a full expert report setting forth in more detail my opinions and bases therefor.

2. I am currently President Emeritus of the Andrew W. Mellon Foundation, a charitable grant-making institution with special focus on higher education and scholarship. I have held this position since 2006. From 1988 to 2006, I served as President of the Andrew W. Mellon Foundation. Prior to that, I served as President of Princeton University for sixteen years and as Provost for five years. I was a Professor of Economics at Princeton University from 1965 until 1988, having been member of the faculty since 1958. I have served as a member of several corporate boards, including American Express and Merck & Co., Inc.

3. I have written extensively about issues in higher education, including the consideration of race in admissions. Together with former Harvard President Derek Bok, I have conducted extensive original research on the impact of race-conscious admissions policies in American higher education. Many of the conclusions we drew from this study are set forth in *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, William G. Bowen and Derek Bok, Princeton University Press (1998).

4. In forming the following opinions, I am relying on my own original research, both published and unpublished. In addition to *The Shape of the River*, my research has appeared in book-form in *Equity and Excellence in American Higher Education,* William G. Bowen, Martin A. Kurzweil and Eugene M. Tobin, University of Virginia Press (2005).

5. I am not receiving any compensation for my work in connection with this matter. I previously testified as an expert in *Gratz v. Bollinger*, No 97-75321 (E.D. Mich. July 7, 1998).

6. Since its inception, the consideration of race in university admissions has been an important contributor to the socioeconomic mobility and well-being of racial minorities in the United States.

7. For example, race-conscious admissions programs have contributed to great rise in the numbers of African Americans pursuing higher education.

8. Many successful African-American students would have been rejected by their alma mater under a race-neutral admissions regime.

9. Minority students who have benefited from the consideration of race in university admissions have made a clear impact in the political and professional world. There are, for instance, a growing number of African-American doctors and lawyers practicing in the United States. In addition, the number of African-American elected officials in this country has risen dramatically since the first race-conscious admissions programs were implemented.

10. My research with Derek Bok also shows that race-conscious admissions programs have had an important impact upon economic outcomes for racial minorities, including per capita earnings.

11. The available evidence indicates that race-neutral alternatives are unlikely to be as effective as race-conscious admissions in enrolling a diverse student body.

12. In particular, income-based strategies are unlikely to be good substitutes for race-conscious admissions policies. Although African Americans, Latinos and Native Americans are overrepresented in the country's poor population, the great majority of that population is still white. Children from poor African-American and Latino families make up less than half of all poor children.

13. Thus, according to my analysis published in *Equity and Excellence,* moving from race-conscious admissions policy to class-based one would substantially reduce the minority enrollments at selective institutions, and severely impair current efforts to achieve racial diversity.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 10th day of October, 2007 in New York, New York.

William G. Bowen
William G. Bowen

DECLARATION OF KRISTINA WILFORE
Cantrell v. Granholm, No. 06-15637 (E.D. Mich.)

I. Background and expertise.

1. My name is Kristina Wilfore. I submit this Declaration in support of the Cantrell Plaintiffs' motion for summary judgment. If needed, I will submit an expert report at the appropriate time setting forth in full my areas of expertise, opinions and bases.

2. I received a Bachelor's Degree in Political Science and Broadcasting from Washington State University in 1995. I received a Master's Degree in Public Administration from the University of Washington in 1998.

3. Since April 2002, I have been the Executive Director of Ballot Initiative Strategy Center, Inc. ("BISC"). BISC, a non-profit organization located in Washington D.C., provides education, training, and research to a wide range of groups on the voter ballot initiative process. BISC studies initiative trends, monitors major campaigns and donor activities, assists committees and organizations promoting progressive initiatives and publishes a comprehensive Campaign Manual on the topic of ballot initiatives. In my position as Executive Director, I am responsible for strategic planning and implementation of programs; acting as chief contact to the Board of Directors; directing national initiative strategies; being the principle contact for the media; raising and overseeing the organization's budget; providing staff management and oversight to BISC's fulltime employees and consultants; directing political programs; building state coalitions and working with state campaigns;

maintaining BISC's organizational profile within and outside of Washington, DC, and; shaping polling and research projects.

4. In the past five years, I have worked on approximately 150 ballot initiative campaigns in 30 different states in the United States. From 2002 to 2004, I worked on seven ballot initiative campaigns in the state of Michigan.

5. My role as Executive Director of BISC places me in a unique position to opine on ballot initiative campaigns. To my knowledge, BISC is the only organization in the United States that conducts research on multi-issue, multi-state voter initiative campaigns. Other organizations that research ballot initiative campaigns or that are involved in campaign advocacy tend to consider single state, single issue campaigns or are academic and research groups that examine narrow aspects of the voter ballot initiative process (e.g., turnout, election effect, civic engagement, expansion of the process). BISC, by contrast, is involved in every phase of the initiative campaign process, including pre-campaign evaluation regarding initiative viability.

II. Statewide ballot initiative campaigns are lengthy, complex, difficult and expensive.

6. Statewide voter ballot initiatives are in use in 24 states and the District of Columbia. Although the voter ballot initiative mechanism is contained in each state's constitution, some aspects of the initiative process are governed by statute (e.g. signature requirements, timing deadlines, requirements on initiative petition formatting).

7. Measures may be either direct or indirect. Under the direct initiative, a measure is put directly to a vote after being submitted by a petition. Under the indirect initiative, a measure is first referred to the legislature, and then put to a popular vote only if not enacted by the legislature.

8. Voter ballot initiatives were initially promoted by civic-minded reformers in the early 20th century as a means of countering endemic governmental corruption and enabling ordinary citizens to shape public policy. Alongside these goals, reformers also considered that the initiative process had an educative value, encouraging citizens to become more civically and politically engaged with the process of government.

9. Voter ballot initiatives today have dramatically different goals from those that motivated their inception. First, ballot initiatives are no longer only about allowing citizens to shape public policy. Ballot initiative sponsors today often choose to insert controversial or "wedge" issues into elections in order to drive certain voters to the polls and affect the electoral result. Second, because issue committees may raise unlimited sums of "soft" money, candidates running for statewide office increasingly use initiatives to provide alternative electoral vehicles that are unconstrained by candidate campaign contribution limits.

10. Today, in every state that has a voter ballot initiative, campaigns are generally lengthy, complex, difficult and expensive. Although originally conceived as a means for ordinary citizens to involve themselves directly in the political process, ballot initiative

campaigns have become highly professional and managed, benefiting organized and well-funded groups.

11. The length of a ballot initiative campaign may run as long as two to three years if one counts coalition-building and research before filing a measure, although most campaigns take approximately a year from start to finish.

12. Successful initiative campaigns require connections with a network of supporters, political capital with the major players in the relevant state, and access to significant financial resources as well as a substantial base of willing volunteer supporters.

13. In order to have any chances of success, individuals and groups seeking to enact laws through ballot initiatives must go through a lengthy and complex process that can be considered in three stages: (1) the initial stage, where proponents of a measure must decide whether they have a viable proposal; (2) the signature-gathering stage, where a requisite number of voter signatures are collected in order to secure the initiative's placement on the ballot; and (3) the voting stage, where the measure is submitted to the electorate.

A. Initiating Stage.

14. The initial stage of a ballot initiative campaign involves a series of processes, including (among others):

- conducting policy research to evaluate the validity of the proposal;

- building a support coalition by contacting donors and other stakeholders;

- pre-polling fundraising;

- polling to determine the popularity of the proposal. At a minimum, pre-campaign polling results should show support of between approximately 60-70% of the electorate. The industry standard for such pre-campaign polls involves taking a representative sample of likely voters. Sample sizes range from 400 to 700 persons with a margin of error of approximately 3%;

- testing possible ballot language through the use of focus groups;

- preparing petition language; and

- submitting proposed petition language, summaries and/or titles to the designated state authorities for approval or certification as required by applicable state law.

15. Depending on the complexity and controversy of the issue being undertaken, the initial stage of a ballot initiative campaign can take anywhere from six months to two years of advance work.

16. At the end of the initial stage the state advises the proponents whether they are allowed to begin circulating the petition. The signature-gathering stage commences once the state approves the petition.

B. Signature-Gathering Stage.

17. The signature-gathering stage of the initiative is both difficult and expensive. All states require a certain number of valid signatures to place an initiative on the ballot. Most states require between 5-10% of the voters who voted in the last election or voted for a particular race, such as governor, although that number can be higher or lower depending on the state. In states that allow both statutory and constitutional initiatives there is usually a different number of signatures needed, with more being required for a constitutional amendment. Michigan requires signatures from 10% of the total vote cast for all candidates for governor in the last preceding general election in which governor was elected for a constitutional amendment.

18. Signature gathering is done primarily by professional firms. Gathering signatures is an expensive and timely proposition, especially if the timeline is relatively short. Signature gathering drives can take months and most campaigns do not have enough volunteers who are willing to commit the hours needed to complete a drive. There are a number of signature gathering firms in the U.S., including but not limited to National Voter Outreach, National Petition Management, PCI Consultants and Democracy Resources.

19. The success of obtaining a sufficient number of signatures depends on a number of factors, including:

- the number of other competing measures that season;

- the use of paid media campaigns;

- the cost of gathering signatures, which can range from $1.25 to $6.00 per signature; and

- the need to gather at least 20% more signatures than required to account for invalid or duplicative signatures.

20. Proponents of ballot initiatives may have to contend with legal disputes involving signature verification. States such as Michigan collect a sample number of signatures in order to measure validity. When the statistical sample, which determines the error rate, is available for review, the Board of the State of Canvassers sets deadlines for objections. Individuals may inspect these signatures or pay the costs to copy them in order to challenge the signatures in the sample.

C. The Voting Stage.

21. Putting the ballot initiative to the electorate increases complexity and costs of the initiative process significantly. This stage of the campaign requires considerably more volunteers, staff and funding.

22. The greatest expenditure of funds is on television advertising, which is essential to any campaign. In addition to television advertising, campaigns use a variety of methods simultaneously to reach the electorate, including direct mail, phone calls and canvassing.

23. In some cases, proponents of a measure may be forced to spend additional funds to defend the measure

from legal challenges after it has already been approved by the electorate.

24. The 2006 election cycle was the third most active cycle for ballot initiatives since the first measure was proposed in 1904. Voters decided 204 statewide measures in 37 states in that cycle. Seventy-nine of the 204 measures were citizen-petitioned and 125 referred by the government (legislative referenda). There were 22 more initiatives on the ballot than in 2004. Voters approved 29 initiatives and 108 legislative referenda.

25. According to industry sources, not only has the number of initiatives increased, but so has the intensity, coordination, and money spent. While 2004 was a record-breaking year with $393 million spent on ballot initiatives, last election cycle just twelve of the most expensive initiatives in the country spent $349,239,173. That figure includes the most expensive initiative campaign ever - $153 million spent by proponents and opponents on California's renewable energy campaign.

26. With all the money spent, very few proposed initiatives make it to the ballot, and less than half of those pass. Incorporating results from elections through 2006, industry data indicate that a total of 2212 initiatives have qualified for the ballot since the process began. Less than half of all measures have been approved by voters; 900 of the measures passed, or 40.7%. The passage rate of the 2006 initiatives was lower than the historical average, as only 29 out of 79 initiatives, or 36.7%, were approved by voters.

III. <u>The Michigan ballot initiative process is particularly onerous in comparison to ballot initiative processes in other states.</u>

27. The ballot initiative process in Michigan contains various features that make it particularly onerous, expensive and burdensome when compared to other states.

28. Michigan's ballot initiative process is set out in the Michigan State Constitution.

29. Michigan is a politically competitive state, with expensive media markets and a large number of initiatives vying for voters' attention on any given ballot.

30. The Michigan media market is expensive when compared to other ballot initiative states. In Michigan, measures can cost as much as $10-$15 million with $5 million being a practical minimum. Media costs alone can account for as much as $4 million.

31. Michigan requires a large amount of signatures due to the size of its population. The Constitution of Michiga. requires signatures from 10% of the total vote cast for all candidates for governor in the last preceding general election in which governor was elected. In addition, a 20% safety margin must be added to account for invalid and duplicative signatures. Signature gathering alone can cost from $750,000 to $1 million.

32. Michigan has an unusually short time frame for the gathering of signatures and filing of petitions. Petitions must be filed at least 120 days before the

election at which the proposed amendment is to be voted on. The circulation period is limited to 180 days. Other states, such as Oregon and Arizona, allow as long as two years. This means that in Michigan proponents must submit signatures gathered within the same 180 day period. The short circulation period adds to the cost of gathering signatures because it requires the use of a greater number of circulators (who are commercially engaged to gather signatures) and adds an urgency premium by requiring the gathering of signatures within a comparatively short time frame. In addition, Michigan law requires circulators to have resided in Michigan for at least 30 days in order to circulate a petition, limiting the number of available qualified circulators.

33. Anyone seeking to have a voter ballot initiative passed in Michigan in 2008 will also have to take into account the proposed reforms to Michigan law regarding voter ballot initiatives. These reforms, originally requested by the Michigan Board of Canvassers and submitted to the Secretary of State, are currently with the Michigan legislature for consideration. The reforms, if accepted, will make the voter ballot initiative process in Michigan more costly and time consuming.

IV. Overturning Proposal 2 will be extraordinarily onerous, expensive and burdensome.

34. Any individual or group seeking to mount a campaign to overturn Proposal 2 must not only face the particular difficulties of the ballot initiative process in Michigan but also the peculiar and unique problems

associated with pro-affirmative action ballot initiatives and minority protection measures generally.

35. Two factors in particular make the possibility of seeking a successful pro-affirmative action voter ballot initiative in Michigan extraordinarily onerous, expensive and burdensome.

36. First, the subject matter involved in an affirmative action campaign places proponents of affirmative action at a particular disadvantage as compared to most other political issues. One reason for this is that polling data is unreliable in this area, which adds to the cost and complexity of developing successful proposal language and predicting successful strategies for targeting the electorate through the use of focus groups. In my experience, citizens do not vote predictably when it comes to race issues in polling booths when compared to providing data for pollsters. Another reason for the particular disadvantage faced by proponents of affirmative action measures is that these measures are particularly difficult to market because they tend to elicit highly emotive responses from voters. Voters often mistakenly link these measures in their minds to broader politically charged issues, not the subject of the measure, such as questions of unfair economic advantages. In this regard, ballot initiative campaigns benefit proponents who have simple messages rather than those who have messages, such as pro-affirmative action campaigns, which are, by their nature, more complex.

37. Second, in the context of having just lost Proposition 2, there is no natural constituency among pro-affirmative action groups in Michigan that would form an appropriate base for those groups to

financially coalesce. There is no single obvious financial benefactor in Michigan who would support the pro-affirmative action position.

38. Overturning any recently passed measure requires more efforts, both physical and financial, than seeking to approve a new measure. As a result, it is extremely unlikely that groups supporting affirmative action would commit any significant resources to a new measure in Michigan. These groups are much more likely to expend their efforts and resources in other states, such as Missouri, Colorado, Arizona, Nebraska and Oklahoma, where similar anti-affirmative action initiatives have been filed.

39. As a means of achieving political change, what was once an attempt to involve citizens in the lawmaking process has since become a highly professional and managed process by which well-organized and well-funded groups are able to achieve change on substantively simple political issues. The ballot initiative campaign in any state is extremely onerous, complex, lengthy and expensive. The difficulty involved in the ballot process is even more acute in Michigan due to the particularities of the initiative process in that state. Proponents of initiatives seeking to benefit minorities on the basis of race, such as initiatives dealing with affirmative action, are even more disadvantaged because of the subject matter of such initiatives. A voter initiative campaign targeted at overturning Proposal 2 in the area of race in universities admissions faces overwhelming odds.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and

correct. Executed this 16th day of November, 2007 in Washington D.C., District of Columbia.

Kristina Wilfore
Kristina Wilfore

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*,
Plaintiffs,
v.
Case No. 06-15024
Hon. David M. Lawson

CONSOLIDATED CASES

JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES OF any other public college or university, community college or school district,
Defendants.

and

CHASE CANTRELL, *et al.*,
Plaintiffs,
v.
Case No. 06-15637
Hon. David M. Lawson

JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan,
Defendant.

DECLARATION OF JEANNIE OAKES IN SUPPORT OF THE CANTRELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [CONFIDENTIAL: EXHIBIT ONE FILED UNDER SEAL]

DECLARATION OF JEANNIE OAKES

I, Jeannie Oakes, declare the following:

1. I have agreed to serve as an expert witness in this matter on behalf of the Cantrell Plaintiffs. I submit this declaration, and the attached report, in support of the Cantrell Plaintiffs' Motion for Summary Judgment.

2. I authored the attached study, entitled "The Viability of' Race-Neutral Approaches for Achieving Diversity at the University of Michigan," for the purpose of this litigation.

3. The conclusions contained in that study are my own, and I can and will testify, if asked, to the content of my conclusions and the basis for each of them.

4. I have also attached an accurate and current *curriculum vitae.*

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 30 day of November, 2007 in Washington, D.C.

Jeannie Oakes
Jeannie Oakes, Ph.D.

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on this 30th day of November, 2007, I served a true and correct copy of the foregoing via electronic mail and First Class Mail upon:

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The Viability of Race-Neutral Approaches for Achieving Diversity at the University of Michigan

Jeannie Oakes, Presidential Professor in Education Equity Graduate School of Education and Information Studies UCLA

I. Introduction

I am Presidential Professor in Educational Equity in UCLA's Graduate School of Education and Information Studies, Director of the University of California's All Campus Consortium on Research for Diversity (ACCORD); and Co-Director of UCLA's Institute for Democracy, Education & Access (IDEA.) My research examines inequalities in U.S. schools, (including inequalities in access to college), and follows the progress of equity-minded reform. As detailed in my curriculum vitae (Appendix A), I am the author of 17 scholarly books and monographs and more than 100 published research reports, chapters, and articles. My awards for this work include the Distinguished Achievement Award from the Educational Press Association of America; three major awards from the American Educational Research Association (Early Career Award; Outstanding Research Article; Outstanding Book), and the National Association for Multicultural Education's Multicultural Research Award. I am also the recipient of Southern Christian Leadership Conference's Ralph David Abernathy Award for Public Service. One of my recent books, *Becoming Good American Schools: The Struggle for Civic Virtue in Education Reform* won AERA's Outstanding Book Award in 2001. In addition to my scholarly publications, I have assisted state and

national policymakers in developing equity-focused education reform and most recently served as an advisor to Joint Legislative Committee for the California Educational Master Plan, K-University. I have also conducted research and testified in three school desegregation cases—San Jose, California; New Castle County, Delaware; and Rockford, Illinois. In addition, I served as an expert consultant in a fourth desegregation case, the *Hoots* case in Woodland Hills, Pennsylvania and, most recently, in the *Williams v. California* litigation focused on students' access to basic learning opportunities.

II. Nature of the Assignment

This report examines whether the racial diversity the University of Michigan requires can be achieved without considering race in the admissions process. Specifically, it investigates the extent to which permitted race-neutral university admissions policies are likely to produce the diversity the university requires.

III. Research Approach

To examine these questions, this report draws from the experiences of Texas and California and contrasts relevant circumstances in these states with those in Michigan. It also investigates admissions data from the University of Michigan about the pool of applicants, admits, and enrollees as well as publicly available data about Michigan's K- 12 schools to in order to assess the likely outcomes of "race-neutral" strategies on the diversity of freshman admits to the University of Michigan. These analyses consider the composition of the 2005 pool of University of Michigan freshman

admits and enrollees as a baseline against which to assess the likely impact of race-neutral strategies on the diversity of the University of Michigan undergraduate student body. As shown in the table below, the racial composition of the class of students admitted in 2005 as first-time freshmen mirrors the racial composition of Michigan's public school enrollment for white and Latino students. Blacks are underrepresented by almost 300%, and Asians are overrepresented by slightly more than 800%.

Racial Composition of University of Michigan Freshman Admits and Michigan Public School Students

	2005 Michigan Public School Enrollment	2005 Freshman Admits	2006 Undergraduate Student Body
Black	20%	7%	7%
Hispanic	4%	5%	5%
Asian	2%	17%	13%
White	72%	71%	67%

Source: Data provided by the University of Michigan

Using the 2005 percentages as a baseline recognizes that past practice at the University of Michigan in which race was one of many factors considered in the admissions process fell short of equitably representing students from the state's racial

groups. Using this baseline does not presume that the undergraduate student body yielded by past admission practices included a critical mass of black and Hispanic students required for achieving the benefits of a diversity student body. Rather, the goal in this analysis is simply to assess whether current percentages of underrepresented minority (URM) students would likely remain in a race-neutral admissions environment. In other words, the analysis looks at whether race-neutral admission practices would make the University of Michigan less racially diverse.

I was assisted in the preparation of this report by Erica Frankenberg, Harvard University Graduate School of Education; Professor Mark C. Long, University of Washington, Daniel J. Evans School of Public Affairs; and Professor Michal Kurlaender, School of Education, University of California Davis.

IV. Conclusions

A. Race-neutral admissions strategies (e.g., Percent Plans) have not been effective as replacements for race-conscious strategies in maintaining or increasing diversity in the public universities in Texas and California, two states with restrictions on race-conscious practices in university admissions similar to those required under Michigan's Proposal 2.

Race-neutral Percent Plans that guarantee admission to the top ranked graduates of each public high school have not been successful in either California or Texas in maintaining levels of racial diversity comparable to those achieved with race-conscious policies prior to the *Hopwood* case in Texas

or the passage of Proposition 209 in California that made race-conscious policies impermissible.

B. Michigan differs from California and Texas in ways that make it even more unlikely that race-neutral approaches would result in the diversity required at the University of Michigan. In fact, such strategies would likely exclude from admission in-state African American and Latino high school graduates with academic preparation sufficient to succeed at the university.

> **B.1.** Whereas the top-tier universities in California and Texas draw their freshman classes almost exclusively from graduates of California high schools, a majority of those offered admission as first-time freshmen at the University of Michigan (including a majority of those from underrepresented minority groups) are not Michigan residents. Race-neutral admissions criteria (e.g., Percent Plans) and outreach strategies focused on Michigan high schools would not benefit the large percentage of underrepresented minority students who are drawn from other states. Moreover, given the substantially lower scores on academic admissions criteria of non-resident underrepresented admits, in comparison to non-underrepresented admits, few of these underrepresented out-of-state admits would likely be admitted were race not a consideration in the admissions processes.
>
> **B.2.** The high degree of racial segregation in Michigan high schools means that students from underrepresented minority groups are

concentrated in a very small percentage of the state's high schools. As a result, a plan guaranteeing admission to high ranking students at each of the state's high schools would have its greatest benefit to students in schools with predominantly white populations and yield a relatively small number of underrepresented minority students.

B.3. The small number of Michigan high schools with predominantly URM populations produces relatively few graduates with the academic records that would make them competitive for admission at the University of Michigan. This, in part, results from the relationship between the high concentration of poverty at racially isolated minority schools and the low level of opportunity associated with these schools. Lower levels of opportunity, in turn, affect the academic performance of students, specifically their ability to meet state standards on assessment tests, qualifying for state merit aid for college. These low levels of achievement are related to the racial and/or poverty composition of a student's high school. Consequently, race-neutral "Percent Plans" would like result in the admission of underrepresented minority students with academic preparedness far below that required to succeed in an "elite" university.

V. Supporting Evidence

A. Race-neutral admissions strategies have not been effective as replacements for race-conscious strategies in maintaining or increasing diversity in the public universities in Texas and California.

The effects of abandoning affirmative action programs have been investigated by some researchers who have looked at both policy changes restricting affirmative action (in California and Texas in particular), or have conducted simulations based on small sets of elite institutions. Results from these studies suggest declines in overall enrollments of underrepresented groups at the most selective colleges and universities. The effect of ending affirmative action is not confined to admissions decisions. Analyses of application patterns tell a similar story: the proportion of African American and Hispanic students applying to top-tier institutions decline in the absence of affirmative action (Long 2004; cf. Barreto and Pachon, 2003) and there is some evidence that suggests that the proportion of minority students that even take a college entrance exam (required for admission to most four-year colleges) declines in the absence of affirmative action (Dickson 2006).

Most state systems that ended race-conscious admissions replaced them with "race-neutral" policies to attempt to address inequities in K-12 schooling that result in racial disparities in higher education admission. The most commonly utilized approach is a Percent Plan, which guarantees admission for a fixed percentage of students who rank at the top of their high school class in the state. The specifics of these

plans vary substantially, for example, the plans of California, Texas and Florida (Horn and Flores 2003). Percent Plans' efforts to diversify admission to selective public universities rest on the assumption that secondary schools are in large part highly segregated by race, and thus, top students in a high-minority school will have a relative advantage in gaining admission to the state's flagship universities. Other school-based "Outreach" approaches seek to increase the academic performance and college going of students at low performing schools with academic preparation programs, mentoring, assistance in the college application process, and other college-going supports. Universities have also responded by changing the weights given to various non-racial student characteristics in the admissions process.

Details about the specific impact in California and Texas are summarized below.

California. The University of California is made up of ten campuses that offer undergraduate and graduate education. It is a highly selective system, targeting admission to only the top 12.5% of the state's high school graduates under California's Master Plan for Higher Education.[1] Students become eligible for

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[1] For more detail, see Grodsky & Kurlaender (2006), The Demography of Higher Education in the Wake of Affirmative Action, Paper Prepared for the Conference--*Equal Opportunity in Higher Education: The Past and Future of Proposition 209*, Sponsored by the Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity at Boalt Hall, University of California Berkeley (October, 2006). The 1960 Master Plan outlines California's higher education structure and articulates the University of California (UC) as the state's premiere research university.

the University of California based on a minimum grade-point average on a specified set of high school courses (known as a-g courses) and defined scores on standardized admissions tests (SAT or ACT). Students who meet basic eligibility are guaranteed access to a UC campus, although not necessarily one of the applicant's choice, due to the increased selectivity of some of the more competitive campuses within the UC, in particular Berkeley, Los Angeles and San Diego.

Historically, the University of California has engaged in affirmative action in order to enroll a student body that reflects the demographic composition of California. California is one of the most diverse states in the nation, where the demographics are rapidly changing as the growth in the Latino population increases, and whites no longer represent the majority of the state's school-age population (Census Bureau 2000).

The University has worked to attain a diverse student body through targeted outreach programs in K-12, and through the use of race/ethnicity as a factor in admissions. Given significant racial disparities in the eligibility pool and on grades and test scores, the most selective UC campuses employed a dual admissions process to ensure diverse enrollment, one for whites and Asians, and another for underrepresented minority groups (Douglass 1999). The percentage of underrepresented minorities in the UC freshmen class overall grew from 9.9% in 1980 to 21.0% by 1995 (UCOP Report 2003).

Changes in these race-conscious policies, as a result of the UC Regents' ban on the use of race in admissions in 1995 and the passage of Proposition 209

in 1996 have had a significant, negative impact on minority applications, admissions, and enrollments.[2] Specifically, Proposition 209 prohibited the state from discriminating against or granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Although the Board of Regents decision in 1995 and the passage of Proposition 209 in the fall of 1996 did not go into effect until the entering class of 1998, the University of California witnessed immediate drops in applications from underrepresented groups (Karabel 1998). Many observers attributed these immediate declines to the "chilling effect" resulting from the end of race-conscious practices on minority applicants to the University (Orfield and Miller 1998). In 1995, 21.5% of UC applicants were from an underrepresented minority group, by 1998, 17.5% of UC applicants were from an underrepresented minority group. Minority applicant rates stabilized at about 17% following Prop 209 implementation, and then actually increased in subsequent years, albeit not to the pre-209 levels. The result is that ten years later, the representation of Latino, African American, and American Indian

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[2] Richard Atkinson (President Emeritus of the University of California) writes, "[the Regents decision (SP- 1) and the passage of Proposition 209] transformed California into a battleground where opposing views of individual merit, fairness, and educational opportunity struggled to prevail (and still do). They also made the University of California a case study in how an elite public university, required to employ admissions policies that are demonstrably inclusive and fair, responded to the end of nearly 30 years of affirmative action" (Atkinson and Pelfrey 2004).

students in the University of California (UC), and particularly at the UC's most selective campuses, has decreased, even as these groups make up a larger share of California high school graduates.

Admission and enrollment rates of underrepresented groups declined further in 1998 when Proposition 209 was implemented. Overall, enrollment levels of underrepresented minority applicants at the University of California before SP-1 or Prop 209 were about 21% system-wide; immediately after 209 went into effect, enrollments of underrepresented minority applicants dropped to about 15% (UCOP Report 2003). The drop at the most selective campuses was greater. In one year, (between 1997 and 1998), the fraction of minorities in the UC Berkeley freshmen class fell from 22% to 12%; UCLA URM freshmen went from 22%% to 15%; and UC San Diego went from 13% to 10%. (Card and Krueger, 2005).

By 2002 underrepresented groups represented about 17% of UC freshmen matriculants (UCOP Report 2003). Moreover, given the growth in the percentage of California high school graduates who are students of color, the gap in UC enrollment of underrepresented groups widened considerably. In 1995, 38.3% of California high school graduates were from an underrepresented minority group and only 21% of new UC freshmen were from an underrepresented minority group (a difference of 17.3%). In 1998 following the implementation of 209, the gap had widened to nearly 24%, as underrepresented groups constituted 41.6% of California high school graduates, but only 17.8% of new UC freshmen (UCOP 2003).

The University of California and Governor Gray Davis developed multiple strategies to address the declining enrollment of African American, Latino and Native American students after the passage of Proposition 209. The "Four Percent Plan" (also called Eligibility in the Local Context) was one strategy. Under this plan high school graduates in the top four percent of their high school were guaranteed admission to at least one of the University of California campuses. However, the four percent plan has not adequately increased admission and enrollment of URM students in the University of California. The plan has been particularly limited in increasing URM admission and enrollment at the most selective UC campuses (Los Angeles, Berkeley). Less than three-fourths of California students in the top 4 percent plan apply and are admitted to these two most selective campuses. The first year the 4 percent plan was in effect (2001), African American freshmen enrollment at Berkeley fell to 3.9 percent (compared to 7.8 percent in 1997). Similarly, Latino freshmen enrollment at Berkeley dropped to 10.8 percent (compared to 14.6 percent in 1997).

In a recent paper, Grodsky and Kurlaender (2006) evaluate changes in minority matriculation at California public and private institutions in the wake of affirmative action. Specifically, they investigate how minority enrollments across institutions shifted as a consequence of Proposition 209. They also examine the degree to which California's community colleges and private colleges and universities may have compensated for the losses in minority enrollment at some of the more selective public institutions. Their results corroborate earlier findings that the

elimination of affirmative action led to declines in minority enrollment at selective public comprehensive colleges in California. Yet, in addition to the much-publicized declines in minority enrollments at the state's most selective public institutions, several other considerably less selective public four-year institutions also witnessed big losses in Black and Latino enrollments post-209.

For African Americans, they find that minority enrollment in public four-year colleges declined by about one percent, while African American enrollment at private not-for-profit and proprietary institutions increased by 1.2% and 3.5% respectively. For Hispanic students, they find a modest and non-significant decline in enrollment at public four-year colleges accompanied by a 4.7% increase in community college matriculation. The shares of incoming Hispanic students at private not-for-profit and proprietary schools increase by 2.5% and 5.9% respectively. These mean shifts mask important changes in minority enrollment patterns across institutions of each type as well as shifts in the average quality of the institution under represented minority students attend. In the absence of affirmative action, Black and Latino students clearly turned to the least selective UC campus—UC Riverside—and to some of the state's less selective four-year public institutions.

Moreover, the average SAT scores of schools attended by African American and Hispanic students declined by over 100 points (a half a standard deviation) as a result of Proposition 209. Private institutions compensate for this decline in part in the case of African American students, but not in the case

of Hispanic students. Overall, however, their results suggest that both Black and Latino students increased their reliance on private four-year and proprietary sub-baccalaureate institutions post-209. In addition, Latino students also saw large increases in enrollment at community colleges post-affirmative action.

Texas. Despite serious efforts by policymakers and university administrators to maintain minority enrollment at Texas' flagship public higher education institutions (notably UT-Austin and Texas A&M), minority students' share of enrollment at these institutions has not achieved the levels that would have occurred had these institutions been allowed to maintain their pre-*Hopwood* affirmative action policies. There is no evidence that the variety of approaches taken (including the Top-10% policy, which grants automatic admission to Texas public universities for students in the top-10% of his or her high school class; changes in the weights attached to various applicant characteristics aside from race; and additional recruiting efforts and new scholarship programs) have completely reversed the adverse effects of the *Hopwood* implementation on minority representation.[3]

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[3] As shown in Long and Tienda (2007), the Top-10% plan led to a 42% rebound in the share of minority applicants accepted by at UT-Austin and 12% rebound at Texas A&M.[3] In addition, that these universities changed the weights placed on applicant characteristics (e.g., lowering the positive weight placed on SAT scores, lowering the penalty attached for attending a lower quality high schools, etc.). These changes benefited minority applicants, and produced rebounds of 32% at UT-Austin and 18% at Texas A&M. Thus, the cumulative rebounds were 60% at UT-Austin and 28% at Texas A&M. That is, while the combination of state and

In raw levels, minority students' share of enrollment is higher now than it was in 1996 (before *Hopwood* was implemented) for both universities. The press highlighted this rebound as evidence for the effectiveness of the top-10% plan. However, a close analysis of the impact of the Texas percent plan suggests that minority students admitted under the plan at the most selective campuses would likely have been admitted anyway (Tienda et al 2003). Furthermore, even in majority-minority schools, white students are more likely than URM students to graduate in the top 10% of their high school class and more likely to be aware of the top 10% law (Niu, Sullivan, and Tienda 2006).

The recovery in minority representation at UT Austin was largely a result of rigorous race attentive recruitment efforts (Horn and Flores 2003) and robust growth in minority students' share of high school graduates in Texas. As Long documents (2007, Figure 2), the degree of under-representation of Blacks, Hispanics, and Native Americans among enrollees (relative to the minority share of Texas high school graduates) increased post-*Hopwood* from 20 to 25 percentage points at UT-Austin and from 25 to 30 percentage points at Texas A&M. The degree of freshman enrollee under-representation of minorities at UT-Austin has remained virtually unchanged since 1997: 24.4% in 1997 and 23.7% in 2004. At Texas

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university efforts was helpful, it was not able to replicate the minority representation that would have occurred with traditional affirmative action. In addition, these admission changes lowered the SAT scores of entering students at these universities. It is unlikely that universities would be willing to go further in using such proxies for race in their admissions decisions.

A&M, the freshman enrollee under-representation of minority students has worsened from 27% in 1997 to 30.3% in 2004. The evidence from both California and Texas make clear that the elimination of race as a consideration in undergraduate admissions to the University of Michigan will result in enrollments of underrepresented minority students at rates considerably lower than has been the case, even if the university mounts vigorous race-neutral efforts to achieve diversity.

B. Michigan differs in key respects from California and Texas that make it even more unlikely that race-neutral approaches could result in the diversity required in the University of Michigan. In fact, a possible unintended consequence of such strategies would be to systematically exclude most of the URM Michigan high school graduates who have sufficient levels of academic preparation to be successful at the University of Michigan.

B.1. The University of Michigan draws a majority of its Freshman class (and a majority of the freshmen from underrepresented minority groups) from out-of-state high school graduates. This contrasts with the top-tier universities in California and Texas that draw their freshman classes almost exclusively from graduates of California and Texas high schools, respectively.

Approximately 90% of the freshman admits at the University of California, for example, are graduates of California high schools. In 2007, UC admitted a record number of freshman students for the fall 2007 term. A total of 57,318 California high school seniors were

offered admission. Nine out of every 10 admitted freshman students are California residents. Admissions offers to out-of-state and international students numbered 6.283, a slight increase over fall 2006 (6,143).[4] Texas' flagship public university, University of Texas at Austin's in-state admits comprise about 95% of the freshman class. For example, in Fall 2006, only 5.5 percent of entering freshmen were out-of-state students.[5]

In contrast, the University of Michigan selects a considerable portion of its freshman class each year from applicants who are not graduates of Michigan high schools. The following chart shows how this practice affected the composition of the African American and Latino admits in 2005. As the table below shows, more than half of the African American and more than 70% of the Hispanic admitted students in 2005 (for whom the university reported residency data) were not residents of the state.

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[4]http://www.ucop.edu/news/factsheets/2007/fall_2007_admissions_summary_e.pdf

[5]http://bealonghorn.utexas.edu/whyut/studentlife/population/index.html

2005 Admits
Ethnicity by Residency

	# In State (IS)	% In State (IS)	# Out of State (OS)	% Out of State (OS)
African American	**275**	**47.74%**	**292**	**51.49%**
Hispanic	**151**	**28.92%**	**371**	**71.01%**

Source: Data provided by the University of Michigan

This pattern of admissions stems from the university's explicit interest in enrolling a diverse student body that represents "Undergraduates from all 50 states and over 80 foreign countries; over one-third from outside the state of Michigan."[6]

Michigan's high proportion of freshman admits from outside the state poses particular problems for maintaining or increasing diversity under Proposal 2's restrictions. Moreover, since school-based race-neutral policies such as Percent Plans do not reach beyond the state borders, these students cannot possibly benefit from such plans.

Additionally, race-neutral admissions policies are likely to reduce the admissions of underrepresented minority out-of-state applicants, in that, on average, admitted students from this group admits score

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[6] http://www.admissions.umich.edu/fastfacts.html, accessed on 11-27-07.

significantly lower on academic admissions criteria than those admitted from non-underrepresented groups. The following table shows that, although underrepresented admits from out-of-state in 2005 scored somewhat higher on academic admissions criteria than did in-state underrepresented admits, they are, as a whole, far less likely to be competitive for admission in a race-neutral admissions environment.

Academic Profile of 2005 Freshman Admits by Race and Residency

	SAT Verbal	SAT Math	ACT Composite	GPA
Not URM Admits	661	699	29	3.8
URM In-State Admits	571	574	24	3.4
URN Out-of-State Admits	620	628	26	3.4

Source: Data provided by the University of Michigan

B.2. <u>The high degree of racial segregation in Michigan high schools means that students from underrepresented minority groups are concentrated in a very small percentage of the state's high schools.</u>

> As a result, a plan guaranteeing admission to high ranking students at each of the state's high schools would have its greatest effect on schools with predominantly white populations, yield a very small number of URM students from these schools, and would likely yield many admits without sufficient academic preparation to succeed at the university.

As noted above, Michigan's public school enrollment is 1.7 million, with 72% white students. An additional 20% of students are black, 4% Latino, 2% Asian, and 1% Native American. (2005-2006 data). From 1990-1991 to 2005-2006, Michigan public school enrollment grew more than 13%.[7] Like the rest of the country. Michigan's school enrollment has also grown more diverse during this time period although Michigan's public school enrollment is not as racially diverse as the national enrollment.[8] In 1990, 78% of students were white while only 72% were in 2005. The percentage of both Latino and Asian students has doubled, and the percentage of black students has also slightly increased.

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[7] The primary source of data is the National Center for Education Statistics Common Core of Data (CCD). The CCD's Public School Universe has collected data from virtually every public school district in the nation since 1987, using student enrollment counts. These data provide the opportunity to analyze student enrollments, by race/ethnicity and by poverty status, across districts and years. The analyses here use data from 1990-91 through 2005-06, the latest year of CCD data that has been released.

[8] The racial composition of Michigan's public school enrollment approximates that of the Midwest as a region. In 2005-06, in Midwestern states, 73% of students were white, 15% black, 8% Latino, 3% Asian, and 1% Native American (Orfield & Lee, 2007).

Black students remain, by a large margin, Michigan's largest minority group among public school students. The Detroit City Schools are the largest school district in Michigan, with more than 133,000 students in 2005-06. Slightly more than one-third of all black students in Michigan and one-tenth of all Latino students attended Detroit City Schools. Only 0.3% of all white students in Michigan attend Detroit City Schools.

The racial concentration of Michigan students is revealed by examining schools of three different categories: predominately minority schools (50-100% nonwhite students), intensely segregated minority schools (90-100% nonwhite students), and intensely segregated white schools (90-100% white students). Conceptually, 90-100% is used to signify "one-race" schools because schools that are 90% or greater minority students have been shown overwhelmingly to be schools with high concentrations of poor students, and linked to important educational disadvantages. (Frankenberg, Lee, & Orfield, 2003; Orfield & Lee, 2006). Likewise, both 90-100% minority schools and 90-100% white schools indicate only a token presence of whites or non-whites, respectively, in such schools (see Ma & Kurlaender, 2005).

High percentages of black students attend schools with large shares of students of color. In fact, in 2005, a vast a majority of black students attended predominantly black and intensely segregated minority schools. 77.5% of all black students attended 50-100% minority schools in 2005-06, and 58% of black students attended intensely segregated minority schools (90-100% minority students). To contextualize these

percentages, it is important to note that Michigan has consistently ranked near the top of all U.S. states in terms of the percentage of black students in predominantly and intensely segregated minority schools; in 2005-06, Michigan was ranked as the sixth and third-highest state, respectively, in the percentage of black students in such schools (Orfield & Lee, 2007). In 2005-06, approximately 40% of black students across the country were in 90-100% minority schools. Yet, this national percentage is still almost 20 percentage points lower than the share of Michigan black students in these intensely segregated minority schools.

Notably, among states that have prohibited the use of race in admissions, Michigan has the highest percentage—by far—of black students in racially isolated minority schools (where 90% or more of the enrollment are students of color). This is particularly significant given the fact, as seen above, that Michigan has the *fewest* students of color and thus it would be expected that fewer students would be likely to be in schools with such high concentrations of students of color. Washington, whose demographics are the closest to Michigan, has the least black segregation on any of the three measures.

School Racial Isolation of Black Students in Michigan, California, and Texas 2005-2006

	% of Black Students in Schools with 90-100% Non-White Students
California	40%
Texas	38%
Michigan	58%

Source: Orfield and Lee, 2007.

The percentage of Latino students in predominantly and intensely segregated minority schools (40%) is substantially lower than the percentage of black students, which is not surprising since Hispanics are a much smaller percentage of Michigan's public school enrollment. However, there is a consistent trend of increasing percentages of Latino students attending both predominantly and intensely segregated minority schools.

This pattern of racial isolation means that the majority of Black students in Michigan and a significant proportion of Hispanic students are found in a very small number of the state's high schools. In 2005-2006, only 113 of the state's 831high schools were comprised of 90-100% non-white students. In contrast, 60 percent of Michigan's white students attend schools where white students comprise 90-100% of the student body. Of the state's 831 high schools, nearly half (406)

are 90-100% white. An additional 230 high schools are 50-90% white.

A Percent Plan applied to Michigan's pattern of racially isolated high schools that would guarantee admission to top-ranked students at each of the state's high schools would disproportionately favor white students who are much more broadly distributed across a large number of the state's schools. This is particularly the case because Black and Hispanic students are less likely than whites to fall in the top ranks of their class in racially diverse schools, even when they are in the majority, a Percent Plan would yield a small number of Black and Hispanic students. Moreover, such a plan would not capture the Black and Latino students who attend racially diverse schools and might not be ranked at the top of their class but are nonetheless high-achieving and prepared to succeed at the University of Michigan.

B.3. <u>The small number of Michigan high schools with predominantly URM populations produce relatively few graduates with the academic records that would make them competitive for admission at the University of Michigan.</u> This, in part, results from the high concentration of poverty at racially isolated minority schools. These lower levels of academic performance result, in part, from the differential educational opportunity in Michigan—specifically the ability to meet state standards on assessment tests, qualifying for a state merit aid for college—that are related to the racial and/or poverty composition of a student's high school. Consequently, race-neutral "Percent Plans" would

likely result in the admission of underrepresented minority students with academic preparedness far below that required to succeed in an "elite" university.

One indicator of the lower levels of college readiness provided by schools attended by most of the state's Black students is the rates at which students in different schools earn Michigan Merit awards.[9] The Michigan Merit Awards are granted based on student performance on the Michigan Educational Assessment Program (MEAP). The MEAP consists of a series of questions, the purpose of which was to evaluate the teaching of Michigan students with respect to curriculum standards established by the State Board of Education in five content areas: mathematics, reading, science, social studies, and writing.

Fewer students in intensively segregated minority schools have opportunities to learn sufficient to enable them to earn Michigan Merit Scholarships. Specifically, in the high school class of 2006, less than 10% of students in segregated minority schools, on average, received the Michigan Merit Award. By contrast, the average percentage of students who received the merit award in majority white and segregated white schools was more than four times, 39.6% and 42.2%, respectively, the average share of

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[9] Data on students' performance on the MEAP, Michigan's standardized test, is taken from the Michigan Department of Education's website. The dataset of Michigan Merit Award Recipients is available from the Michigan Department of the Treasury, which administers the award. These datasets were merged with the respective year CEPI datasets to calculate the racial and poverty composition of each school.

Merit Awardees in schools with 0-10% white students. More than 30% of segregated white schools had a majority of students receiving the Merit Award. At the same time, *none* of the 10-50% white schools and only one 0-10% white school had more than half of their twelfth graders receiving the Merit Award.

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{United States District Court for the Eastern District of Michigan Docket No. 2:06-cv-15024}

THE UNIVERSITY OF MICHIGAN
ANN ARBOR

OFFICE OF THE PRESIDENT

March 5, 1970

To the Members of the Black Action Movement:

The statement submitted by the Black Action Movement has been reviewed by the Executive Officers, and the attached proposal will be presented to the Regents for their consideration during the course of their meetings on March 18 and 19. I should like to add some comments about the proposal.

Black students have placed special emphasis on the point that there should be sufficient black students enrolled by the academic year 1973-74 to equal ten percent of the student population in Ann Arbor. In the preliminary conversations which have been held between administrators and black students, the administrators have suggested two reservations about the ten percent enrollment point. One has to do with obtaining the financial resources to support it. The other raises the question of whether a viable modified admission standard can be devised which will produce the required number of students by 1973-74.

Unfortunately, both the black students and the administrators seem to have difficulty in understanding one another on the ten percent issue. When the administrators indicate reservations, the

black students interpret this as a foot-dragging or lack of commitment. When the black students insist on an unequivocal ten percent commitment, the administrators do not reject the figure as either undesirable or unattainable. On the contrary, they simply do not wish to promise something which present information would indicate may not be possible.

For all practical purposes, funds to be used in support of additional black students can be derived from general funds appropriated to the University by the State Legislature, tuition paid by students, income on investments, gifts (individual, corporate and foundation), and federal funds. If there is any single fact about universities today which is the subject of agreement, it is that all of them are very short of funds. Therefore, the only way in which funds can be put into the support of additional black students is to divert such funds from other purposes and give a very high priority to the recruitment and support of black students. Such flexible funds as there are, are now heavily committed to such things as laboratory renovations, land purchases, badly needed equipment, library books, and capital improvement projects.

Aside from the financial problem, there is a problem of admissions criteria. These criteria are administered more flexibly in the case of Opportunity Award students than for others, with less reliance on academic averages or test scores. We know from our present experience that the attrition rate on Opportunity Award students runs somewhat more than twice the average of all students, but it is still tolerable in terms of what is being accomplished. We do not know how much further deviation we can make in

the criteria and still accomplish anything. At some point it is clear that the student is far better off to enter a college where the competition is less severe and where the course options are less academically oriented.

Our tradition, if one can speak of traditions in so short a period, is one of working together toward the achievement of mutually desired ends. There are on our staff a number of individuals on whom we all rely for advice in these matters. Men like John Chavis, George Goodman, Richard Huston, Will Smith and others have now spent some time on the problems of black students, particularly as they relate to admission and financial aid. With their help, and with our joint efforts to advance, we can agree on how best to maximize our interests. Given the willingness of the University to give a very high priority to these problems, and the dedication of the black students to increased educational opportunities for blacks, it will be tragic if we expend our energies in disagreement.

I shall be glad to involve the above named individuals and others in conversations as to how we can best move forward. I have, in fact, asked Will Smith to deliver this statement to you and discuss it with you.

Sincerely,
R. W. Fleming
R. W. Fleming

{United States District Court for the Eastern District of Michigan Docket No. 2:06-cv-15024}

The following rates for 1970-71 for Baits Houses were approved:

Room Type	*1970-71 Rates*
Single	$625.48
Double	$500.38
Double Suite	$599.79
Triple Suite	
Single	$599.79
Double	$575.21

President Fleming said that the issue of the black student demands had been discussed at two previous meetings. Subsequent to these meetings, there had been developed a document that would be presented to the Regents by the executive officers, indicating the kind of proposal the administration was prepared to make. The Regents furthermore had copies of the black student document, as well as the administration proposal. In addition to those documents, Vice-Presidents Smith and Spurr spoke to the other issues in the black student document which had not been covered in the original proposal.

The problem, Mr. Fleming said, was on the one hand to make the maximum commitment, and on the other, to do so responsibly. We were in a period when anyone concerned with university financing must know that the single most difficult problem was simply that of money. This was true of all academic institutions. Unfortunately, this problem came at a time when on

both a state and national level education was enjoying its least popularity in perhaps many a year.

Regent Huebner then read the following statement, which was moved and supported:

1. The Board of Regents concurs in the suggestion that questions of admission and financial aids be separated for program analysis, in all the schools and colleges.

2. That the Board of Resents then concurs in the establishment of an admissions goal which is designed to produce by 1973-74 admissions aimed at 10 per cent enrollment of black students and substantially increased members of other minority and disadvantaged groups.

3. In reaffirming the conviction of the importance of recruiting added numbers, the Board of Regents recognizes that increased funds for staff (both recruiting and counseling) and for financial aid will be required. It therefore commits for 1970-71, a minimum of $100,000 for employment of staff, strategically placed to assure the broadest intensification of the effort. Moreover, the financial commitment to the program (for both staff and financial aid will be raised from its present level of approximately $1,000,000 to $3,000,000 by 1973-74. The allocation of the annual increments between staff and financial aids can be determined best on an annual basis. It may be noted that $3,000,000 represents an amount greater than the total present General Fund Budget for financial aid. It must also be noted that in providing this level of guaranteed financial support, the commitment provides a top priority of University funds, and the

achievement will require active support from all operating units of the University.

It is recognized also that the financial support thus guaranteed will require supplementation, and the recruitment program should include efforts to seek out students with veterans' educational benefits so that numbers may be increased while alleviating the financial drain. In addition, intensified efforts will be undertaken to raise additional funds from state, federal and gift sources, including the many local foundations now being contacted. We invite the assistance and suggestions from the many groups interested and benefitted by the program.

4. The criteria for admissions of disadvantaged students should continuously be studied and experimented with in such a way that the objective of increasing enrollment may be achieved while at the same time preserving a satisfactory probability of successful completion of the educational program at the University.

5. The total Opportunity Award Program, including recruitment, admissions, and financial aids will be centrally coordinated in the Office of Vice President Spurr, working with a committee consisting of students, faculty, and administrators.

6. By separating admissions from financial aids, it is clear that admission of self-supporting students, and the strategic allocation of resources in individual cases based on need, will advance the achievement of the admissions goal.

7. In addition to the assertion of a goal of admissions, and the commitment to increase total dollar support of that program, the University will provide General Fund support, in the College of Literature, Science, and the Arts for 1970-71, in the amount of $170,000, to provide support for continued development of the Afro-American Studies Program, the initial development of the Black Students Center, and the funding of special seminar support. The allocation among the three purposes will be handled within the College to assure the best use of the funds for total development. Program Centers for other groups may in the future be appropriate in the University.

Regent Cudlip said that he had not spoken at the previous hearings because he wished to hear all of the facts from all of the sources. He said that he learned a great deal at the hearing of yesterday, and he had continued to learn as the discussions proceeded. He said that the proposal presented by Regent Huebner in his estimation was a sound plan which did indeed give attention to the seriousness of the problem.

Our country, he said, was experiencing severe strains because of problems that had gone unattended for many years. He felt that every segment of society must assume some responsibility to help those who had not had their fair share. These objectives he felt were necessary to achieve harmony and unity in the country. He said that it was pointed out before that there were limitations, because money which was representative of resources was not readily available. Education, he felt, was a vital part of everyone's life, and the more educated people of all kinds who had the

will to come and conclude their education at a place of higher learning would indeed make a contribution to society. Everyone, he felt should be brought into the stream of life.

Regent Dunn commented that he wished to recognize the constructive comments brought by the Black Action Movement students to help broaden educational opportunities for black students and for all disadvantaged students. He hoped that in the future, students as well as faculty would constructively help the University achieve its goals. He thought that the movement assisted the Regents to review priorities: he knew that the force of the movement would continue to have the Regents do so.

Regent Dunn also stated that he felt that students and faculty could not only help in setting financial priorities, but through analysis assist in curriculum and course content development. In sum, he said, he hoped that the other schools in Michigan would follow the lead which The University of Michigan at this point was prepared to take.

Regent Nederlander was particularly impressed by the presentations made over the last two months by members of the Black Action Movement and black faculty, and the manner in which the entire process had been handled. He felt that it was the obligation of the University to see that blacks continued to remain and more definitely be brought into the mainstream of life. If that meant the committing of funds, then the University must do so.

He also said that by approving the proposals read by Regent Huebner this would be interpreted as

capitulating to student demands, particularly by some of the legislators. He felt, however, that the issue was of such priority that the University and others should work on the state level to try to get funding for these critical programs. He concluded by saying that he would support an admissions goal for 1973-74 which aimed at a ten per cent enrollment of black students and increasing the number of other minority and disadvantaged groups.

Regent Brown said that the University had been involved for the last five or six years in a very constructive approach which was identified as the Opportunity Awards Program. The goals of that program, he said, were still valid and continued to receive wholehearted encouragement from the Regents. An earlier document prepared by George Goodman, he went on, carried out in some detail the concepts and ideas supported by that program.

Regent Brown went on to say that the financial aid program had increased from $66,000 in 1964-65 to $980,000 for the current year. He continued to support the program, and hoped that over the next four or five years significant progress could be made. Therefore, he too felt that the proposal read by Regent Huebner was one which he could accept and would indicate the Regents' dedication to improving the position of the black students as well as that of other minority and disadvantaged groups.

Regent Lindemer commented that the responsible and constructive approach taken by many members of the student body, members of the Black Action Movement, and black faculty was, in his estimation, good. He thought he reflected the reaction of the other

Regents to the favorable presentation made yesterday by Professor Marshall and in the manner in which it was done. He hoped that in the future responsible and mature approaches could be taken to this problem, separating the true issues from extreme emotionalism, and in some instances, extreme and irresponsible actions.

One of the problems which the University had was the problem of disassociating the merit in matters such as the presentation of the Black Action Movement from the uses that others sought to make of that merit for their own ends.

He wanted it clearly understood, in order to avoid any possibility of deception, that except where the Regents have said "commit," they were referring to goals. He said these were good faith goals toward which everything would be devoted.

Regent Dunn asked whether the goals that were set were for the total University community.

Vice-President Smith responded that indeed the intent was to make the goals University-wide, clearly including Flint and Dearborn.

Regent Goebel said that perhaps many of the comments he had intended to make were already made, but he wanted it made clear that the actions the Regents would take were not being taken as a result of pressure. He said that the University had a responsibility to do everything humanly possible to assist in correcting social wrongs, as was also true of the state and federal government. When the University initiated, several years ago, the Opportunity Awards

Program, this was a clear indication that the University was concerned about solving the problem: it had a distinct obligation. This program at the University was one of the first in the country of a rather large magnitude.

He went on to say that he felt the University had been moving in the direction suggested by the Black Action Movement. He said that he was wholeheartedly in favor of the University's program of expanding and encouraging the admission of more minority and disadvantaged groups to the University community.

President Fleming then made some concluding remarks wherein he said that if the goal of ten per cent enrollment of black students was to be achieved, it would require the wholehearted cooperation of the various schools and colleges: it was here that the resources lay, and thus the commitment by the schools and colleges would be an essential factor.

In addition to that, the proposal certainly contemplated that the University community as a whole would work with the state legislature and federal sources to increase dollars that could be devoted to the program. One should not, however, underestimate the difficulties that would be faced to bring this about. There was no question, he said, that the entire program would necessitate a reallocation of internal resources, and that could only be done by the complete cooperation of all those involved in the University community.

Therefore, the significant difference between the proposal read by Regent Huebner and the previous statement was that the ten per cent admissions goal

was concurred in for 1973-74, a commitment that was taken seriously and one which the University would seek to achieve.

Mr. Ron Harris then addressed the Regents and indicated that no clear statement was directed to the Black Action Movement's request for additional recruiters for Chicanos; to the specific number of additional recruiters to be hired; or to the admission of at least 900 black students in the school year of 1970-71.

Vice-President Smith said that the dollars allocated and committed which call for a level rate of $500,000 a year, would be available for both staff acquisitions and student aid, and the allocations would be made through Vice-President Spurr's coordination with the committee that was proposed. We do not know, he said, whether a sizable proportion of the initial allocation should go to recruiting staff. If that committee determines that there should be in effect a front loading on staff acquisitions in order to give mote rapid impetus to the recruiting efforts at both graduate and undergraduate levels, then that decision can be made in the allocation of the funds available in next year's budget.

Mr. Harris then asked about the admission of 900 black students for the 1970-71 period.

Vice-President Smith responded that the question of 900 black students for that period would again be a question for the committee to consider, and to look for the areas in which such a number could possibly be achieved.

Professor Gloria Marshall then addressed the Regents and said that she wished it to be clear that the black faculty and Black Action Movement persons were in support of commitment rather than the simple setting of a goal of ten per cent admissions. She hoped, therefore, that statement number 2 would be rewritten in order that commitment would be the dominant thrust therein.

President Fleming observed that this was the intention of Paragraph 2, that the University would make every effort to achieve the goal of a ten per cent enrollment. "We do not lightly undertake obligations," he said, "and when the University establishes that as a goal and says it will try to achieve that goal it will make every effort to do so."

Mr. Ron Harris suggested that a manner in which the Regents could proceed would be to look at each of the ten black student demands and vote on them individually.

Regent Lindemer said that the resolution which Regent Huebner presented reflected the input and thinking of all of the Regents, as well as the thinking of the black students themselves. And in the process of working out a solution, nobody got everything that he or she wanted, including Regents or other members of the University community, or including those who had written in direct opposition to the demands laid before the Regents.

With respect to the tuition waiver, Regent Lindemer said that in the cold light of reason it was an unworkable concept.

Vice-President Smith said he would like to make another comment, and that was that the total dollar figures expressed in the resolution were by no means the only monies that would be devoted to the program.

An unidentified speaker from the audience suggested at that point that the Regents should vote the motion down because there really were slight changes in this proposal from that of the previous one.

On vote of the resolution stated above by Regent Huebner, the motion passed unanimously.

All of the above actions were by unanimous vote except where indicated.

Expenses of the Regents of the University reported during the month of February 1970 were $771.70.

The Regents adjourned to meet on April 16 and 17.

HERBERT W. HILDEBRANDT, *Secretary*

{United States District Court for the Eastern District of Michigan Docket No. 2:06-cv-15024}

EXHIBIT A

Graduation Year	Total	Caucasian	African-American	Latino	Asian-American	Native American	Other
1950	305	301	4				
1951	273	270	3				
1952	288	283	5				
1953	244	243	1				
1954	213	210	3				
1955	194	192	2				
1956	213	208	5				
1957	253	251	2				
1958	243	242	1				
1959	260	260					
1960	239	238	1				
1961	255	255					
1962	240	239	1				
1963	334	333	1				
1964	293	293					
1965	297	296	1				
1966	353	353					
1967	350	350					
1968	330	330					
1969	350	345	5				
1970	245	236	9				
1971	350	339	11				
1972	418	398	20				
1973	446	404	41	1			
1974	342	322	19	1			
1975	357	320	31	4	2		

Graduation Year	Total	Caucasian	African-American	Latino	Asian-American	Native American	Other
1976	368	333	29	5		1	
1977	376	328	38	7	1	2	
1978	356	306	36	12	1	1	
1979	378	337	28	11		2	
1980	347	315	21	7	2	2	
1981	361	328	17	13	1	2	
1982	378	353	25	7		3	
1983	371	334	21	12	2	2	
1984	370	332	22	10	2	4	
1985	359	317	17	16	9		
1986	380	329	22	13	9	7	
1987	379	323	31	14	7	4	
1988	374	330	20	18	5	1	
1989	376	312	34	18	12		
1990	373	321	28	16	6	2	
1991	423	351	38	18	15	1	
1992	405	342	30	17	11	5	
1993	340	279	33	13	12	3	
1994	396	305	40	28	15	8	
1995	396	307	34	28	20	7	
1996	411	355	22	19	11	4	
1997	367	288	32	7	32	7	1
1998	355	324	10	7	12	2	
1999	276	217	21	5	27	1	5

{United States District Court for the Eastern District of Michigan Docket No. 2:06-cv-15024}

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BARBARA GRUTTER, for herself
and all others similarly situated,

Plaintiff,

Case Number:
No. 97-CV-75928

-vs-

LEE BOLLINGER. JEFFREY LEHMAN,
DENNIS SHIELDS, and REGENTS OF
THE UNIVERSITY OF MICHIGAN,

Defendants,

and

KIMBERLY JAMES, ET al.,

Intervening Defendants. VOLUME 6

BENCH TRIAL
BEFORE THE HONORABLE BERNARD A. FRIEDMAN
United States District Judge
238 U.S. Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
TUESDAY, JANUARY 23, 2001

APPEARANCES:

FOR PLAINTIFF: Kirk O. Kolbo, Esq.
R. Lawrence Purdy, Esq.

* * *

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THE COURT: Very well. As I said, I'm not disagreeing with you, and I'm here to listen and to learn.

MR. WASHINGTON: Very good. Thank you.

MS. MASSIE: Gary Orfield is our next witness.

GARY ORFIELD,

A having been called as a witness herein, and after Having been first duly sworn to tell the truth, was Examined and testified as follows:

DIRECT EXAMINATION

BY MS. MASSIE:

Q Professor Orfield, can you spell your name for the record?

A Gary Orfield, O-R-F-I-E-L-D.

Q Give us your basic geographical data, where and when you were born?

A I was born in 1941, in Minneapolis.

Q Did you grow up there?

A I did.

Q Tell us your educational history if you would?

A I'm a graduate of public schools in Minneapolis, and of the University of Minnesota where I graduated in political science. I went to the University of Chicago and received my masters, Ph. D. in political science, and then began teaching and a research career.

Q If you could summarize the highlights of that teaching

[Page 82]
and research career, it would be very irritating and tiresome to go through your entire resume, but if you could at least the give the Court a sense of some of the high points that would be very helpful.

A Well, I basically taught at five research universities, the University of Virginia initially. Princeton University, University of Illinois, the University of Chicago, and Harvard University. I've also worked at research centers including Brookings Institution. I've done brief stints with the government, the U.S. Civil Rights Commission. My highlights are on many kinds of research and many hundreds of wonderful students.

Q Can you tell us your main current areas of research?

A I research particularly on issues of educational equality at this time. During this year, we will publish three edited volumes on educational and equality issues. One will be on an issue on school reform. It's called "Hard Work for Good Schools." It's about Title I programs in the federal government. The second one is on testing. It's called, "Raising Standards or Raising Barriers." It's about the effect of testing and accomplishments of testing on active -- completion of the school --

Q Do you mean standardized testing?

A Standardized testing.

And we are publishing a book called, "Our Diversity

[Page 83]
Challenge," which is about -- research on impacts of diversity. I will also be issuing a report on School Segregation Trends in the 1998-99 school year in the relatively recent future.

Within the last couple of weeks, our project ran a national conference together with dropouts in United States. This Friday, we're running a conference at the University of Texas with research centers on the impact of the changes in testing and in college admissions tests at the Texas Institution.

We are doing a study now about the Florida Plan. We've been doing interviews by phone, and we'll be doing interviews in the field on that.

Q What you mean by the "Flor Plan" if you would?

A The Flor Plan, is the -- called the One Flor Plan to admit the top twenty percent of the graduating class of each high school in Florida.

Q And that was instituted as a replacement for affirmative action programs in Florida's higher ed?

A By Governor Bush, yes, sir.

Q Have you testified as an expert witness before?

A Yes.

Q In what kind of cases?

A On many kinds of cases. In school segregation cases, housing discrimination cases. Some on higher education. Those

[Page 84]
are the major areas in which I've testified. And I think in some cases I just filed affidavits or -- done depositions, and the issue has been settled before trial.

Q You were an expert in the University of Washington Law School Affirmative Case; is that right?

A That's correct.

Q And have you been retained by lawyers or appointed by courts, or both?

A I have never been retained by lawyers. I have always served as a volunteer in cases. I have been retained by judges. I've work for judges as a court-appointed expert or special master in some cases.

Q Have you testified on other matters involving race, racism, and education in other forums, I mean specifically congressional and similar hearings?

A Yes.

Q Tell us about those.

A Well, I've participated in many congressional hearings, in state legislative hearings, and in state rule making hearings. I've worked with the National School Board Association. I've worked with the -- done a report -- I've worked with many state and national educational organizations. I'm currently doing some work with the National Education Association.

Q Forgive. me, did you mention your chairmanship of the

[Page 85]
Civil Rights project already? I'm not sure that you did.

A I've served together with my colleague, Christopher Evers from Harvard Law School, co-directors of the Civil Rights project at Harvard which is a research center on civil rights issues.

Q Which has been responsible for backing some of the projects you mentioned earlier as I understand?

A Yes, it's the mechanism through which we have carried out a number of these projects, and many others in the process now.

Q You and the project have received grants from numerous foundations, could you name several?

A We received grants from the Ford Foundation, from the Mott Foundation here in Michigan. From the MacArthur Foundation, from the Carnegie Foundation, from the Spencer Foundation for education research. I think those are some of our major funders.

MS. MASSIE: Judge, I'd like not take any more time with this. I know you have a copy of Professor Orfield's CV.

THE COURT: I have read it and I don't believe the plaintiff has any objection, nor the defense to allow him to testify as an expert.

MS. MASSIE: Great.

BY MS. MASSIE:

Q Professor Orfield, please turn to Tab 167.

A Yes.

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Q Got it?

A My glasses just broke.

(pause in proceedings.)

BY MS. MASSIE:

Q If you turn for me quickly to Exhibit C.

THE COURT: What exhibit number are you on?

MS. MASSIE: I'm sorry. We're at Tab 167, which I had directed Professor Orfield to turn his attention to. I'm going to wait for you to get your hands on it.

THE COURT: Thank you. 167?

MS. MASSEY: Correct.

THE COURT: Okay. Ready.

BY MS. MASSIE:

Q If you could look at your Exhibit B to your Exhibit 167.

Q Exhibit B?

Q I'm sorry. I wasn't being clear. What I meant to ask was whether within Exhibit 167 you have the exhibit marked there, but I believe--

A Yes, I do.

Q You do. I'm sorry. Exhibit B is entitled "Diversity"-- what I mean to direct you to is Exhibit C. Excuse me.

A Yes, I have it.

Q You just mentioned when we were speaking to your current projects what sounded like it was going to be an update to this; is that correct?

[Page 87]
A Yes, and I have been issuing reports on state segregation in American schools since the 1970s, twelve of them, and we're going to be issuing another on this year.

Q Have there been any dramatic changes in your conclusions or in the trends that you identify in Exhibit C to your export report?

A Well, our forthcoming study will show an acceleration of segregation in the South and a rapid expansion of minority -- for residents and minority segregation in the suburbs, the metropolitan areas, but otherwise, the general trends are the same.

Q Can you give us a very general description of those trends and then we'll come back and break them down a little bit more.

A Certainly. Basically up until the time of the Brown decision, the entire country was very segregated for

African-American students. And nobody even measured segregations for Latino students, but in all likelihood very high.

We didn't get really good national data on segregation until after the Enactment of the 1964 Civil Rights Act, and a collection of data that followed that Act. From the period when we begin to closely, we went from almost complete apartheid in the South in 1954, almost one hundred percent of black students and teachers were in completely

[Page 88]
segregated institutions, to a situation whereby 1970, following the Enactment of the Civil Rights Act and its enforcement by the Executive Branch of the Court, the South became the most integrated part of the United States.

Throughout all of the data that we have the most intense segregation that existed in the country since 1970, has been in the major industrial states of the northeast and midwest, and the absolute center of segregation for black students in the country have been -- typically have been in four states, in Illinois, and Michigan, and New York and New Jersey, where you have very large metropolitan areas, very large African-American populations and extreme residential segregation and fragmentation of the metropolitan areas into many separate school districts.

MS. MASSIE: If I could ask you, George, to put up proposed Exhibit 196. I will talk to counsel later and see if there are any objections to any of these exhibits.

THE COURT: 196?

MS. MASSIE: Yes. They are based on things already in the record so I don't anticipate any.

BY MS. MASSIE:

Q Professor Orfield, do you want a hard copy of that? Would that be easier?

A I have a hard copy.

Q Okay.

[Page 89]
A Yes. Well this is a chart that shows the most segregated states in the United States for black students in 1998-99, which is the most recent data that's available from the federal government and what will be in our forthcoming report measured three different ways. And it basically here shows that in the state of Michigan only seventeen percent to the students in the state or black students are in majority white schools. In other words, eighty-three percent of the black students in the state of Michigan are in predominantly minority schools, in schools that we would call segregated schools.

On the measure of what we call extreme segregation which is ninety to one hundred percent minority schools, Michigan ranks number one. Sixty-four percent of all the black students in the state are in extremely segregated schools. These are the ones that you might call hyper-segregated schools where there is little or no contact with students of other racial groups.

In terms of the third measure that we use which is call the Exposure Index which shows that typical

composition of a class -- of a school attended by students in the states which involves computing every school in the state and figuring proportions and so forth, it indicates the typical black student in Michigan is in a school that is about eighty percent non-white. And Michigan ranks second in the country on this measure. So Michigan ranks between first and third out

[Page 90]
of the fifty states on these three measures of segregation of schools in the most recent data that's available in the United States.

Q In your view are those the three best ways of trying to provide a matrix or a description of segregation?

A I think those are three very good ways of giving you indicators. These have been valuable and understandable. In many of the measures that are used in sociology are very difficult for people to understand. So we found that most people can understand these measures. And if they do produce -- as you can see, pretty consistent rating systems.

Q That was my next question actually, does the information in the three columns tell you different things?

A Yes.

Q Can you tell us a little bit about the different conclusions you might draw from the different columns?

A Well, for me basically if you were to compare Michigan say with -- I notice outside your courtroom here you have a Norman Rockwell picture of a young black -- a young black girl being led into a school in Little Rock in the 1950s.

Basically there's no place in the South that is anywhere close to the segregation level of Michigan. There's no place where there's less contact between blacks and whites in any of the areas where there is apartheid in the country until a generation ago. A little girl was never led into a

[Page 91]
school in the Michigan area.

I just read a report from the National Bureau of Economic Research yesterday that showed that in metropolitan Detroit segregation is the highest of any metropolitan area in the country for schools. And the typical black student in metropolitan Detroit is in a ninety-three percent minority school. It's the most segregated urban community we have in educational terms in the country.

The intense segregation is kind of a measure of really almost complete isolation because many of those schools who are nearly almost one hundred percent minority is almost like the school that Erika talked about where there are no students of other races, and there's no way for students to understand what students of other races experience until they take a field trip or something like that as she described in her concert competition.

My children went to public school in Chicago, and they had a very similar experience to going to the suburbs and seeing an incredibly shocking difference of a city in every dimension of educational opportunity.

These are extremely isolated educational experiences in our society where only one fifth of the children are black, they have no contact with five fifths of society in growing up.

So each of these tell you something -- it's just

[Page 92]
another way of looking at the same phenomenon.

Q What is the educational consequences of that kind of segregation?

A Well, there are many educational consequences because basically the schools that say separate but equal is the most extensive social experiment in the United States history. We've tried it in thousands of places for many generations. It never worked anywhere as far as I can tell. Nobody's been able to me a comparable example. There never was a separate but equal school system. That's because of many things. It's because the poverty levels in segregated schools are much higher. Almost the only intensely improvished schools that we have in the metropolitan areas are for black and Latino children. They are also because there are many fewer minorities in teacher training. There are many fewer teachers who choose to go work in schools of this sort. Most teachers who start in schools that are segregated leave faster. The curriculum that is offered is more limited. The probability that the teacher will be trained in their field is much more

limited. The level of competition is less. The respect for the institution on the outside world is less. The connections to colleges are less. There are more children with health problems because minority children are much more likely to live in rental than ownership housing. The population is much more unstable. Many segregated schools have a vast turnover of students every year

[Page 93]
and there's tremendous educational instability as far as students go and faculty go. It's a different world in every respect. You heard some illustrations of that. But basically we are not a society that's learned how to run separate but equal schools. We run separate schools that are always systematically unequal. And basically if you -- sometimes when I was doing research on this issue in Chicago a suburban teacher would call me and say, you know, we've read your study, we decided to actually go in and see what the same exact class looked in a counter-part school in Chicago. And they would come back and everyone would just be stunned. The kids didn't have books. They were only half way through the subject. The teacher didn't know the subject. There were no facilities. And the whole level of competition, expectation was so different that it was like a different planet, a different society.

MR. PURDY: May it please the Court, we are -- this is, I believe an appropriate time, may I approach the podium?

THE COURT: Of course.

MR. PURDY: We are not taking issue with all of the subjects that Professor Orfield is talking about.

What he is addressing are tremendous issues that this country faces, that this society faces, that we all face involving educational policies starting from the very earliest ages and rising all the way up until the kids get to the point where they are

[Page 94]
applying to the University of Michigan and ultimately to the University of Michigan Law School.

His testimony, we're not contesting that he is an expert in these areas. He quite clearly is an expert and has written profusely on the areas of segregation and re-segregation, and all of the problems that deal with that. And we're not here to dispute that, or argue with him, and indeed we would join with him in many of the ways to correct all of the problems that we -- that everybody deals with daily. But these subjects have nothing to do with the questions that the Court is trying in this limited procedure.

THE COURT: Please.

MR. PURDY: Your Honor, for that reason we would just ask that the Court limit the testimony as we go down the road to those subjects that the Court had set down for trial. Once again, we're not contesting that -- we will not put on a witness or take any issue with the types of numbers that Professor Orfield is going to talk about in terms of various school systems. Those are all problems that certainly be addressed, but they're not a subject of the issues before this Court. For that reason we would ask the Court to limit his testimony to those areas that the Court deems appropriate and relevant to the limited issues the Court has set down for trial.

THE COURT: Okay, as I indicated before when Mr.

[Page 95]
Washington spoke, in terms of relevance I guess, relevance is a relevant term, but I think that we will listen to it. I think all that I can learn and glean and be educated about and the record can learn, glean and be educated about is important. As I say I probably didn't mean to trigger by my statement at the conclusion of -- I forgot Erika's last name --

MS. MASSIE: Dowdell.

THE COURT: Thank you. Everyone was calling her Erika. Anything other than the fact that I have promised the Intervenors in this matter that I would go into it, listen to what they had to say. That's why I limited the time so that we could do it within a reasonable time frame. I understand where they're coming from, and will allow them to proceed over the objection.

MS. MASSIE: Thank you, Judge. In that case, I'm going to wait until some later point to respond to Mr. Purdy's--

THE COURT: You may respond but I'm not sure that -- excuse me one second. I am not sure that you need to respond. I think it was more of a statement. You may respond whenever you care to, I have no problems with that, but as I say it was more of a statement than --

MS. MASSIE: They say that they join us in decrying the levels of segregation and equality that

Professor Orfield's talking about, and it's exactly what they would bring to

[Page 96]
higher education, into the University of Michigan Law School.

THE COURT: I understand your argument.

MR. PURDY: I hope it's clear, your Honor, that it's not at all --

THE COURT: I understand.

MS. MASSIE: If necessary we can get into it further some other point. I hope it won't be.

THE COURT: I don't think we're going to have to. As I indicated to you and to Mr. Washington and to everyone that we're going to proceed and learn everything we can, and try to leave no stone unturned within the frame work of what – the time we have and everything else. Let's move on.

MS. MASSIE: Thank you, Judge.

George, could you put up Proposed 195, please.

BY MS. MASSIE:

Q Do you recall this table from your report?

A Yes, I do.

Q And that if I understand correctly you were just testifying about the level of segregation in urban areas.

A Yes, that's correct. This is just a table to show the enrollment of the largest central cities in the United States largest central city school systems in 1996-97.

Q As far Detroit goes, it shows that there's a hundred and eighty-seven thousand and five hundred and ninety students of whom only 5.2 percent are white and 90.1 percent

[Page 97]
were African-American. 2.8 percent Latino, and one percent were Asian.

So this is one of the great centers of African-American African-American population in the midwest, and certainly dominant African-American population distribution here in. Michigan, and it's very, very high.

Q And one of the great centers of school segregation.

A It is indeed the greatest center of school segregation in metropolitan Detroit.

Q How does educational segregation relate to housing segregation?

A It's directly related to housing segregation unless there is some kind of de-segregation plan that overcomes the housing segregation. And Detroit has -- is one of the most intensely segregated housing markets in the United States. It's one of those that have been designated as hyper-segregation in our research. Doug Massey and Nancy Denton and other scholars who have looked at housing segregation across the country. So there's intense housing segregation, and very strong boundaries that separate schools from

different racial groups because even the working class suburbs of Detroit have had tremendous residential segregation.

Q Is there to your knowledge, has there ever been school integration without conscious policy choices and initiatives?

A In urban communities with residential segregation school

[Page 98]
integration requires desegregation plans and initiatives. And when they are ended, school segregation increases.

Q And is it on the increase now?

A It is. It's been on the increase now for almost a decade, and our study will show it's continuing.

Q And that's because of the coming to an end the determination of conscious policy initiatives?

A That's correct, and also the expansion of residential segregation. I want to catch up to you with the exhibits here. Here is proposed 197. You were speaking, Professor Orfield before the objection was made about the relationship between segregation by race and poverty in the schooling.

A Yes.

Q If you could tell us a little bit about this chart, and what we should draw from it. Well, we looked at all of the schools in the United States in which data was reported to the federal government, many tens of

thousands of schools. And we looked at schools that had different percentages of African-American and Latino students, and different percentages of poverty to see whether or not these two things were related fairly strongly.

And what we saw is that if you look at the schools that had zero to ten percent black and Latino students, which are almost half the schools in the United States at this period, only 7.8 percent of those -- 7.7 percent of those

[Page 99]
schools had more than half poor kids in them, only one out of fourteen schools.

If you look at the schools who are ninety to one hundred percent black and Latino and those are the schools that have about three quarters of black students in Michigan, for example, those schools have eighty-seven percent concentration of poverty. In other words, intensely segregated minority schools have very high levels of poverty, and those very high levels, of poverty are linked in many forms of educational and equality. And poor white children are much less likely to end up in impoverished schools than poor minority children because they're just not that concentrated residentially.

Q What's the measure of poverty here?

A Well, this is the measure of Free Lunch. It's the only data that exists on poverty in schools at the national level. Free Lunch, of course, is set by federal statute and eligibility. It's not the same as the census poverty standards. It's a little higher. It's very low income.

Q I'm sorry, it's a little higher meaning that you can have a little more income --

A A little more income than the poverty standard, but these are families whose income level is not adequate to provide -- they don't have enough money to pay for lunch for their children.

[Page 100]
Q Does this chart mean that going to a school that's largely black and Latino means going to a poor school? Does it mean that poor and black are co-extensive?

A It means that if you go to a school that's overwhelming black and Latino, nine times out of ten it's going to have concentrated poverty. If you go to a school that's overwhelming white, hardly ever, once out of fourteen.

Now, there's many kinds of schools that aren't in either of these categories. But at these extremes there's a strong relationship, a serving relationship.

And when we looked at metropolitan Chicago we looked at eighteen hundred elementary schools, and we found none that were white with heavy concentrated poverty, and virtually all with the African-American, in densely segregated schools.

Q Here's what I'm wondering, Professor Orfield, if the level of correlation is this high in the context of the affirmative action debate, why couldn't we just substitute poverty measures for race in admissions-decision making?

A Well, there are several reasons. This has been tried in a number of places and we have a lot of evidence about what actually happened. But at the extreme, these relationships are very dramatic, but you can still see that there are white schools that are predominantly poor. And there are small numbers of non-white children in these segregated black and Latino schools. And as you -- and inbetween there are many

[Page 101]
other sorts of schools where these patterns are less dramatic. So the correlation of co-efficient between poverty and black and Latinos percentage is about twenty-six. That means there's a strong relationship, but it's far from perfect. And when you do -- particularly when you use poverty plus test scores or something like that, you don't get the results you think at all. You don't get the same kind of access from minority students because there are a lot of temporarily poor white students and particularly immigrant students whose parents are at a very high educational level, who are in these improverished schools for at least a short term in their educational experience, and they will tend to get the advantage if you concentrate on poverty.

So poverty and race aren't the same; they're different, although, they effect the same schools. You can't solve one by the other. You run into all kinds of complexities in the implement of this process. And you get all kinds of benefits that you're not looking for. We're not looking for policy that gives a special benefit to immigrants who don't have any history of discrimination here in this country. We're looking for

policy that addresses the inequalities that are reflected in segregation statistics.

Q If I understand your report there's a growing tendency -- there's a growing number of quite segregated much more middle class suburban schools.

[Page 102]
A Yes, in the last several years are showing a pretty dramatic extension of residential and school segregation into the suburbs of metro areas. There is a huge increase in black and Latino middleclass migration to the suburbs. But unfortunately, it's pretty highly segregated.

We released the study in metropolitan Boston that showed that most of those families into seven out of a hundred and twenty-six suburban towns and none of them are the ones with competitive schools. Many are the one with the least adequately funded schools and the highest dropout rate. So it's suburban but it's suburban of a different color and a different school and it does not provide the same kind of access.

Q How do the social backgrounds of those middleclass Latino and black students you were describing differ from those who bear white counter-parts in white suburbs?

A This is one of the issues that the College Board is looking at in a study right now of the High Unequal Education Attainment of Middleclass Children in this country. There are -- many suburban communities around the country are collaborating because we have the disturbing differences between black so-called

middle class achievement and white middleclass achievement.

When you look under this data there's many differences between middle class black and white in this

[Page 103]
country on an average. Middleclass black typically do not come from a family with the same kind of educational history. They don't come from a family the same kind of financial resources. In this country, the average black family has only about one tenth the wealth of the average white family, for example. The wealth gaps are much bigger than the income gaps. They're much less likely to be homeowners. They're much less likely to live in a stable community. They're much more likely to have a single parent. Most middleclass families have a network of middleclass relatives that support them through trouble. Most middleclass black families and Latino families have work with low income, and families that they have to support through trouble. Most middleclass black and Latino areas are near poor black and Latino areas. That's why the housing market works. So those kids are exposed to many more negative peer group influences.

There's a wonderful set of studies done by a psychologist at Northwestern who grew up in a community like this, who wrote this book called "Black Picket Fences," who explains that being middleclass is not the same across racial lines. Families are less middleclass. They have less middleclass network, resources, respect, connections. Their middleclass is much more vulnerable. Their ability to isolate their

children from lower class and negative influences is much less. And as you noticed, for example, in testimony we

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just heard. Erika was telling us how she had to cut herself off from her community to make it. This is the experience of many of our middleclass students at Harvard and other universities. They have been in situations that have so many negative influences that they or their parents had to decide to cut themselves off almost completely from their setting in order to have a chance to make it in the educational process.

There's a difference. There's a very dramatic difference even if you are so-called middleclass. And there's a danger of not remaining middleclass and being exposed to non-middle influences. It's much greater for minority students.

There's also preferential treatment in schools. I've had professional colleagues at all the great universities that I've been at who are African-American or Latino and almost always they tell me that one or more of their children have been placed in a lower track when they first go to their school. And they are professional Ph. D. from the greater universities in the country. And they go and they raise hell with the principal and they get the kid put back in the right track, but, they are presumptively put in the wrong track, given the wrong advice because of their skin color. They are children of the most educated people in the United States, but they are seen as black or Latino and they are assumed to be better off in a lower track course until somebody tells them

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that their parents are Harvard, and then the school says, I'm so sorry, Doctor, we didn't know. We thought this child was black.

Q How about -- that's in some of the more intergraded schools, how about in the more segregated suburban middleclass black and Latinos schools is the quality of those schools the same as the quality of white suburban schools?

A No.

Q Tell us why.

A Well, basically what you have happened when you go through racial transition typically --

THE COURT: Hold on one second. Stay exactly where you are

(Short Pause in Proceedings.)

BY MS. MASSIE:

Q Professor Orfield, you were saying I think, you were starting to say how the schools that have segregated Latinos and black, more suburbs are different from those than white suburbs.

A Yes.

Q If you could develop that please?

A As the housing works typically after a community goes through racial change, it then gets exposed to lower income families pretty rapidly so oftentimes if

you look at a typical pattern in a community that's on the frontier of racial change

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the initial families that move into the communities will be middleclass people who are seeking middleclass schools and often integration. But after they come in, oftentimes the housing is no longer shown to whites, the housing market shrinks, and within a few years they begin to break it up into rental housing and show it to poor people, and it begins to be targeted with Section Aid and other kinds subsidized housing. And you get more families who are connected to basically non-middleclass backgrounds.

And those schools, even middleclass schools that serve minority families typically have substantially higher numbers of low income children. Many of the teachers that are in suburban schools are completely unprepared to teach minority kids. They have no experience or comfort, and they have lots of stereotypes. This goes to the tracking and placement and so forth and they often leave schools when they go through racial transition.

Minority schools have a much greater difficulty recruiting teachers than white schools do partly because the vast majority of the teachers who are trained are not trained in how to work in a diversed setting and are white themselves.

What you basically have happened is a downgrading of the curriculum that takes place. You go through lots of teachers and through the lack of a critical mass of students who are prepared to take certain kinds of courses.

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You also have a different kind of structure of a group that takes place in the classes. Gangs tend to penetrate in neighborhoods a few years after they go through racial changes which has a very, very negative effect on high schools. There's kind of a systematic process of detachment from mainstream and downgrading of the educational opportunities that takes place after racial transition. And you can see it right now in city-after-city, community-after-community. And people will describe it. If you go into any of those communities they'll describe what happened and when. But the net process is that there's a narrowing of the educational opportunities that follow a racial transition even when it starts out as the middleclass transition in a middleclass community. And middleclass minority families are easily troubled by this and often leads them to make a concession or move to try to get away from it.

Q What's the fundamental cause of the dynamics that you're describing?

A Well, there's an interaction between residential segregation, school segregation, belief in the society, special structure to perpetuate inequality. There's a whole system of ghetto station and inequality that has it's roots in the earl 20th century, never been broken in our largest metropolitan areas. That's the patterns that have really not changed significantly in one and a half century, in these large

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Industrial centers of hyper-segregation. They are less extreme in some places in the west and some multi-racial metropolitan areas.

Q Could I summarize those causes that you just said, they apply safely with the word racism?

A I usually don't use that word to define it. It doesn't advance the debate very much. But I think -- what I like to talk about is discrete elements of racial inequality. There is a system of residential segregation. And there's lots of innocent victims in it. Both the whites would like to remain in an intergraded place, are not offered the option because of the way -- no pure whites are shown into the community. The minorities who would like to live in a intergraded place have almost no opportunity because extreme residential segregation and so forth. And there's lots of innocent bystanders who contribute to this process without being explicitly racist just by having belief and fear that they wish weren't true, and that they fear are true.

There are a lot of other institutions that perpetuate just by not doing anything to change it. In other words, it's a deeply-rooted set of social structure and practices and beliefs that have a very strong tendency to perpetuate and spread itself unless there is explicit intervention to stop it or to create a different option, and those are difficult to do. And they can only be done when you

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decide to do them consciously.

Q How long as we as a nation been engaged in policy measures like that to intervene in those structures, and in those dynamics of racial inequality.

A Well, in terms of school segregation in my judgment we intervened in the period 1965 and 1973, and mostly in the South. We really never did desegregate our big metropolitan areas in the North. And we have abandoned making any significant effort to do that by the middle 1970s an early 1980s. And now in 1990s we are dissolving what we have a desegregation plan in much of the country. Even where we had a plan or a consent decree or something -- like you had the Milliken case here in Detroit, it was dissolved. In our book, "Dismantling Desegregation" we actually at the effects of that and found it was dissolved without achieving any of its educational goals.

THE COURT: That was the Detroit school system?

THE WITNESS: No, it in Grand Rapids. The Milliken II case, it was decided educational remedies which we, in our judgment, were never implemented significantly to make a difference for kids in Detroit.

THE COURT: So it was both resolved as well as implementation.

THE WITNESS: Yes.

BY MS. MASSIE:

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Q Touching just briefly on something that we'll come back to later which is the question of integration of

higher educational institutions, how long have we been giving that a try?

A. There never has been a very large push for integration of public policy terms. No state university in the United States, to the best of my knowledge has ever been faced with fund cutoffs for non-enforcement of discrimination requirements by the federal government. Many hundreds of school districts face that.

The standards that were issued by the Department of Health, Education and Welfare in the 1970s that effected the nineteen states that had de-jury segregation of the higher education institution were never enforced, and they were substantially abandoned by them in the middle of the 1980s.

I think we've had very little effort to integrate our higher education institutions from public policy. Most of it has come from inside the universities, from their own voluntary efforts, and most of that come from faculty and administrators in most universities who decided that they needed to do it for educational purposes and for the purposes of making admissions in the university.

Q And that's -- something like that is what's involved here, is that your understanding?

A That's my understanding, yes.

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Q And those programs, affirmative action programs, how long have they been around?

A Well, they've been around in significant levels since the late 1960s.

Q When we've tried -- it's never been easy -- but when we've tried, we've made forward progress; is that right?

A That' s correct.

MS. MASSIE: I have two quick things I would like to touch on and then I think it might be a good point to break for lunch.

THE COURT: Great.

BY MS. MASSIE:

Q The first thing I want to ask you and I don't want to spend too much time on this, but can you say something about the relationship of state and federal policies of the public sector in housing segregation and discrimination?

A Yes there's a very pervasive involvement of federal policy and significant involvement of local policy particularly in housing segregation. Of course, particularly -- and this deeply affected our older cities and our older metropolitan areas because the federal government itself permitted and sometimes required segregation of itself up through the early suburbanization process following World War II through -- through underwriting standards, their the FHA policy, through its Veterans administration policy all of which favored

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MS. MASSIE: You should have an incorrect and now a corrected one.

THE COURT: Okay. Which is which now? The first one is 199, okay.

MS. MASSIE: And you already had a 199. And the only thing that's different about this 199 is the title is longer and more precise.

THE COURT: Where did I have a 199, because I have not seen a 199.

MS. MASSIE: From this morning you had a 199.

THE COURT: He can throw the old ones away.

MS. MASSIE: Throw away the earlier 199 only, right.

THE COURT: Okay, got it.

BY MS. MASSIE:

Q Professor Orfield, when we broke you were talking about how black and Latino students in law school all had had substantial interracial contact in contradistinction and contrast with their white classmates.

What does that mean, why is that?

A Well, if you look at the report that we did from the Michigan and Harvard service, it basically shows

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that for African Americans almost all of them had had significant interracial contact either residentially or in school or both. And the same was true for Hispanics, but half of whites had not.

I think the reason is that there's almost never an adequate preparation given for all the skills you need to succeed in a place like competitive law school in the segregated educational environment.

And basically for minority students who go to elite white institutions in this society, they have to make a transition to a middle and upper class institution that's overwhelmingly white simultaneously.

So, they have to make a social class and a racial transition almost instantly and fluently, and to be able to perform very highly in that new setting very fast. Because there's very few support systems in elite colleges and universities or of professional schools.

And so if they don't have that preparation on, which is usually both ability to understand and interpret that situation and the academic skills that you need to make it, they have to be really remarkable, or they don't have a

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reasonable chance.

Also students who are in segregated background typically don't even hear about a lot of the options and are not recruited and are not in networks where they know people have been to those institutions, don't have

all the kinds of contacts and networks that lead you into different kinds of choices in your life.

I've had a good many African American, Latino undergraduate students and very, very talented ones who never thought about a graduate school until I talked to them about it.

Nobody had ever mentioned it to them in their lives even though they have been in a great university. And no one in their family ever had contact with that possibility.

So, you have to be in a place where you hear about the possibilities, and where there are real connections and where you can get what you need.

And what you need to survive is both academic and an understanding of the setting that you're going into. And those are very, very hard to get in isolated situations.

Q In that our society doesn't provide the majority

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black, majority Latino, majority minority institutions with the resources they would need to properly train people for that kind of opportunity?

MR. PURDY: I am going to object on foundation.

THE COURT: Overruled.

A Well, there's different kinds of resources. Specifically those institutions lack tangible resources like money and books and libraries and other things that we heard discussed this morning.

But then there's other things that are very important, which is learning how to function across these racial and class lines. But you really can't provide adequately in a segregated setting. Because the way you learn how to do that is by doing it, and becoming familiar with it.

And if you don't learn all of those cues and ways that things operate and so forth, you have a lot of difficulties when you get into different kinds of institutions.

Any of us who are white can just imagine ourselves trying to function in an all black inner city school, where we didn't know anything, what the expectations were, the customs, or what the underlined social relationships were, anything else.

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There is all kinds of knowledge that you get from schools. Also you tend to have the teachers who have connections with great universities, go into the schools where the parents of the students are from those same places.

So there's a very self reinforcing place. I haven't done the study here, but we did in the metropolitan Chicago where we found the University of Illinois teachers taught in the better suburbs.

The teachers from other teacher training institutions that were not as competitive, taught in less competitive places. And the teachers that taught in the inner city did not tend to come from very strong colleges and universities.

And they didn't have the connections, so they didn't suggest their students went into those networks. And they didn't know anybody to call to explain if a student had talent that didn't show up on his records, or how would he get. Like the suburban school would have, for example.

So, there's all kinds of things that exist in your typical middle class and upper middle class school both in terms of resources, connections, levels of competition, knowledge of

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options and so forth. They just don't exist in most segregated schools.

Most of the students who come out of those schools who really make it are incredibly self driven, or they know somebody who is mentoring them very, very strongly. Or they would never make a connection like that.

Q Let's change the subject a little bit. We've been speaking mostly about black students up to now?

A Right.

Q How do these same kinds of questions come out when we're looking at the Latino student population?

A I think that's a really good question, since the Latino student population is just exploding in the country. It's gone up by orders of magnitudes since the '60s.

Latino students are even more segregated then black students in all of the United States today, and they have been throughout the last several years.

And they tend to be isolated in big cities and metro areas of relatively small number of states. The nearest one here is metropolitan Chicago, of course.

And they tend to be in very inferior

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schools, and they also tend to have to deal with additional problem, particularly for recent immigrants of language, and linguistic isolation in the residential communities. As well as it's an isolation by race and class. Those are really, really hard problems.

In our college admissions processes, we don't consider fluency of two languages to be an asset, we only measure English ability.

And any of us who would try to get admitted to competitive schools in Spain would probably not do too well, no matter how intelligent we were.

So, you have to think about this as another very large great disadvantaged population. Latino students are much more likely not even to make it through high school, and they're less likely to go to college than the black students, if they do graduate from high school.

And they're very often very poorly prepared for making the kind of transition that we talked about between two different worlds.

Q Do we have enough data on the Native Americans student population to make similar kinds of analysis

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and judgments?

A The Native American student population is very poorly represented. It has a fairly high drop out rate, and it has not been studied very much and doesn't appear in large enough numbers in most of our national surveys to describe in much detail.

And, of course, represents hundreds of different kinds of communities within the Native American population. But their general problems are similar.

Q There is I notice that at one point in your report, there is a high correlation of going to a majority Native American school, and the level of poverty of the students at this school?

A That's right.

Q So there's that similarity that can be empirically shown?

A Yes. I did work when I was in college at reservations in northern Minnesota and they were desperately isolated. Particularly people in tribal communities are experiencing extremely high poverty concentrations. And very inadequate schools, lots of prejudice, isolation.

Q Nationally, what percentage of black students in K through 12 attend segregated schools?

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A More than two-thirds.

Q And nationally what percentage of Latino students in K through 12 attend segregated schools?

A About 70 percent.

Q What are the implications of what you've testified to about educational segregation and inner quality? Well, two things, we'll take them one at a time.

First, access to college, and second achievement in college?

A Well, if you think about access to college, you're thinking about a number of different things. First of all, you're thinking about whether you acquired the precollegiate skills that you absolutely have to have to survive in college.

Which are basically skills about research, writing analysis, basic mathematical computational skills and so forth. And increasingly fairly high level of math preparation.

Those skills are very hard to acquire in a lot of segregated schools, and they are fairly normal in middle class schools. There's a default expectation that students in middle class, upper class suburbs will receive those and that they will be taught by people who actually know the subject, and they will be at a level that's appropriate

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preparation for college.

That does not exist in a lot of central segregated schools. There's not the level of competition, there's not the level of training by the teachers. And the classes are not operated at a level that actually perhaps you to meet the minimum requirements of the collegiate environment.

When I was a faculty member at the University of Chicago, we would routinely--my Admissions Office would routinely reject valedictorians from Chicago high school, most Chicago high schools because of the experience that they could not survive for a single quarter on our campus.

Even if they were the very, very best student in their school, there was no way in the world they could have acquired the skills, you need to be a minimally adequate student in our college. No matter how intelligent they were as a person, because preparation did not exist in their community.

So we would--I didn't reject them, but our Admissions Office would reject them all the time. I once had a student who was the best student in many years in a segregated inner city school in

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Washington, D.C. who came to the University of Chicago and she was my advisee.

And she had never gotten less than an A plus in her life and she had been leader of every activity, and she could not survive the first semester of our classes. And she had a mental breakdown.

And nothing about it was her lack of intelligence ability or an education, it was simply that she was in a completely inadequate preparation.

Now, in logical preparation you need to understand what you need to do to get ready for college. We did a survey of several thousand students in Indiana, we found that most students whose parents hadn't been to college really didn't know what courses they needed to take to get ready for college, and they often didn't take them.

Even though they planned to inspire to go to college, we found the same thing in senior surveys that were done in Chicago. Many students believed they were ready, when they weren't ready in any way and nobody had ever told them differently.

Many students in isolated communities have no way of knowing what they need, and the counselors in big city schools are typically

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overwhelmed with all kinds of non-academic counseling. First of all, community problems and reporting requirements and so forth. They have almost no time to work with students.

The students when we would survey them would say, they have almost no information about college from their own communities or from their parents, because often times nobody there has been to college. And there is no network.

The colleges I've taught and I teach in my graduate seminars on college access issues, classes that included

many admissions officers from colleges around the country, or people who have been admissions officers.

They routinely report that they do not recruit in most central city high schools at all, because there's nobody there that they could possibly get admitted who could make it on the campus.

I have no idea whether that pattern is true here, but it is in much of the country. And the reason they don't recruit isn't because they don't want to, it's that they know by and large that there's very few students there who have been given the tools they need to survive.

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And most competitive colleges don't have anything to really helps students who have lacked basic tools. It's a very difficult, difficult requirement at that stage.

So, the network isn't there, the knowledge isn't there, the preparation isn't there. And the college doesn't really reach out very effectively into most of these particular kinds of schools.

So, if a student gets to a selective college from an institution like that, usually there's an individual mentor or program or something that's identified that student and just grabs them and giving them the skills and motivated them and filled out their forms and done all kind of things that wouldn't normally happen. It almost never happens by accident.

There was this study done on four children growing up in Chicago in Woodlawn, a community south of the University of Chicago, that there was an experiment to

help these kids in their earliest years in school, it was pretty massive.

And 20 years later they tried to see who got to college, and they found that nobody from the whole experiment had gotten to college out of

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that community without someone actually reaching out and bringing them to college. Nobody had gotten there by themselves.

So, you know, you have--it's not only a lack of a network, it's really just nonexistent connections between many of these communities and what we need, particularly, to get into a competitive college.

Q Let me ask you about a slightly different category of schools, a school that's somewhat more privileged but it's still a segregated school. maybe like Cass Tech or like a segregated suburban school with an overwhelmingly black or Latino population?

A Yes.

Q What are the implications for college, first access, and second achievement GPA for students from schools like that?

A Well, I have a special interest in magnet schools, magnet from out of desegregation plans and I have studied them in Chicago and all other places.

Magnet schools give you a chance, but even though it may look like a very elite school inside the city, it

really looks like a very average or low average school in suburban terms.

So, my own children went to a school

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that was a magnet school in Chicago Public Schools which was predominately African American, and had some wonderful teachers and programs in it.

And that school was recruited, the colleges do recruit from schools like that pretty intensively. There are students who do make it, but they're not nearly as well prepared as they should be.

Basically that school as best I could tell, was equivalent to a lower level of suburban school. That school had the only debate team that was left out of 65 Chicago high schools at that time.

When the debate team went off to a suburban school, they would see paid staff person working with them, they would see a library, and they see kids going to debate camp, they see this and that and the other thing. And this school had none of those things there.

They had a volunteer, they had no materials, they had no room, they didn't have a media center to support them, they had nothing. And they were the only ones in the city who could even amount a debate team at that point.

So you have these inequalities even

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in the elite schools. We found that magnet schools really on average offered a lot better set of opportunities and teachers and background and so forth than the non-magnet schools. But they were not competitive with good suburban schools in terms of the offerings. They had a lot of remarkable and talented young people in them though.

Q And would the increasingly common and segregated suburban schools, and when I say segregated I mean in this question mostly Latino and mostly black, is that a comparable situation the way you just described?

A Well, what I see in the segregated suburban schools is the pattern that existed in the city schools a generation earlier. When they're in the stage where there's still a middle class majority, but they're going through economic transition as well as racial transition.

Most of those segregated suburban schools really aren't solid, stable middle class schools, and they really do serve communities and transition and on a downward slope.

And they don't offer the same preparation or connections, and they are seen by their own staff as deteriorating in many cases. And

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they don't have the pizzazz of the city magnet schools.

So, they function fairly well for a while, and then they tend to deteriorate in terms of their ability to prepare people for competitive colleges.

Q Would you be surprised if students coming from schools like the ones we've been talking about, end up with lower GPAs than their white counterparts in college?

A No.

Q I'd like to shift gears here and talk about--George, if you could put up Proposed 198.

THE COURT: Can I just ask a question. Magnet schools, tell me a little more history.

A Judge, the magnet schools really are a result of the desegregation plan that started in the 1970s primarily, and they started out in the big scale in Cincinnati and Milwaukee.

Congress then passed an amendment to the Emergency School Aid Act to provide the funding to create magnet schools around the country. That was part of the segregation plan. And hundreds of them were created.

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THE COURT: Tell me what role they play in the desegregation plans?

A In the desegregation plans the problem that the courts faced after the Milliken decision which prevented suburban schools from being included in the desegregation plans, was how to achieve any desegregation in predominately minority central cities and to hold any middle class residence of any race.

The solution that was invented in Milwaukee and Cincinnati was to try to create magnet schools that would be integrated and offer a specifically advanced curriculum, so that people would choose to go to an integrated school in order to get a better education.

THE COURT: So, part of it was education, part of it was to keep the diversity from moving out so that, at least, they had some that they considered to be a better educational school?

A Exactly. And the tool of it was to create something so attractive that it would be diversed and it would be reasonably stable.

And the other advantage they had was there were new programs so they could create new faculties and start new. And they could also offer

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ideas that weren't really appropriate for everybody in a particular neighborhood, but would be exciting to some kids from all over the city.

So it offered a chance for a major educational innovation when it's done the right way.

THE COURT: But part of the reason was to try to attract those persons what may be moving out and leaving?

A Yes, that was the basic reason.

THE COURT: Okay.

BY MS. MASSIE:

Q In other words, it was a substitute for mandatory bussing programs in the like, or a component of desegregation that was non-mandatory?

A It was non-mandatory, and it did involve a major educational experience when it was done right. Now, we have what I call little magnets which had an actual major alternative name plate magnet, which just appeared they were magnets, but didn't really have anything really strong.

THE COURT: Was it done right anywhere?

A Yes, it was done right many places.

THE COURT: Give me an example. Not so much here, but why did it work there and why was

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it done right there as opposed to other places when it wasn't done right.

A Well, for example though, Judge, that many cities that are created racial and performing arts magnets. They offer chances for kids to do professional level preparation in the fine arts and visual arts and performing arts, that didn't exist anyplace before.

Or science and math magnets that are similar, that really offer very good competitive training for college, that didn't exist in the school district before. And they really do have good staffs, and they really do do the job.

THE COURT: Did it accomplish anything in terms of diversity?

A Yes, I think it helped a lot of students who would have been lost otherwise. It tended to stratify kids on social class and income levels, because for kids who had knowledge and connections figured out how to get into them. But it did hold a lot of middle class kids in the central city schools.

THE COURT: So certain cities it did work?

A Yes. And in certain schools and certain cities it was quite successful.

THE COURT: Okay.

* * *

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BY MS. MASSIE:

Q And these are admissions figures, right, they're not enrollment figures?

A These are admissions figures.

Q Do you know off the top of your head, Professor Orfield, how many students enrolled at U.C. Berkley and UCLA in the fall of 2000?

A Not off the top of my head. But I have seen the data, but I have not memorized it.

Q It's a very small number of, in particular black students, but also Latino students given the population in California, is that right?

A The population in California now in terms of its public school enrollment is about two-thirds non-white, and about half Latino.

So, these are very dramatically different from the composition of the state. And not responding to the alternative efforts of the schools, which have been substantial.

Q One of the things that we've been talking about a lot so far in this trial, is the question of--do you need to get a hard copy?

One of the things we've been talking about a fair amount so far in the trial is the question of student activity in law school

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admissions and its relationship to affirmative action in admissions?

A Yes.

Q And the broad question I want to pose to you, and I think there will be a number of different components for our discussion of that, is why just becoming less selective does not guarantee maintaining a measure of integration and diversity in a law school like the University of Michigan?

Put it a different way, why do we need affirmative action?

A If you're going to look at the University of Michigan, for example.

Q And let me interrupt you very rudely, I apologize. Tell us what the data is behind this chart, it looks like it was supplied by the LSAC, what is that, if you can just say what the chart represents graphically?

A Yes. The Law School Admissions Council is the organization that sponsors the law school admissions test and kind of oversees its use. And it's the institution that's responsible for the major assessment of entering law students through standardized testing.

And it sets rules and policies under

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which those tests are supposed to be used, which most of the colleges don't follow.

But basically the law school admissions test gives you a score, and the law schools tend to look for students along a certain point on those continuum. And tend to use those tests as one of their major criteria for admissions.

And they tend to be evaluated in part, particularly by influential evaluation like U.S. News who will report about how high an average test score is on this test. And that effects who applies to them and how they are viewed in the profession and so forth. So this is a very important tool.

The Law School Admissions council say it should never been used as the only way to select a student for a law school, but sometimes it is and sometimes there's absolute cut points and so forth.

The law school admissions test like other standardized tests is not a reliable predictor of an individual student's performance. It's a moderately good predictor of a group of students with a similar test score for the first part of their law school career in terms of what their grades are.

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Law school admissions test has nothing whatever to do with measuring whether you will you be a good lawyer. There is no evidence to show that it's linked to that.

Now, here if we look at this distribution of scores, we'll see the University of Michigan is selecting around this kind of average score for its overall population in the 168 or 69 levels as I understand.

So, if the population that has almost no minorities in the distribution of the test scores is 13, an almost invisible line there. And basically if it were to lower that average test score, for the moment we're just considering this as the thing that they're admitting on, they're obviously admitting on multiple dimensions.

But if it were just test scores, if they were to go down by ten points, they would expand the number of students who would be eligible to get in there by many times.

And most of the students who would be included by lowering the standard, huge majority of them would be whites. Because as you go down the next several levels in test scores, the line of increase in white eligible students increases much

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more rapidly then the line of eligible black or Asian or Mexican American students.

It's just a tremendously high increase. So you'll be getting a huge number of students that would be eligible, the vast majority of them would be white.

Q So, in other words, even if the average LSAT score of people accepted to a school like the U of M Law School were substantially lower than what it is, you would still, if you were the school, have to have affirmative action in order to maintain any level of integration and diversity at this school because of how much the white people out numbered everybody else at all the points of the spectrum until you get to the very low end of it?

A Until you get very far down into the level of pretty non-competitive law school admission.

Q Right.

A So, the problem that you're facing is like the problem the admission officer at Texas A & M told us about, when she was talking about what they tried to do in recruiting minority students after it was outlawed in Texas.

Their college was not one that traditionally received significant minority

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enrollment, it was viewed as hostile by many minority students.

So, they would typically bring five or 600 promising students to campus to get to know the campus when they were allowed to do it.

After that was forbidden and that they were allowed to do any targeted recruitment, she said to get those five or 600 students, and if they invited all the white students who had the same test scores, they

would have to invite 30,000. So they stopped inviting anybody.

Basically the numbers get so large you'd have to process applications from incredibly large numbers of people. And you'd still have to think about race in making your selection.

Because of the number of minorities who would be even in a much larger pool, would be a very, very small percentage of a hugely increased number.

Q Well, the numbers are large and the distributions are quite different?

A Yes, very different.

Q Is that a way of summarizing?

A Yes.

Q This is 199. And this is the same data, except this

[Page 158]
data is representing the number of students scoring each range, it represents the percentage of students, is that true?

A Yes.

Q Why does this graph look so different, it's kind of an obvious question to ask, only because we presented the wrong graph until the lunch break?

A Well, this graph shows you the distribution of student scores within each racial group. But it doesn't

show you the number of students who are actually taking this test within each racial group.

So, as you can see that there are overlaps, but there's substantial differences in the distribution by race for all these groups that are represented.

And you shift, the center of the distribution shifts pretty dramatically downward for the non-white population with blacks, Mexican Americans, Puerto Rican, Native Americans, underrepresented minorities.

But it doesn't show you is that the numbers of those underrepresented minorities is really much smaller than the number of white students. So it gives you an inaccurate picture in that respect.

[Page 159]

It tells you about the distribution of the students who do take the test, but it doesn't tell you about the number who are taking them. Plus the distribution.

Q So, what does it say about the relationship of the student activity of the law school and affirmative action assuming, just for this question, that the LSAT is going to be one important part of law school admissions?

A A school can become a lot more selective without getting substantial minority representation and becoming a lot less selective. And on this dimension, it would probably have a huge increase in applications to deal with.

So, it would have a lot more work to do, and it would still be faced with the problem of having to

figure out how to get representation to produce an integrated class. Especially in a place like Michigan with such unequal preparation.

Q In giving your earlier testimony about college access, college achievement, inequalities in K through 12 education, if you were to attempt to eliminate the LSAT in law school admissions system, and instead relied only on other academic criteria, would you still have to use some kind of affirmative

[Page 160]
action under those circumstances as well?

A Yes, I believe you will. There was actually proposals to eliminate SAT in the state of California put forward by a Latino caucus and among the University faculty.

And an analysis was done by the University of California system, and they found that even if you eliminated the SAT and you just used grades, you'd still have a fairly similar problem.

MS. MASSIE: Judge, if we could just take a brief break. I mean we're just about done. If I could have a huddle with co-counsel.

THE COURT: Take your time.

(Discussion off the record.)

MS. MASSIE: Thanks for the time, Judge.

BY MS. MASSIE:

Q Professor Orfield, is part of the opinion you're expressing that, so long as a university admissions

system whether it's law school or undergraduate or whatever it is, is using some kind of academic criteria which could be standardized test scores alone, grades alone, the two in combination, some other set of academic criteria that I can't even particularly think of right now, that in order to

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maintain any level of integration in diversity, affirmative action will be necessary?

A I think so long as the society has such inequalities in the school are so unequal and preparation is so unequal, any kind of just simple ranking on the basis of academic preparation will tend to perpetuate that segregation through the colleges and professional schools.

And that you really have to consider other criteria and you have to consider race as part of that to get a reasonable representation, a reasonable integration of those institutions.

Q In the aggregate differences by race in those criteria suggest to you the operation of a double standard favoring minorities?

A No, absolutely not. I think that these criteria in this outcome represents an unequal set of opportunities in this society. Both the present and the historic--the results of the historic discrimination within families and communities.

And these are measures of what kinds of resources and opportunities you have, and they're not measures

of whether you're personally deserving and dedicated and capable of contributing to a profession.

[Page 162]
And if the law school were to continue to weigh the LSAT at all in law school admissions, what these graphs tell us is that it would have to essentially open up the field entirely and, in fact, not playing at all in order to have any reasonable number of minority applicants in proportion to the number of white applicants it was considering, is that right?

A Yes, I think that it would be difficult to use this as the criterion of any real importance in the absence of affirmative action, without having a very segregated outcome.

Q And the same is true for GPA?

A They're very strong. The GPA and these scores are going to be very strongly related, yes.

Q Have you heard the term cascading?

THE COURT: Can we go back for one second?

MS. MASSIE: Absolutely.

THE COURT: You talked about the necessity for affirmative action in order to have any relief.

In terms of just your own expertise in the area, does there come a time do you think in our society the way, at least, you see it and the projections that you have made and so forth, that

{United States District Court for the Eastern District of Michigan Docket No. 2:06-cv-15024}

DECLARATION OF BOB LAIRD

Background.

1. I am a citizen and resident of Berkeley, California.

2. I graduated from the University of California, Santa Barbara in 1962 with a bachelor's degree in Physical Education. I completed a Master of Arts degree in English at UCSB in 1965. I also hold California General Secondary and California Community College teaching credentials.

3. I worked in the Admissions and Enrollment Cluster of the University of California at Berkeley (UC Berkeley) continuously from my hire in 1977 until my retirement in November 1999.

4. In July 1993, UC Berkeley appointed me as the Interim Director of Undergraduate Admission. In March 1994, the university appointed me as the Director of Undergraduate Admission. I served in that position until my retirement in November 1999.

5. As Director of Undergraduate Admission, I either reviewed or supervised the review of over 150,000 applications to UC Berkeley.

6. In addition to my work at UC Berkeley, I have participated in numerous committees, forums, task forces, and other bodies that studied or discussed admissions programs at all nine undergraduate campuses of the University of California (UC). I have

participated in similar bodies that studied or discussed admissions programs at universities across the country.

7. I was particularity involved in the discussion and the formulation of programs to admit African American, Chicano,[1] Latino, and Native American students. These groups of students are sometimes referred to as underrepresented minorities because their numbers have historically been so low at colleges and universities in this country.

8. At UC Berkeley, I was in charge of the programs to admit underrepresented minorities during the period from March 1994 through November 1999. In that capacity, I appeared before and briefed the Board of Regents of the University of California on these issues on several occasions.

9. Most importantly, when Regent Ward Connerly proposed eliminating affirmative action at the University of California in general and at Berkeley in particular, I was intimately involved in briefing the Regents, including Mr. Connerly, on these issues.

10. I have published a book on why affirmative action programs are essential if selective universities are to be able to admit more than a token number of underrepresented minority students. See Bob Laird,

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[1] At UC Berkeley, we had an affirmative action program for Latinos of Mexican descent (Chicanos). At one point, UC Berkeley had an affirmative action program for Latinos generally but that had been eliminated by the time of the debate on SP-1 and Proposition 209. As affirmative action programs for non-Chicano Latinos still existed at that time on other campuses in the UC system, I have used both terms in this declaration.

The Case for Affirmative Action in University Admissions (Berkeley CA: Bay Tree Publishing, 2005). In addition, I have spoken and written on these subjects on many other occasions, as is more particularly set forth in the resume that is attached as Exhibit 1.

Summary.

11. On July 20, 1995, the Regents of the University of California approved, by a vote of 14 to 10, Ward Connerly's Special Policy 1 (SP-1) which eliminated the consideration of race, ethnicity, and national origin in admissions at the University of California. See attached Exhibit 2.

12. After that vote, Connerly, and Pete Wilson, the Governor who had appointed him, led the statewide campaign for Proposition 209 which placed the substance of SP-1 in the Constitution where it could be not changed by a future vote of the Regents.

13. The California electorate approved Proposition 209 in the November 2006 elections.

14. For a variety of legal reasons, SP-1 and Proposition 209 did not go into effect at the graduate and professional level until the class that entered in fall 1997 and at the undergraduate level until the class that entered in fall 1998.

15. In the Regents' debate leading up to the adoption of SP-1 in July 1995, I, along with the admissions directors at other UC campuses, provided oral testimony and submitted numerous reports, computer simulations and other data to the Regents. In

summary, the admissions officers advised the Regents that ending affirmative action would inevitably result in a sharp and immediate drop in the number of African American, Chicano, Latino and Native American students who were admitted to Berkeley, UCLA and the other selective campuses of the UC system.

16. In fall 1997, when SP-1 and Proposition 209 went into effect at the graduate and professional schools, our recommendations and predictions were confirmed when there was a sharp drop in the admission of African American, Chicano, Latino, and Native American students at the selective law, medical and graduate schools throughout the UC system. That drop has continued for the ten years that Proposition 209 has been in effect.

17. Our recommendations and predictions were again confirmed in fall 1998, when SP-1 and Proposition 209 went into effect at the undergraduate level. At Berkeley, there was a 55 percent drop in the number of underrepresented minorities admitted. There were also sharp drops at UCLA and other selective campuses in the UC system. That drop has also continued for the 10 years that Proposition 209 has been in effect, especially when the data is interpreted, as it must be against the background of the massive growth of the Latino and Chicano population of California. The attached Exhibit 4 is a copy of the official UC statistics documenting these facts at the undergraduate level, including in particular at UCLA and Berkeley.

18. Both before and after the date when SP-1 and Proposition 209 went into effect, the admissions offices at UC Berkeley, UCLA and other campuses attempted

to develop systems that would allow us to admit larger numbers of underrepresented minority students. Despite our efforts, we could not devise such a system because of the gaping educational inequalities in California and the country and because of the inherent biases and inequities in grade point averages, test scores, and other criteria that are the main standards that are available to use in evaluating applicants.

19. I have reviewed the admissions policies of the University of Michigan, the deposition of Ted Spencer (the director of undergraduate admissions at Michigan), and the demographic data on the classes that Michigan admitted in 1999 and in 2003-2005.

20. I concur with Mr. Spencer's testimony that Proposal 2 will inevitably result in a drop in the number of African American, Latino, and Native American students who are admitted to the University of Michigan. I would add that that drop will be substantial and that there is little or nothing that admissions' officers can do to stop it as long as Proposal 2 remains in effect.

21. There are, of course, demographic differences between Michigan and California. In particular, Michigan has a far larger percentage of its population that is African American and far smaller percentages of its population that are Chicano, Latino, or Asian. These demographic differences would have some effect, but because the pattern of unequal education and unequal test results is common to African American, Latino and Native American students, those demographic differences will not mean that the effects of Proposal 2 will be different in magnitude from those of Proposition 209.

22. In fact, because Michigan's high schools appear to be far more segregated and the pool of minority students from integrated schools thus far smaller than in California, the long-term effects of Proposal 2 in Michigan could, if anything, be worse than the effects of Proposition 209 in California. As is set forth below, at Berkeley and at every other selective university of which I am aware, the underrepresented minority students who in general had the best education and the best chances of success in the university were students who attended integrated schools.

23. I have set forth below the facts that make clear that Mr. Connerly and anyone else who was familiar with the admissions process knew before they were ever adopted that Proposition 209 and Proposal 2 inevitably drive down the number of underrepresented minorities who would be admitted at any selective university for the time during which those proposals remained in effect.

Background--the University of California.

24. In order to explain the intent and effect of Proposition 209 in California, it is necessary to begin by setting forth a few basic facts about the University of California and about the students who apply to and attend the UC.

25. Other than the California State University system, UC is the largest public university in the country. It now has nine undergraduate campuses located throughout the State. In addition, the Hastings College of Law and the Medical Center at UC San Francisco are part of the UC system. The UC is governed by an appointed Board of Regents.

26. UC is governed by the Master Plan, which was enacted into law by the California Legislature in 1960. Under the Master Plan, the UC is the leading undergraduate, graduate and research university in the state. The Master Plan also established a state university system and a system of community colleges.

27. The Master Plan requires the UC to admit 90 percent of its students from California and to accept the top 12.5 percent of high-school students in the state into the UC system as a whole.

28. The Regents have at various times established differing standards for determining the 12.5 percent of students who are "UC eligible." In general, however, those standards have included graduation from high school, a specified grade point average, the completion of certain course work, and certain minimum scores on standardized tests. After Proposition 209 passed, the Regents also established a program where the top four percent of the class at any particular high school was considered UC eligible.

29. Except for a small category of admissions by exception[2]--which may not exceed six percent of the entering freshman class and four percent of the entering transfer class--an individual UC campus may only accept persons who are eligible under the Regents' criteria.

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[2] "Admissions by exception" are frequently used for athletes, for applicants who have had a non-traditional educational experience, for some disabled applicants, and for students with outstanding talent in the performing arts. Prior to the passage of SP-1 and Proposition 209, admission by exception had also been used for some African American, Latino, and Native American students.

30. Beyond those basic standards, each UC campus decides which students it will accept. Because the campuses differ widely in the opportunities that they afford, there is a great difference in the applicant pools at each campus and in the selectivity of their admission systems.

31. The University of California at Los Angeles (UCLA) and UC Berkeley are the flagship campuses of the entire UC. They are world-famous research universities with numerous professors who have received Nobel Prizes and other recognition for their advanced scholarship. Their graduates have vastly increased chances of being admitted to the most selective professional and graduate schools in California and in the Nation. Both proudly claim that they have produced a disproportionate share of the political, economic, and professional leaders of the State. Berkeley and UCLA are by far the most selective undergraduate campuses in the UC system. Since the early 1970s, admission to Berkeley and UCLA has become extremely competitive, with the two campuses currently admitting roughly 25% of their freshman applicants.

32. In addition, as California's population has grown, the admission standards at other campuses, including in particular UC San Diego and UC Santa Barbara, have become increasingly selective because these campuses are perceived as offering opportunities beyond those on other UC campuses.

SP-1 and Proposition 209 intentionally aimed at a sharp drop in the admission of African American, Chicano, Latino, and Native American students at Berkeley, UCLA and other selective campuses.

33. I have read Ward Connerly's deposition testimony where he claimed that he did not know that Proposition 209 would result in a sharp drop in the admission of underrepresented minority students at Berkeley, UCLA and other selective campuses. Based on the information that the admissions officers provided to the Regents, including Mr. Connerly, that claim is absolutely untrue. He and the other Regents knew that it was essentially undisputed that SP-1 and Proposition 209 would result in a dramatic drop in the admission of African Americans, Chicanos, Latinos and Native Americans at the most selective campuses.

34. Because Mr. Connerly targeted the policies of UC Berkeley throughout his campaigns against affirmative action, I played a special role in providing the Regents with information that made clear what the effects of SP-1 and Proposition 209 would be.

35. In repeated and highly-publicized meetings of the Board of Regents during 1994 and 1995, I personally heard Connerly repeatedly focus on the difference in GPAs and standardized test scores of students admitted from different racial groups as the primary evidence of what he and Governor Wilson called "racial preferences."

36. I, along with other admissions officers, submitted voluminous material to the Board of Regents that established that students who were white or from most Asian backgrounds[3] in fact had significant advantages

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[3] South East Asian refugees and some other Asian groups suffer disadvantages similar to those for underrepresented minorities. Most Asian groups who are allowed into the US, however, have

on those criteria over applicants who were African American, Chicano, Latino, or Native American.

37. To begin with, we advised the Regents that the educational disparities in California, like those in the Nation, were so great that the percentage of high-school graduates who were even eligible to apply to the UC was far higher among whites and Asians than it was among African American, Chicano, Latino, or Native American graduates. In 1990, it was undisputed that the percentage of high-school graduates who were UC eligible were approximately as follows:

Non-Hispanic whites 12.7%

Asian and Pacific Islanders 32.2%

African American 5.1%

Hispanic 5.8%

38. We further informed the Regents that even among those graduates who were UC eligible, white students and students from most Asian backgrounds had, in general, significant advantages over African-American, Chicano, Latino, and Native American students.

39. On grade point averages, for example, the Regents had decided that high-school students who took AP or honors courses should receive an extra grade-point point on that course when the grade-point average was calculated. Although the Regents policy capped the

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high levels of educational achievement both before and after they emigrate here.

number of additional honors grade-points at eight, this cap did not mitigate the differences in curricular offerings between highly affluent high schools and very disadvantaged high schools. Predominantly white and Asian high schools were far more likely to have a large selection of honors and AP classes, and students from those schools had a distinct advantage on GPA over students who went to schools that were predominantly African American, Chicano, Latino or Native American.

40. Although the UC system does not require letters of recommendations, counselors in predominantly white and Asian schools were very knowledgeable about the UC admissions process and would often make very effective phone calls or write compelling letters of support for students from their schools who had unusual circumstances or who were appealing denials of admission. These counselors and teachers could provide far more knowledgeable and detailed letters than schools that were predominantly composed of underrepresented minorities because their schools had far better teacher and counselor to student ratios. Many disadvantaged high schools in California have no counselors whatsoever.

41. Above all, however, white students and students from most Asian backgrounds had significantly higher mean scores on the standardized tests than students from African American, Latino, or Native American backgrounds.

42. In part, this was due to the fact that white applicants and applicants from most Asian backgrounds had on average far higher family incomes

and higher parental education levels, two variables with which test scores are highly correlated.

43. The advantage, however, was far greater than this. According to UC and other studies, we knew that even with income held constant, white students and students from most Asian backgrounds had much higher mean scores on the standardized tests African American, Latino, or Native American students.

44. In fact, we knew that white students from the poorest income brackets had mean test scores that were above those of African American and Chicano students from the highest income brackets.

45. As the admissions director at Berkeley, I advised the Regents that the Berkeley Admissions Office had long recognized that it could not apply the existing criteria mechanically if it was to identify talented and promising students across racial lines. As I advised the Regents, our office evaluated scores and other educational criteria in the context of the background from which the particular student came. We recognized that a given score, for example, meant very different things for a student who had had every advantage and one who had struggle to overcome disadvantages, of which the effects of racial discrimination were by far the largest.

46. As I and other admissions officers advised the Regents, if we could not evaluate the educational qualifications that we were using in light of the race of an applicant, we could not identify many of the most promising and talented African American, Chicano, Latino and Native American students.

47. As far as I can recall, every study provided to the Regents during the debate on SP-1 made clear that eliminating affirmative action, including eliminating the consideration of race in the admissions process, would inevitably mean a sharp drop in the admission of underrepresented minorities at Berkeley, UCLA and every other selective campus.

48. The UC Berkeley Admissions Office even ran careful computer simulations of the results that would occur if race was not considered in the admissions process. Those simulations demonstrated that there would be a devastating drop in the number of African American, Latino, and Native American students at Berkeley, UCLA and every other selective campus in the UC system.

49. When the Board of Regents adopted SP-1 on July 20, 1995, it knew that there would be a sharp drop in the admission of African American, Chicano, Latino, and Native American students at the selective graduate and undergraduate schools in the University of California.

50. Similarly, when Connerly and Governor Wilson, who was then still running for President, announced their support for Proposition 209, they knew that there would be a sharp drop in the admission of African American, Chicano, Latino, and Native American students at the selective graduate and undergraduate schools in the University of California.

<u>After the adoption of SP-1 and Proposition 209, the admissions offices could not stop the drastic decline in the admission of underrepresented minorities.</u>

51. Before SP-1 and Proposition 209 went into effect, the Berkeley admissions office and many other admissions offices attempted to establish policies that would reduce the drastic drop in minority admissions that we knew would occur.

52. In November 1997, Berkeley adopted a policy statement that provided for a flexible review of every candidate and that considered every form of disadvantage except race. A true copy of that policy is attached as Exhibit 4.

53. However, because race was by far the source of the largest degree of inequality in education and in educational measures, we knew that our policies could not halt the decline in admissions that we had predicted. The contrast between the last Berkeley freshman class with affirmative action and the first that entered after Proposition 209 took effect starkly illustrates the magnitude of that decline.

54. For the class that entered in fall 1997, UC Berkeley received over 27,000 applications and offered admission to approximately 8,450 students. The racial composition of the 3573 students who actually enrolled at Berkeley in fall 1997 was as follows:[1]

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[1] The totals do not add to 100 percent due to international students, students in other ethnic categories, and rounding errors.

African-American	7.2 percent
Native American	.6 percent
Chicano	10.9 percent
Other Latino	2.3 percent
White	28.0 percent
Asian	41.0 percent
Decline to state	5.2 percent[5]

55. The undergraduate class that entered in fall 1998--that is, the first one selected under Proposition 209--had the following composition:

African-American	3.4 percent
Native American	.4 percent
Chicano	5.1 percent
Other Latino	2.1 percent
White	29.2 percent
Asian	41.9 percent
Decline to state	14.5 percent[6]

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[5] Various studies had indicated that most of those who declined to state their race were white students who either objected to doing so on moral grounds or who believed it would hurt their chances in the application process or Asian American students who believed that UC, and particularly UC Berkeley, might discriminate against them because of the large numbers of Asian American students already enrolled in the UC system.

56. In a single year, there was a drop of 932 African American, Chicano, and Native American students who were offered admissions. That is, we offered admission to 55 percent fewer students in these groups than we had one year before.

57. In the years after 1998, the admissions office, under my direction and that of my successor, continued to search for ways to increase the numbers of African American, Chicano and Native American students whom we could admit. But even after SP-1 was rescinded by the Regents in 2001, that was impossible because Proposition 209 remained in the California Constitution. I have attached as Exhibit 5 a copy of the official statistics on new freshmen registrants from at UC Berkeley from fall 1996 through fall 2007.

58. After the class that entered in fall 1998, we, for example, continued to consider economic and social disadvantage in evaluating an applicant's performance on educational criteria. But as our studies had shown, at every level of social and economic status, candidates who were underrepresented minorities had adjusted GPAs and, especially, scores, that were significantly lower on average than white and Asian applicants from the same social and economic background.

59. Moreover, we found, as almost all universities had found, that African American, Chicano, Latino and Native American students who attended integrated, middle class or upper-middle class schools were the best prospects for admission and for graduation from schools like Berkeley. For a variety of reasons, these

students suffered educational disadvantages relative to their white and Asian high-school class mates, including, above all, on standardized tests.

60. With affirmative action, we could admit these highly-promising minority students. If, however, we considered social or economic disadvantage without considering race, we could not admit them--and we lost many of the best minority students to private institutions or to far less selective UC campuses where they would not receive the education or the opportunities that they could have received at UCLA, Berkeley, or similar universities.

61. Beyond these specific effects of SP-1 and Proposition 209, the Regents repeatedly threatened to audit us and private parties occasionally threatened to sue us for alleged violations of Proposition 209. These threats put a chill over a decision to admit any African American, Chicano, Latino or Native American student who was not among the very few such students with relatively high test scores and a large number of AP and honors classes. No such chill affected decisions to admit any other student or group of students.

62. Finally, Proposition 209 harmed Berkeley and UCLA on both the application and the yield ends of the admission process.

63. As fewer underrepresented minority students were admitted, both campuses had to fear that fewer would apply. Especially after the California Supreme Court held that Proposition 209 banned targeted recruiting, there was the fear that the whole process of building up minority admissions--which had taken years to accomplish--would begin to unravel.

64. Similarly, at the other end of the admissions process, both campuses had to fear that fewer underrepresented minority students would accept the offers of admission that the campuses were able to make in favor of offers from other institutions that had more African American, Chicano, Latino, or Native American students.

The expected effects of Proposal 2 in Michigan.

65. As a person who has spent most of my professional life participating in or writing about the admission of minority students at selective universities, I can say without hesitation that racial differences between applicants are by far the largest differences that any admissions department at any selective university will face.

66. Michigan is, by any standard, a selective university, and particularly selective for the one third of its class that is taken from outside the State.

67. The Michigan admissions policies that I have reviewed are essentially like those that we devised at Berkeley after the passage of Proposition 209. They take account of every level of disadvantage and inequality except the one that is most crucial--race.

68. I am less familiar with the pool of applicants to Michigan than I am with the pool of applicants to Berkeley and UCLA. Nevertheless, the problem of fewer honors and AP classes for underrepresented minorities, the inequalities in secondary education, and, especially, the large racial disparities in standardized test scores are national phenomena.

69. In fact, because the State of Michigan has a larger percentage of students in racially segregated schools and far fewer African American and other students in integrated schools, it will be more difficult for Michigan to admit underrepresented minority students from Michigan than it was for us to admit underrepresented minority students from California.

70. It is my opinion that the number of African American, Latino and Native American students will drop substantially in future years at Michigan. It is further my opinion that the admissions office can somewhat lessen that fall, but that it can not stop it as long as Proposal 2 remains in effect.

71. Finally, it is my opinion that Ward Connerly and others who know the realities of admissions, knew that SP-1, Proposition 209, Proposal 2 and all similar proposals will result in a drastic reduction in African American, Chicano and Native American students at any selective undergraduate institution and at any selective graduate or professional school.

I declare under penalties of perjury that the foregoing is true and correct.

Bob Laird
Berkeley, California.
January 5, 2008

{United States District Court for the Eastern District of Michigan Docket No. 2:06-cv-15024}

DECLARATION OF ROBERT A. SCHAEFFER

Qualifications.

1. I am a citizen and resident of Sanibel, Florida.

2. From 1985 to the current date, I have served as the Public Education Director of the National Center for Fair & Open Testing. (Fair Test).

3. I attended the Massachusetts Institute of Technology (MIT) as both an undergraduate and graduate student. I worked as a Research Associate at the MIT Education Research Center from 1969 to 1972.

4. I am co-author of the book *Standing Up to the SAT* (ARCO/Simon and Schuster, 1989).

5. I have also authored or coauthored many publications of Fair Test, including Testing Our Children: A Report Card on State Assessment Systems; Standardized Tests and Our Children: A Guide to Testing Reform; Implementing Performance Assessments; Standardized Tests and Teacher Competence; The SAT Coaching Cover-Up; Test Scores Do Not Equal Merit; and Sex Bias in College Admissions Tests: How Women Lose Out.

6. I am very familiar with the SAT, ACT, LSAT, and MCAT and with the various statistical claims made for their validity in the admissions process.

7. Because of my knowledge about the role of admissions test scores in influencing the racial makeup of student bodies the U.S. Department of Justice's Civil Rights Division engaged me as a paid expert in its intervention in the Mississippi higher education case (Ayers). I have also served as an expert in other cases including the challenge to MEAP scholarships in Michigan, a challenge to the Massachusetts teacher licensing examination, a challenge to the scoring on a nationally administered teacher licensing examination. In the current matter, I expect to receive no compensation beyond reimbursement for expenses.

Background on the adoption of standardized tests.

8. Most major public universities did not require applicants to submit SAT or the ACT scores until the "Baby Boom" generation entered college in the early 1960s. Before that date, only the Ivy League colleges and a few private and public institutions used such tests for admissions decisions.

9. At the time when many public universities first adopted the SAT or the ACT, it was generally known that there were differences in scores associated with the race, national origin, family income, gender, and similar factors. In addition, it was known that the initial author of the SAT tests and many of its early advocates had openly stated beliefs in racial superiority and eugenics. But the test manufacturers claimed to have corrected the bias in the tests and had dissociated themselves from the eugenics and racial superiority views of the early advocates of such tests. Until 1980, the manufacturers did not release data on the differences in scores associated with the race, national origin, family income, gender, and similar

factors. The scale of the differences in scores based on race and income was thus not known before 1980.

10. Beginning in 1980, however, the Educational Testing Service (ETS), which manufactures the SAT, and the College Board, which sponsors the test, released such data publicly.

11. From the time of the release of that data forward, there has been no question that there are very large differences in the scores on the SAT, ACT and similar tests that are associated with race, national origin, and, to a lesser extent, family income.

Racial and national gaps in test scores

12. The attached Exhibit 1 is a statement of the College Board's own data on the way in which average SAT scores in 2007 varied by the race of the applicant and by the income of his or her family.

13. The attached Exhibit 2 is a statement of the ACT, Incorporated's own data on the way in which average ACT scores in 2007 varied by the race of the applicant and by the income of his or her family.

14. The attached Exhibit 3 is a statement of the Law School Admissions Council own data on the way in which average Law School Admissions Test (LSAT) scores in 2007 varied by the race of the applicant and by the income of his or her family.

15. The attached Exhibit 4 is a statement of the Association of American Medical Colleges' own data on the way in which average Medical College Admissions

Test (MCA) scores in 2007 varied by the race of the applicant and by the income of his or her family.

16. As can be seen from Exhibits 1, 2, 3, and 4, race affects the average variation in test scores far more than income or any other factor.

17. Moreover, there is voluminous research that shows that even when white and minority test takers come from the same income groups, there is a still a very great discrepancy in the average test scores based on the race of the applicant.

18. In fact, even racial minorities who have the same educational accomplishments as their white peers score far lower on standardized tests. For example, in a study of applicants to the University of California at Berkeley Law School (Boalt Hall), Mr. David White demonstrated that among applicants who had attended the same elite undergraduate institution who had the same undergraduate grade point average, Native Americans scored on average 4.0 points lower on the LSAT test, Hispanics scored 6.8 points lower, and African Americans scored 9.2 points lower.

19. The University of California has published similar data. UC and the SAT: Predictive Validity and Differential Impact of the SAT I and SATII at the University of California (Saul Geiser with Roger Studley, University of California, Office of the President, 2001).

20. In the last twenty years, there have been some variations and some improvements in the average score gaps by race set forth in Exhibits 1 through 4. But there has been at all times a significant gap by

race in average scores on the SAT, the LSAT, the MCAT, and the ACT.

21. There are many explanations offered for the differences in test scores--but there is no dispute as to the fact of those differences.

What test scores claim to predict

22. There is also no dispute that in the ranges of scores of students admitted to selective colleges or universities, the differences in test scores between white students and African-American, Hispanic and American Indian students say little or nothing about a student's chance of success in college or, still less, in his or her later professional life.

23. The companies that manufacture the SAT, the ACT, the LSAT, and the MCAT have long ago abandoned any claim that these tests measure "intelligence," "aptitude," or any similar quality. In fact, the College Board and ETS have given up the names "Scholastic Aptitude Test," and "Scholastic Assessment Test," both of which were prior names for the "SAT." The test-makers have retained the name SAT, but now assign no meaning to those initials.

24. The only claim made by the test manufacturers is that there is some level of correlation between test results and the average grades during the first year of college, law school, or medical school.

25. The explained variation refers to the portion of a statistical outcome (in this case first year grades) that is accounted for by a particular predictor (e.g. high-school grades or test scores) or set of predictors (grades

and test scores combined by a specified formula). Thus, the figures set forth below indicate that, on average, the test scores alone account for less than a quarter of the difference among students' first year college grades.

26. The reason that admissions test scores (either alone or in conjunction with high-school grades) explain such a small portion of first year undergraduate grades (generally less than a third, no matter how precise the predictors are) and even smaller percentages of more meaningful outcomes such as graduation rates or four-year grades (typically one-fifth to one quarter) is that the predictors do not include many factors that are significant for academic performance. These include: perseverance in overcoming obstacles, self-discipline, creativity, openness to new ideas, willingness to seek help, etc. Nor do they account for the fact that the individuals in question are teenagers, who are still developing intellectually, personally and socially.

27. There is some dispute over how much predictive power the test results, standing alone, have as to an applicant's likely first-year grades. Even the College Board and ETS, however, claim that the SAT only has the ability to predict 22 percent of the variation in first year grades of college freshmen. Other researchers have published data that puts the figure much lower.

28. The ACT claims to predict about 20 percent of the variation in first-year undergraduate grades. The LSAT claims to predict 13 percent of the variation in first-year law school grades. The MCAT exams make similar claims.

29. Every college and graduate school, however, considers scores on tests in conjunction with an assessment of high-school or college records. The question is therefore not how much predictive power as to first-year grades that the tests have standing by themselves, but how much they add to the prediction from high-school or college grades.

30. The College Board and ETS now claim that the SAT adds eight percent to the predictive power of high-school grades alone in forecasting first year college grades. ACT Inc. makes a similar claim about their test. The Law School Admissions Council now claims that the LSAT adds about 15 percent to the power of college grades alone in predicting first year grades. The Association of American Medical Colleges now claims that the MCAT adds 21 percent to the predictive power of college grades alone in forecasting grades in the first two years of medical school

31. Even assuming that these claims are true, requiring a "neutral" application of scores on standardized admissions tests would have little or no effect on improving the graduation rates of those minorities who are admitted.

32. First, the tests make no claim to predict graduation rates, so there is no evidence that raising the test score requirements would change the average graduation rate at all.

33. Second, the graduation rate from selective colleges and law schools is already very high for all students--including minorities.

34. Third, James Crouse and Dale Trusheim have documented statistically that requiring a "neutral" application of the test scores would not assist in identifying the particular minority students who would fail to graduate if they were admitted. See James Crouse and Dale Trusheim, *The Case Against the SAT*, Chapter Five, pp 89-121. Since that time, no one has disputed their findings in a published work.

35. The factors that primarily determine a minority student's success in college that are not measured by test results. For example, the tests do not claim to account for financial difficulties or family responsibilities that may affect a student's chance of success. Nor can they measure factors such as work habits, motivation, peer and family support, and other factors that affect graduation rates.

36. Recognizing the facts set forth above, many private liberal arts and non-selective public colleges have dropped the requirement for an SAT or ACT test. The number of accredited, bachelor-degree granting colleges that do not require many or all applicants to submit test scores before admissions decisions are made is now in excess of 760.

37. However, the tests continue to be required by all selective public universities. Moreover, the LSAT is required for accreditation at law schools by the American Bar Association.

38. Finally, there are strong political pressures for continued use of the tests.

39. In universities where they are still used, it is undisputed and well known that requiring a "neutral"

application of test scores between white applicants and African-American, Hispanic and Native American applicants would exclude large numbers of minority students with no increase in the success rate of the much diminished number of those minority students who were still admitted.

I declare under penalties of perjury that the foregoing is true and correct.

Robert A. Schaeffer
Sanibel, Florida
January 7, 2008

EXHIBIT ONE

College Board SAT
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2007 College-Bound Seniors
TOTAL GROUP

Demographic Information
SAT Reasoning Test: Mean Scores by Gender Within Ethnicity

Table 8: Total Mean Scores by Ethnicity

SAT Reasoning Test	Test Takers		Critical Reading		Mathematics		Writing	
Test-Takers Who Described Themselves As:	Number	Pct	Mean	SD	Mean	SD	Mean	SD
American Indian or Alaska Native	9,897	1	487	106	494	104	473	100
Asian, Asian American, or Pacific Islander	140,794	9	614	124	578	123	513	121
Black or African American	159,849	11	433	97	429	97	425	93
Mexican or Mexican American	61,240	4	455	99	466	99	450	94
Puerto Rican	19,778	1	459	102	454	103	447	99
Other Hispanic, Latino, or Latin American	87,526	6	459	104	463	104	450	100
White	828,038	55	527	102	534	102	518	100
Other	53,901	4	497	114	512	114	493	110
No Response	133,608	9	480	133	497	126	474	126
Total	1,494,531	100	502	113	515	114	494	109

Table 9: Male Mean Scores by Ethnicity

SAT Reasoning Test	Test-Takers		Critical Reading		Mathematics		Writing	
Test-Takers Who Described Themselves As:	Number	Pct	Mean	SD	Mean	SD	Mean	SD
American Indian or Alaska Native	4,588	0	490	107	513	107	468	102
Asian, Asian American, or Pacific Islander	68,564	5	513	124	592	122	506	121
Black or African American	67,274	5	429	98	437	101	414	93
Mexican or Mexican American	26,468	2	459	101	485	102	447	94
Puerto Rican	8,531	1	461	104	472	107	442	100
Other Hispanic, Latino, or Latin American	36,992	2	464	106	484	107	448	101
White	388,044	26	529	103	553	103	511	101
Other	23,545	2	497	116	532	116	486	111
No Response	66,494	4	478	134	512	128	465	126
Total	690,500	46	504	114	533	116	489	110

Table 10: Female Mean Scores by Ethnicity

SAT Reasoning Test	Test-Takers		Critical Reading		Mathematics		Writing	
Test-Takers Who Described Themselves As:	Number	Pct	Mean	SD	Mean	SD	Mean	SD
American Indian or Alaska Native	5,255	0	485	104	478	98	478	99
Asian, Asian American, or Pacific Islander	72,109	5	615	124	565	123	519	120
Black or African American	91,262	6	436	95	423	93	433	92
Mexican or Mexican American	34,526	2	453	98	451	94	453	93
Puerto Rican	11,164	1	457	100	441	97	451	97
Other Hispanic, Latino, or Latin American	50,260	3	455	102	448	99	452	99
White	438,511	29	526	101	519	98	524	99
Other	30,203	2	498	112	496	110	499	108
No Response	64,740	4	485	132	485	122	486	124
Total	798,030	53	502	111	499	110	500	108

CollegeBoard SAT
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2007 College-Bound Seniors
TOTAL GROUP

Demographic Information
SAT Reasoning Test: Student Background Information and Characteristics

Table 11: Student Background Information and Characteristics
Student demographic information provides a broader context to aid in interpreting and understanding individual and group scores.
{Table appears on the next five pages}

{Table 11}

SAT Reasoning Test	Test-Takers		Critical Reading		Mathematics		Writing	
	Number	Pct	Mean	SD	Mean	SD	Mean	SD
All Test Takers	1,494,531	100	502	113	515	114	494	109
First Language Learned								
English	1,076,637	77	514	107	518	109	504	105
English and Another	204,603	15	486	114	509	122	482	111
Another Language	125,064	9	470	121	522	132	470	118
No Response	88,227							

{Table 11 (continued)}

SAT Reasoning Test	Test-Takers		Critical Reading		Mathematics		Writing	
Citizenship	Number	Pct	Mean	SD	Mean	SD	Mean	SD
U.S. Citizen/U.S. National	1,242,592	92	509	109	515	111	500	106
U.S. Permanent Resident or Refugee	43,944	3	462	125	506	131	461	122
Citizen of Another Country	58,689	4	492	123	572	128	496	116
Other, Unknown, or No Response	149,306							
Disabling Condition								
Yes	82,292	6	486	113	488	113	470	108
Unknown or No Response	1,412,239							

{Table 11 (continued)}

SAT Reasoning Test	Test-Takers		Critical Reading		Mathematics		Writing	
Plans to Apply for Financial aid	Number	Pct	Mean	SD	Mean	SD	Mean	SD
Yes	932,288	71	501	110	508	112	491	106
No	99,366	8	530	109	548	111	527	109
Don't Know	289,628	22	516	110	532	112	508	108
Highest Level of Parental Education								
No High School Diploma	58,259	4	421	98	445	107	418	93
High School Diploma	413,137	31	466	98	476	102	457	94
Associate Degree	113,958	9	484	95	492	98	473	92
Bachelor's Degree	398,895	30	522	103	533	105	513	100
Graduate Degree	353,262	26	560	109	569	111	552	107

{Table 11 (continued)}

SAT Reasoning Test	Test-Takers		Critical Reading		Mathematics		Writing	
Family Income	Number	Pct	Mean	SD	Mean	SD	Mean	SD
Less than $10,000	40,610	4	427	107	451	122	423	104
$10,000-$20,000	72,745	8	453	106	472	113	446	102
$20,000-$30,000	61,244	6	454	102	465	107	444	97
$30,000-$40,000	83,685	9	476	103	485	106	466	98
$40,000-$50,000	75,836	8	489	103	496	105	477	99
$50,000-$60,000	80,060	8	497	102	504	104	486	98
$60,000-$70,000	75,763	8	504	102	611	103	493	98
$70,000-$80,000	81,627	9	508	101	516	103	498	98
$80,000-$100,000	130,752	14	520	102	529	104	510	100
More than $100,000	245,025	26	544	105	556	107	537	103
No Response	547,184							

{Table 11 (continued)}

SAT Reasoning Test	Test-Takers		Critical Reading		Mathematics		Writing	
Took the PSAT/NMSQT	Number	Pct	Mean	SD	Mean	SD	Mean	SD
Yes, As a Junior	379,256	31	503	106	511	107	494	102
Yes, As a Sophomore or Younger	250,617	20	506	107	515	111	496	105
Yes, As a Junior and As a Sophomore or Younger	343,222	28	543	106	550	107	537	104
No	256,991	21	470	110	486	117	459	105

Exhibit Two

ACT HIGH SCHOOL PROFILE SECTION I, EXECUTIVE SUMMARY
HS Graduating Class of 2007
National Report
Total Students in Report 1,300,599

Table 1.4. Five Year Trends - Average ACT Scores by Level of Preparation
{Table on this page and next}

	Number of Students Tested		Percent[1]	
Grad Year	Core or More	Less than Core	Core or More	Less than Core
2003	667,526	410,753	57	35
2004	661,290	405,328	56	35
2005	658,430	406,763	56	34
2006	647,298	413,888	54	34
2007	659,603	444,906	51	34

[1] Percent of all students tested. Numbers will not add up to 100% due to student non-response.

{Table 1.4. Five Year Trends (continued)}

	English		Math-ematics		Reading		Science		Composite	
Grad Year	Core or More	Less than Core	Core or More	Less than Core	Core or More	Less than Core	Core or More	Less than Core	Core or More	Less than Core
2003	21.4	18.5	21.6	18.9	22.2	19.7	21.7	19.5	21.8	19.3
2004	21.5	18.7	21.7	19.1	22.3	19.8	21.7	19.6	21.9	19.4
2005	21.6	18.8	21.7	19.1	22.2	19.8	21.7	19.6	21.9	19.5
2006	21.6	19.0	21.8	19.4	22.3	20.1	21.7	19.7	22.0	19.7
2007	21.7	19.2	21.9	19.6	22.4	20.2	21.8	19.8	22.0	19.8

Table 1.5. Five-Year Trends - Number, Percentage, and Average Composite Score for ACT-Tested Graduate by Race/Ethnicity {Chart on this and next 2 pages}

	2003			2004		
	N	%	Avg	N	%	Avg
All Students	1,175,059	100	20.8	1,171,460	100	20.9
African American/Black	129,507	11	16.9	131,925	11	17.1
American Indian/Alaska Native	12,127	1	18.7	12,507	1	18.8
Caucasian American/White	804,858	68	21.7	787,870	67	21.8
Hispanic	75,449	6	18.5	78,584	7	18.5
Asian American/Pacific Islander	39,102	3	21.8	39,337	3	21.9
Other/No Response	114,016	10	20.6	121,237	10	20.9

Table 1.5. Five-Year Trends - Number, Percentage, and Average Composite Score for ACT-Tested Graduate by Race/Ethnicity {Continued}

	2005			2006		
	N	%	Avg	N	%	Avg
All Students	1,186,251	100	20.9	1,206,455	100	21.1
African American/Black	138,964	12	17.0	139,118	12	17.1
American Indian/Alaska Native	13,695	1	18.7	13,635	1	18.8
Caucasian American/White	781,581	66	21.9	760,084	63	22.0
Hispanic	83,447	7	18.6	85,796	7	18.6
Asian American/Pacific Islander	39,284	3	22.1	39,867	3	22.3
Other/No Response	129,280	11	20.9	167,955	14	21.1

Table 1.5. Five-Year Trends - Number, Percentage, and Average Composite Score for ACT-Tested Graduate by Race/Ethnicity {Continued}

	2007		
	N	%	Avg
All Students	1,300,599	100	21.2
African American/Black	152,412	12	17.0
American Indian/Alaska Native	14,044	1	18.9
Caucasian American/White	779,147	60	22.1
Hispanic	93,137	7	18.7
Asian American/Pacific Islander	42,257	3	22.6
Other/No Response	219,602	17	21.6

TABLE 4
Number of test takers (N) and mean and standard deviation (SD) of LSAT score by race/ethnicity and testing year.

Race/Ethnicity	Testing Year 1997–1998	1998–1999	1999–2000	2000–2001	2001–2002	2002–2003	2003–2004
African American							
N	9,856	9,543	9,841	9,954	11,734	12,641	12,516
Mean	141.80	141.61	141.64	141.94	142.22	142.05	142.43
SD	8.26	8.52	8.31	8.35	8.26	8.40	8.48
Native American							
N	710	716	712	694	779	883	946
Mean	146.52	147.83	147.23	147.54	147.18	147.82	148.49
SD	8.99	9.32	8.88	9.43	8.66	9.29	9.25
Asian American							
N	5,931	5,803	6,190	6,233	8,369	9,776	10,057
Mean	150.84	151.06	151.30	151.05	151.70	151.80	152.02
SD	10.12	10.19	9.90	10.02	9.93	9.89	9.84
Canadian Aboriginal							
N	80	56	57	40	53	59	83
Mean	148.85	146.06	148.76	148.98	149.01	151.28	150.13
SD	10.14	11.18	11.89	9.79	9.40	10.12	9.02
Caucasian							
N	55,958	56,968	58,901	60,357	74,007	78,648	78,216
Mean	151.96	151.98	152.10	152.27	152.41	152.30	152.47
SD	8.93	8.96	8.82	8.77	8.68	8.80	8.71
Hispanic							
N	3,204	3,343	3,538	3,601	4,623	5,307	5,532
Mean	146.12	146.18	146.39	146.29	146.58	146.71	146.52
SD	9.13	9.36	9.20	9.06	9.10	9.24	9.35
Mexican American							
N	1,608	1,635	1,620	1,611	1,867	1,939	2,032
Mean	146.76	146.92	147.38	147.02	147.09	147.51	147.50
SD	8.57	8.69	8.76	8.68	8.74	8.58	8.92
Puerto Rican							
N	2,439	2,393	2,366	2,403	2,535	2,575	2,487
Mean	138.08	138.09	138.43	137.49	138.31	139.29	138.44
SD	9.22	9.65	9.78	9.36	9.40	9.74	9.52
Other							
N	3,089	3,199	3,475	3,815	5,081	5,436	5,328
Mean	149.71	149.34	149.43	149.97	150.53	150.40	150.52
SD	10.25	10.56	10.27	10.33	10.11	10.14	9.88
No Response							
N	1,684	1,623	487	365	511	3,051	3,202
Mean	154.18	155.05	152.99	153.71	154.17	154.71	155.37
SD	9.49	9.52	10.71	11.11	10.38	9.42	8.89

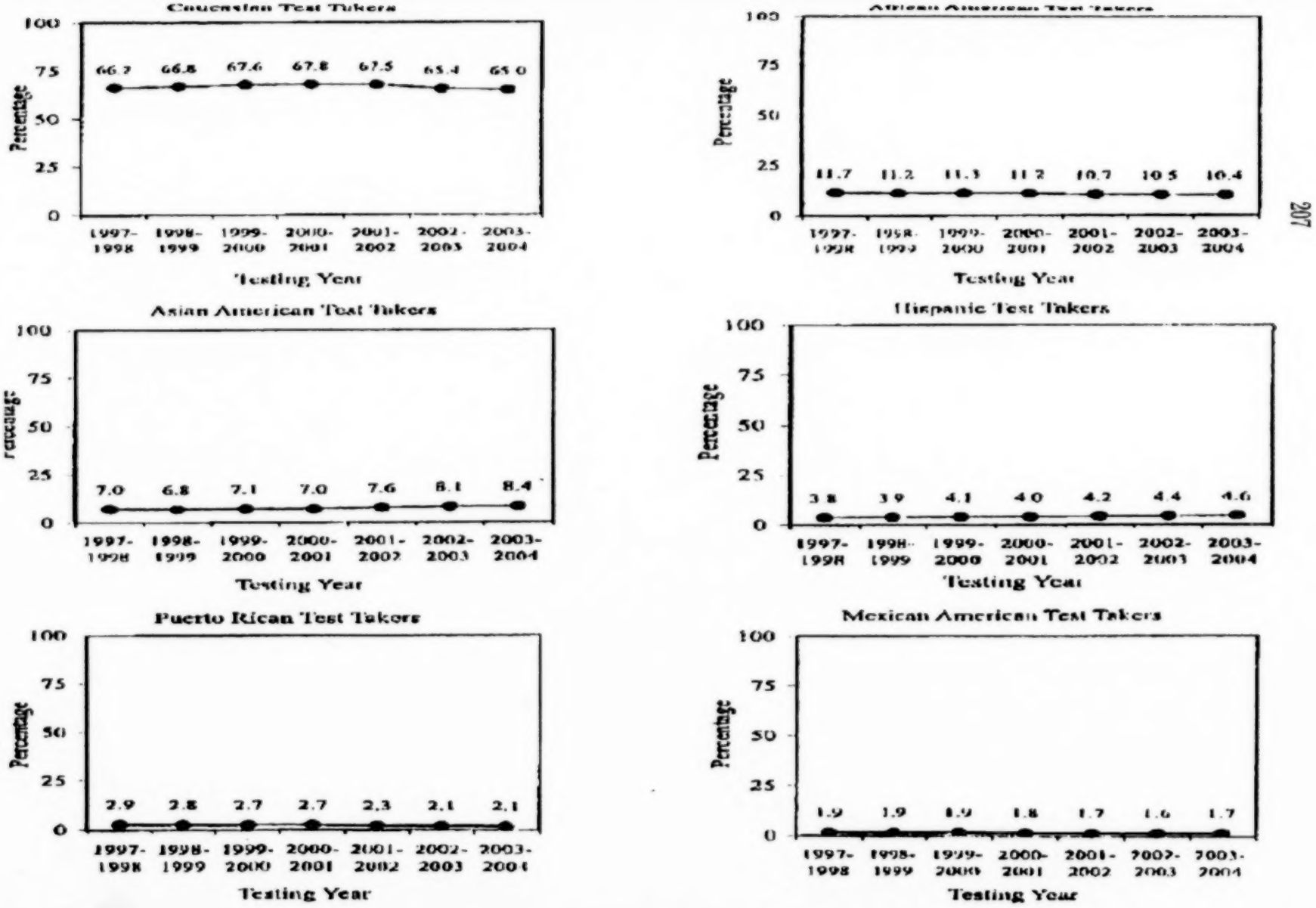

FIGURE 12. *Percentage of LSAT takers by race/ethnicity (six largest groups only, excluding "other").*

As shown in Table 4, the number of test takers who did not indicate their race/ethnicity had dropped om 1,684 (1997–1998) and 1,623 (1998–1999) to 487 (1999–2000), 365 (2000–2001) and 511 (2001–2002). lowever, the results of the 2002–2003 and 2003–2004 testing years are much higher than the 1997–1998 and 998–1999 testing years. In terms of percentages, the no response category comprised about 2.0% of the total roup for the 1997–1998 and 1998–1999 testing years, then decreased to 0.56% (1999–2000), 0.41% 2000–2001) and 0.47% (2001–2002). This trend reversed and the percentage increased in the 2002–2003 2.5%) and 2003–2004 (2.7%) testing years.

Figure 13 displays the mean LSAT scores by race/ethnicity. The legend in Figure 13 is sorted by the ean LSAT score in 2003–2004. The no response group had the highest mean in all seven testing years overed by this report. Ignoring the no response group, Caucasian test takers consistently had the highest ean, followed by Asian American test takers. Puerto Rican test takers consistently had the lowest mean.

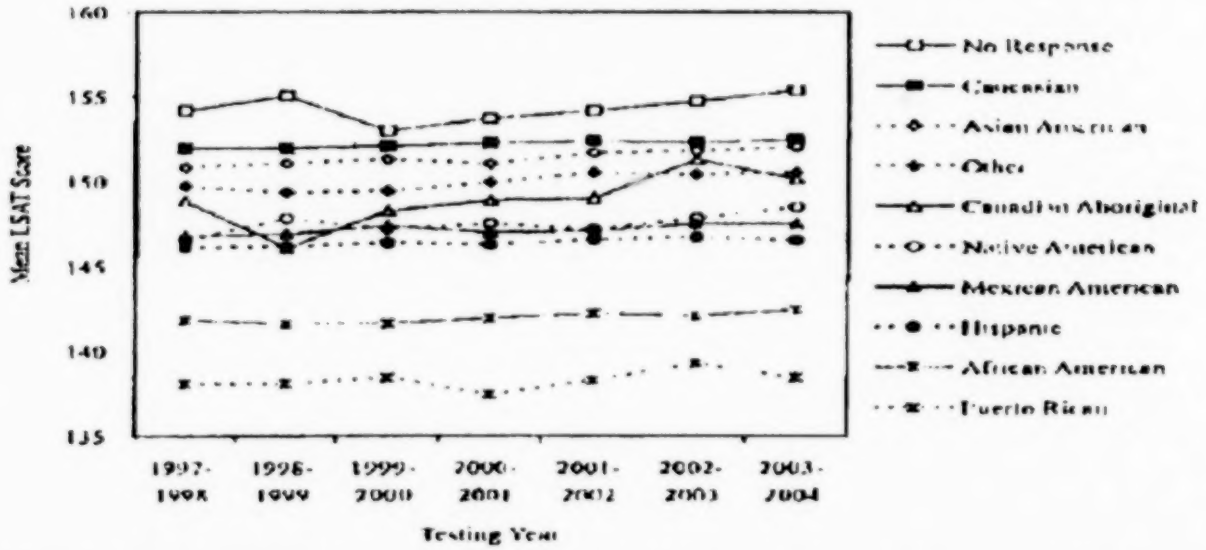

FIGURE 13. *Mean LSAT score by race/ethnicity. The legend is sorted by the mean LSAT score in 2003–2004.*

To provide more detailed information about LSAT performance by race/ethnicity, Figure 14 shows the moothed percentages of LSAT scores by race/ethnicity for the 2003–2004 testing year. Because the number f test takers in the various racial/ethnic groups was different, percentages of test takers by race/ethnicity ere used rather than numbers. The percentage of Canadian Aboriginals was too small to be represented on is graph. As shown in Figure 14, test takers who did not indicate their race/ethnicity had the highest ercentage of LSAT scores above 154 in the 2003–2004 testing year. Puerto Rican test takers had the highest ercentage of scores less than 136.

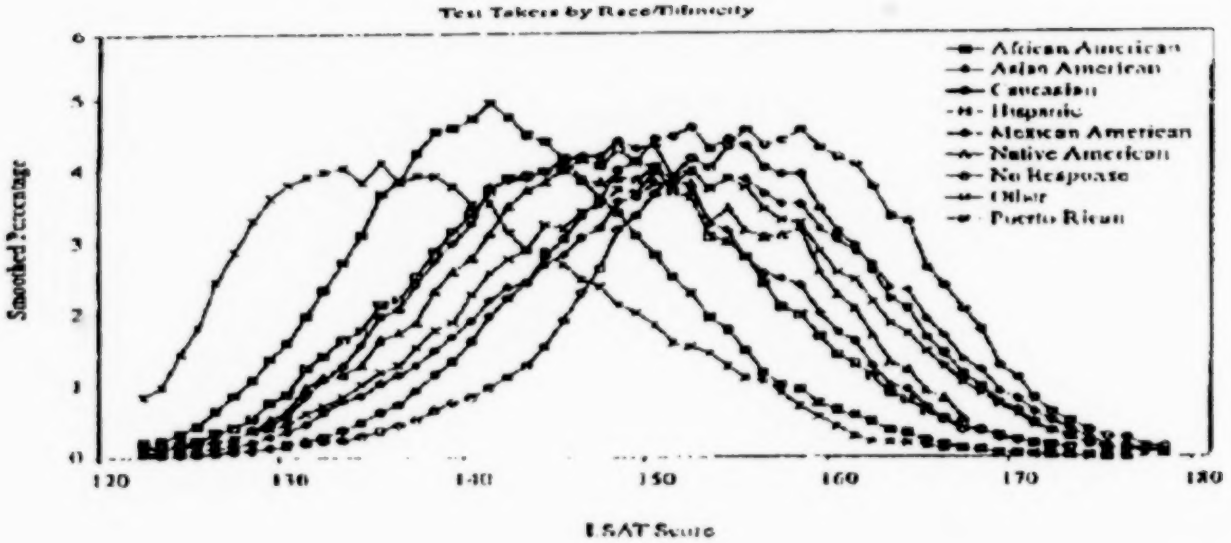

FIGURE 14. *Smoothed percentage frequency of LSAT scores by race/ethnicity in 2003–2004.*

LSAT Performance by Race/Ethnicity and Gender

All results in this section will focus exclusively on test takers from the United States (including Puerto Rico and the Virgin Islands). Results in this section classify test takers by both gender and race/ethnicity. Separate tables and figures are provided for racial/ethnic breakdowns within gender.

Race/Ethnicity within the female subgroup. Table 5 shows the number of female test takers by race/ethnicity for each testing year from 1997–1998 to 2003–2004, along with the mean and standard deviation of their LSAT scores. Test takers who repeated the LSAT within a testing year are counted only once and their multiple scores within a testing year are averaged. Figure 15 shows the percentage of female test takers by race/ethnicity for the six largest racial/ethnic groups, excluding "other." As shown in Figure 15, the percentage of female Caucasian test takers increased slightly from the 1997–1998 to the 2000–2001 testing year, and decreased slightly from the 2000–2001 testing year to the 2003–2004 testing year. The percentages of female test takers from other racial/ethnic groups have remained fairly constant. The number of female test takers who did not indicate their race/ethnicity decreased from the 1997–1998 testing year to the 2000–2001 testing year, and increased from the 2001–2002 to the 2003–2004 testing year, as indicated in Table 5.

Table 19: MCAT Scores and GPAs for Applicants and Matriculants to U.S. Medical Schools by Race and Ethnicity, 2007

NOTE: The table below displays the self-identified* ethnic and racial characteristics of applicants to U.S. medical schools in 2007. Please e-mail us if you need further assistance or have additional inquiries.

Applicants, 2007		Hispanic or Latino					Non-Hispanic or Latino								Foreign	All
		Mexican American	Puerto Rican	Cuban	Other Hispanic or Latino	Multiple Hispanic or Latino	Black or African American	Asian	American Indian and Alaska Native	Native Hawaiian and Other Pacific Islander	White	Other Race	No Race Response	More than One Race		
MCAT VR	Mean	7.9	6.4	8.3	8.2	7.9	6.9	8.8	7.8	8.0	9.5	8.2	9.6	9.3	8.3	9.0
	Standard Deviation	2.3	2.7	2.2	2.3	2.4	2.4	2.2	2.2	2.2	2.0	2.4	2.2	2.1	2.3	2.3
MCAT PS	Mean	7.9	6.8	8.5	8.3	8.0	7.0	9.9	7.2	8.3	9.3	8.7	9.7	9.3	9.9	9.2
	Standard Deviation	2.1	2.1	2.1	2.1	2.4	2.0	2.2	2.0	2.1	2.1	1.8	2.3	2.2	2.4	2.3
MCAT BS	Mean	8.5	7.4	9.1	8.9	8.5	7.4	10.0	7.9	8.7	9.8	8.8	10.0	9.8	10.1	9.6
	Standard Deviation	2.2	2.4	2.1	2.2	2.6	2.4	2.1	2.4	2.3	1.9	2.1	2.2	2.1	2.3	2.2
MCAT WS	Median	O	M	O	O	O	N	P	N	O	P	P	P	P	P	O
GPA Science	Mean	3.19	3.18	3.31	3.21	3.19	3.03	3.40	3.21	3.21	3.45	3.15	3.48	3.33	3.45	3.39
	Standard Deviation	0.47	0.51	0.41	0.48	0.46	0.53	0.43	0.54	0.47	0.40	0.54	0.41	0.47	0.48	0.45
GPA	Mean	3.52	3.58	3.61	3.54	3.52	3.45	3.62	3.48	3.54	3.66	3.52	3.64	3.59	3.61	3.62

non-science	*Standard Deviation*	0.36	0.34	0.30	0.33	0.35	0.37	0.30	0.43	0.33	0.30	0.37	0.31	0.31	0.35	0.32
GPA	Mean	3.33	3.36	3.44	3.35	3.34	3.22	3.50	3.32	3.35	3.54	3.42	3.56	3.45	3.52	3.49
total	*Standard Deviation*	0.39	0.40	0.33	0.38	0.36	0.42	0.34	0.43	0.38	0.32	0.38	0.32	0.36	0.39	0.36
Total Applicants		[illegible]	637	248	[illegible]	[illegible]	3,133	8,390	151	110	24,136	[illegible]	505	1,004	[illegible]	[illegible]

Matriculants, 2007		Hispanic or Latino					Non-Hispanic or Latino									
		Mexican American	Puerto Rican	Cuban	Other Hispanic or Latino	Multiple Hispanic or Latino	Black or African American	Asian	American Indian and Alaska Native	Native Hawaiian and Other Pacific Islander	White	Other Race	No Race Response	More than One Race	Foreign	All
MCAT VR	Mean	9.0	7.6	9.1	9.4	8.9	8.3	9.9	8.8	9.4	10.2	9.6	10.4	10.2	9.4	9.9
	Standard Deviation	1.9	2.4	1.8	1.8	1.8	1.9	1.7	1.9	1.6	1.6	1.6	1.7	1.6	1.8	1.8
MCAT PS	Mean	9.1	7.9	9.5	9.6	9.3	8.4	11.1	8.2	9.6	10.3	9.8	10.9	10.4	11.3	10.3
	Standard Deviation	1.8	1.8	2.1	1.9	2.3	1.7	1.8	1.6	2.2	1.8	1.5	1.7	1.9	1.9	1.9
MCAT BS	Mean	9.8	8.7	10.0	10.3	9.9	9.1	11.1	9.2	10.6	10.7	9.9	11.1	10.8	11.3	10.6
	Standard Deviation	1.5	1.7	1.8	1.7	2.1	1.6	1.5	1.6	1.4	1.5	1.4	1.7	1.6	1.7	1.7
MCAT WS	Median	P	M	P	P	P	O	P	O	P	P	Q	Q	P	P	P
GPA science	Mean	3.38	3.40	3.45	3.45	3.45	3.29	3.62	3.41	3.48	3.63	3.50	3.65	3.54	3.72	3.59
	Standard Deviation	0.39	0.42	0.36	0.38	0.35	0.43	0.29	0.46	0.45	0.29	0.30	0.28	0.34	0.28	0.33
GPA non-science	Mean	3.62	3.67	3.66	3.65	3.65	3.58	3.74	3.57	3.68	3.75	3.66	3.75	3.69	3.76	3.73
	Standard Deviation	0.30	0.28	0.29	0.28	0.25	0.31	0.23	0.41	0.25	0.24	0.29	0.24	0.25	0.24	0.25
GPA	Mean	3.51	3.52	3.55	3.55	3.55	3.43	3.67	3.48	3.56	3.68	3.64	3.70	3.61	3.75	3.65

total	*Standard Deviation*	*0.31*	*0.32*	*0.30*	*0.30*	*0.26*	*0.34*	*0.24*	*0.38*	*0.34*	*0.24*	*0.27*	*0.22*	*0.28*	*0.24*	*0.26*
Total/Matriculants		441	299	297	395	45	[illegible]	[illegible]	61	28	[illegible]	[illegible]	292	[illegible]	326	17,739

*Since 2002, following U.S. federal guidelines, AMCAS has asked applicants who are U.S. citizens or Permanent Residents to self-identify using two separate questions: the first question ("Ethnicity") asks applicants whether they are "Spanish/Hispanic/Latino/Latina" or "Not Spanish/Hispanic/Latino/Latina"; the second question ("Race") asks applicants to self-identify using non-Hispanic or Latino race categories, and applicants are asked to "check all that apply." The ethnicity category and several race categories permit further self-identification by sub-categories. Prior to 2002, AMCAS applicants were not able to select more than one race; thus, data prior to 2002 are not directly comparable to later data.

Source: AAMC: Data Warehouse: Applicant Matriculant File as of 9/25/2007.

[Page 1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, et al,
Plaintiffs, Case No. 06-15024
vs. Hon. David M. Lawson
JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF THE UNIVERSITY OF MICHIGAN, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES of any other public college of university, community college or school district,
Defendants.

CHASE CANTRELL, et al, Case No. 06-15637
Plaintiffs Hon. David M. Lawson
vs.
JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan,
Defendant.

[Page 2]

The Confidential Deposition of THEODORE SPENCER,
Taken at 350 South Main, Suite 300,
Ann Arbor, Michigan,
Commencing at 10:16 a.m.,
Friday, August 17, 2007,
Before Marie M. Puchel, RMR, CRR, CSR-0212.

APPEARANCES:
MARK D. ROSENBAUM
ACLU Foundation of Southern California
1616 Beverly Boulevard
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Appearing on behalf of the Plaintiffs.

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[Page 3]
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LEONARD M. NIEHOFF
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Appearing on behalf of the Defendants, Regents of University of Michigan.

MARGARET A. NELSON
Michigan Department of Attorney General

525 West Ottawa Street
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(517) 373-6434
Appearing on behalf of the Respondent Cox.

[Page 4]
J. D. TALIAFERRO (Via Telephone)
Kaye Scholer
901 15th Street Northwest
Washington, D.C. 20005
(202) 682-3664
Appearing on behalf of the Intervener Alex Russell.

ALSO PRESENT:
Donna Stern
Maya Kobersy

[Page 5]
Ann Arbor, Michigan
Friday, August 17, 2007
10:16 a.m.

THEODORE SPENCER,

was thereupon called as a witness herein, and after having first been duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. ROSENBAUM:

Q. Okay. Can you state your full name for the record.

A. Theodore Spencer.

MR. ROSENBAUM: Mr. Sauer, can you hear okay?

MR. TALIAFERRO: Yes.

MR. NIEHOFF: Is this J.D. on the phone?

MR. TALIAFERRO: It is.

MR. NIEHOFF: This is J.D. -- how do you pronounce your last name?

MR. TALIAFERRO: Taliaferro.

BY MR. ROSENBAUM:

Q. Mr. Spencer, how are you?

A. Fine.

Q. How are you doing today?

[Page 6]
A. I'm all right.

Q. Now, you're under oath, so I want to ask you, recognizing the fact that you're under oath, who is going to win the Michigan-Ohio State game?

MR. NIEHOFF: Objection. Calls for speculation.

THE WITNESS: I am certain that Michigan will win this year.

MS. NELSON: Especially since they're ranked preseason No. 1 in the Big 10.

THE WITNESS: But more than that, we owe Ohio State something. They beat us.

MS. NELSON: Barely.

BY MR. ROSENBAUM:

Q. Mr. Spencer, you've been deposed before?

A. Yes.

Q. And you discussed the procedures with your counsel?

A. Yes, I have.

Q. Do you have any questions you want to ask about how we're going to be proceeding?

A. Not at this point.

Q. At any time you need a break --

MR. NIEHOFF: Do you want water or coffee?

THE WITNESS: No, I'm just clearing my throat. Thank you.

[Page 7]
BY MR. ROSENBAUM:

Q. Any time you need a break, just let me know; we'll be glad to accommodate that. And if my questions aren't clear, you want something repeated, just let me know; I'll be happy to accommodate you on that, too. Are you saying yes?

A. Yes. I'm saying yes. Sorry.

Q. Mr. Spencer, what's your present position?

A. I am the Vice Provost and Executive Director of Admissions at the University of Michigan, Associate Vice Provost.

Q. I was negligent in requesting a vitae. Do you have a resume or vitae?

A. I do.

Q. Is it about a thousand pages long?

A. Not quite.

MR. ROSENBAUM: Can we get that at some point?

MR. NIEHOFF: Not a problem. Mark, I should say that just as a matter of practice, for my own convenience, if parties ask for documents during the deposition. I ask to send me just a reminder e-mail or letter just so that I have their understanding of what they've asked for, as well. You don't need to wait for a transcript. But I just never trust my own

[Page 8]
notes, so I ask that people send me a list of whatever they're asking for.

MR. ROSENBAUM: Okay. That's fine.

BY MR. ROSENBAUM:

Q. And recognizing the fact, Mr. Spencer, that we're going to get a copy of your vitae, you don't have to go into excruciating detail, but can you just briefly sketch out for us your education background?

A. Yes. I attended Melrose High School in Memphis, Tennessee. Graduated from there in 1959. Attended Tennessee State University in Nashville, Tennessee. Graduated from there around 1963. Not around, but in 1963. And I was commissioned as a lieutenant in the United States Air Force and completed my master's degree while on active duty from Pepperdine around 1981.

Q. And the master's was in --

A. Sociology. The BS was in political science.

Q. Okay. And can you briefly sketch out for us your employment background?

A. Well, as I stated, my first real job was as an officer in the United States Air Force. And I was on active duty for about 4 1/2 years. Got out for a period. I worked for IBM in the city of Detroit, and then returned to the military after about three years, and

[Page 9]
went on active duty, and spent a great deal of time at the Air Force Academy in Colorado Springs from about 1976 until 1989, when I arrived at the University of Michigan.

Q. What was your rank?

A. Lieutenant Colonel.

Q. So you came from the Air Force Academy to the University of Michigan?

A. I did.

Q. And what was your -- when was that?

A. 1989.

Q. What was your first position with the University of Michigan?

A. I was the associate director for marketing and recruiting.

Q. And again, just very briefly, what do those duties and responsibilities entail?

A. Pretty much identifying students, prospective students, admitting them to the University of Michigan, encouraging them to enroll at the University of Michigan. And then again making certain that I -- we had a presence in all of the state high schools. And because we're a national university, and most of the high schools around the country, as well as international, and to project the image of Michigan as

[Page 10]
being a warm, welcoming, large but personal university.

MR. NIEHOFF: Mark, if I can interject for just one second, there are two things. One is I just would like to ask the witness to let whoever is asking the questions complete their questions before he begins to

answer: it will make for a clearer record and it's easier for the court reporter.

I also at the beginning forgot to mention that this deposition, consistent with how we've approached all the other depositions, should be marked as confidential, will be treated as confidential, as if there were a protective order in place, until we get a protective order in place.

That's the agreement of counsel with respect to all prior depositions. The same agreement I think applies here, and I simply forgot to mention it, but -- so I apologize for the interruption.

MR. ROSENBAUM: That's no problem.

BY MR. ROSENBAUM:

Q. Mr. Spencer, you said one of your charges was to assure that the University of Michigan had a presence in state high schools throughout Michigan; is that right?

A. That's correct.

[Page 11]
Q. So that's nothing new. That is, Michigan has always attempted to reach out to students in high schools throughout the state of Michigan; is that right?

A. That is correct.

Q. And that would include inner-city schools?

A. It certainly would.

Q. And that would include inner-city schools in Detroit.

A. Yes, it would.

Q. And have you made that a matter of particular attention to -- to you, to make sure that Michigan was well-represented and well-understood in those high schools?

A. I have.

MR. NIEHOFF: You mean -- just so the witness understands the question, you mean has he made it a matter to him personally?

MR. ROSENBAUM: Yes.

THE WITNESS: Yes. The answer is yes.

BY MR. ROSENBAUM:

Q. And that goes all the way back to 1989?

A. It does.

Q. And can you describe for us, please, what that means, having a presence in high schools?

A. Well, one of the things it means is that we – we established an office in the city of Detroit. And

[Page 12]
what we try to do is again to identify young people that might be interested in the University of Michigan, or in some cases identifying students who have the potential to be students at the University of Michigan, and to

design programs and invite them and their families to the events that the University of Michigan sponsors.

Q. So as far as you know, there are not pockets of high schools in Michigan that the university has not already reached out to and made its welcoming message known; is that correct?

A. As far as I know, I think that's -- that is generally true, yes.

Q. And if I use the phrase underrepresented minorities, is that a phrase you're comfortable with?

A. I am comfortable with it.

Q. So it has been the track record of this university, since at least 1985, that you're familiar with, to reach out to underrepresented minorities throughout the state of Michigan?

A. Since 1989, when I arrived, that has been absolutely the goal, one of the goals.

Q. Okay. And does that also extend across the country, to high schools where there are significant numbers of underrepresented minorities?

[Page 13]
A. It does.

Q. Why is that important, Mr. Spencer?

A. Well, the number of minority students around the country who, for whatever reasons, apply to colleges is relatively small. And to identify students who are applying to selective colleges makes the job somewhat

more difficult, given all the kinds of programs and the types of things the students tend to be involved with, to be considered in a holistic review process.

Q. Again, considering Mr. Niehoff's qualifications a few minutes ago, you made that a matter of your own personal concern, that those kids get reached out to by the university; is that right?

A. I have.

Q. And when you say "selective schools," what do you mean by that?

A. Well, I mean the student -- schools that have more applications than they have room and places to admit the students.

Q. And is the University of Michigan -- do you consider that to be a selective school, by your definition?

A. I do.

Q. Okay. Now, after you took the position in 1989, did you subsequently get another position at the university?

[Page 14]
A. I did. I became the Director of Undergraduate Admissions.

Q. When was that?

A. In 19 -- I think 1991 or '92.

Q. And you served in that since that time?

A. I have served in that since that time.

Q. Does being Vice Provost, does that entail additional duties and responsibilities to being Director of Admissions?

A. It does.

Q. And can you briefly tell me what those are?

A. It involves more contact with people within the university at the level of decision making, and also with being -- playing a more -- a different role in the enrollment management process at the university.

Q. And have you been involved in the development of policies and practices for admissions?

A. I have.

Q. And again, I'll come back to this, but generally can you tell me what your involvement has been?

A. Well, as the director, I oversee all of the kinds of guidelines that the colleges and universities furnish us, asking for the types of students that they would like to have enrolled in each of the schools and colleges. We develop programs that will identify

[Page 15]
those students and programs that will bring them to campus and encourage them to enroll.

Q. Incidentally, I was lax on this, when you speak of admissions, you're talking about undergraduate admissions?

A. Yes, I am.

Q. And so just so we know what the universe of that is, what is the universe of undergraduate admissions here at the University of Michigan?

A. Well, it includes admitting students to six different colleges at the university. And it includes, again, making certain that we come within a reasonable range of the targets that each of those colleges and -- schools and colleges would like to have of students entering each year.

Q. Let's name those six colleges.

A. LS&A, engineering, art, music, kinesiology. Who did I forget? How many is that?

Q. That's five.

A. Did I say nursing? Nursing.

Q. LS&A, English, art, music, kinesiology and nursing; is that right?

MR. NIEHOFF: I think you said English and he meant engineering.

MR. ROSENBAUM: Okay.

[Page 16]
BY MR. ROSENBAUM:

Q. And the largest by far is LS&A?

A. It is.

Q. Do you know how many students?

A. That enroll each year?

Q. Yes.

A. Approximately 35-, 3600.

Q. And do you know how many applications you typically receive, if there is a typical number?

A. Typically in the range of -- is this just LS&A, or for the entire university?

Q. Do both, if you're comfortable with that.

A. The entire university last year was 27,000 and some number.

MR. NIEHOFF: Just by way of clarification, by "entire university" you mean the undergraduate?

THE WITNESS: The undergraduate programs I just mentioned, yes. LS&A had the largest portion.

And I'm not sure what that number was, but I think it was somewhere around 17-, 18,000.

BY MR. ROSENBAUM:

Q. Okay. As Director of Admissions, to whom do you report?

A. I report to both the Senior Vice Provost, Lester Monts, as well as to the Provost, Theresa Sullivan.

[Page 17]
Q. And Monts is M-O-N-T-S?

A. M-O-N-T-S, yes.

Q. And you have a staff yourself?

A. I do.

Q. How large a staff is that?

A. Approximately 90 people, not including students who give tours.

Q. Help me understand this, Mr. Spencer. After Grutter and Gratz came down, your office began to employ more people in the admissi· ns process; is that right?

A. We did. We certainly did.

Q. So when you say "staff," does it include, say, additional readers that were involved?

A. It does.

Q. Can you give me a sense of what the jump in numbers was like after Grutter and Gratz came down?

A. Well, we went to a holistic review process, which involves multiple reviews. And so we hired about 16 -- I think the number now is 18 additional readers and three additional counselors. And I'm not certain, but I think five additional people in the processing area.

Q. Okay. I'm going to come back to that. Do you have an assistant or assistants who report directly to you?

A. In our office structure, we have -- I have two

[Page 18]
associate directors, one who is responsible for marketing and for recruiting, and the other who is responsible for processing.

Q. And who are they?

A. Well, up until this week, it was Chris Lucier as the marketing person, and Sally Lindsley as the processing person. Chris is now the marketing director and -- Vice Provost at Vermont, and so today that person is Erica Sanders.

Q. And could you spell Chris Lucier's --

A. L-U-C-I-E-R.

Q. Okay. All right. And marketing recruiting, what does that mean?

A. Well, it's very similar to the job that I had when I first came to the office, that I described earlier. But it entails all the kinds of programs that, again, will identify students and to recruit them and then encourage them to enroll at the University of Michigan.

Q. Okay. And do you meet regularly with your staff?

A. I do.

Q. About how frequently?

A. Well, with the senior staff, it -- schedule meetings once a week; but we're all in a very tight area, so they're practically daily meetings, in many cases.

[Page 19]
Q. And you talk to your staff about methods of effectively marketing and recruiting the university?

A. I do, but so do the directors and the assistant directors. And we have a person who is primarily responsible for training the staff each year on the process of admitting students.

Q. Okay. Now, in your -- help me understand this. Are there professional associations of admissions directors?

A. There are several, yes, there are.

Q. Are you members of any of those?

A. I am a member of several, yes.

Q. I don't want you to be modest here, Mr. Spencer. Is it fair to characterize you as the dean of admissions officers in this country?

A. I think that would be somewhat of an overstatement, but I'm certainly one of the senior admissions officers in this country; therefore, I guess in many ways I've -- I'm looked to for information and advice and often have attended universities to evaluate many of their programs.

Q. Which universities have you served in that capacity?

A. University of Virginia, UCLA. Gosh. I think Nebraska, Texas. There are a couple others; I just can't recall.

[Page 20]
Q. Have you ever served as an officer in any of these associations?

A. Locally I have been the person that was a part of the government relations chairman for that organization.

Q. And what is that organization?

A. That's the Michigan Association of College Admissions.

Q. Okay. Any other professional associations?

A. I have been a trustee. I was a trustee until recently for the College Board, which is the testing agency in New York.

Q. And what did that involve, being a trustee?

A. Well, very similar to any role where you provide advice to the president and CEO of the College Board about the programs and information that they would like us to give them input on.

Q. Were there particular areas about which you gave advice to the College Board as a trustee?

A. I was involved with several programs, one involving diversity, one involving the new test that involved writing.

Q. The new SAT?

A. The new SAT that involved writing. Those were the two primary ones.

Q. And over what period of time did you give advice to the College Board on the subject matter of diversity?

[Page 21]
A. Over a four-year period.

Q. And that period was roughly --

A. Let's see. This is '07, so I guess it started about 19 -- I'm sorry, about 2002. 2003. 2003 I think it was, 2003 until last year.

Q. Okay.

A. 2007, yeah.

Q. Okay.

A. This year.

Q. And do you regularly attend conferences of admissions officers?

A. I do.

Q. And the university here has convened such conferences; is that right?

A. We have, yes, we have.

Q. Okay. And have you spoken at such gatherings?

A. I have, yes.

Q. And have you spoke on the subject matter of diversity?

A. Yes, I have.

Q. And techniques and methods for recruiting underrepresented minorities?

A. I certainly have.

Q. Again, I don't want you to be modest here, but would you regard yourself as one of the leading experts in the country as to methods and methodologies of

[Page 22]
recruiting underrepresented minorities to universities?

MR. NIEHOFF: I just want to interpose an objection. The witness can provide his judgment about his level of expertise, but he's not answering a question about whether he complies with the federal rules and requirements for what constitutes an expert.

MR. ROSENBAUM: I understand that. I just mean lay terms.

THE WITNESS: I think generally that's -- generally that might be true.

BY MR. ROSENBAUM:

Q. Okay. Have you received any honors or awards?

A. I have received several honors and awards as being a spokesperson on diversity from the College Board, from an article in work that I did about admissions directors being change agents. I'm a part of the

Harvard Institute faculty, summer staff. Well, there are some others, yeah, I can't remember them all right now.

Q. You're being modest. What's the Harvard Institute?

A. It is a place, it is -- actually, it is a program in which both college people in the admissions profession and high school folks, who are here in high school counseling, attend one-week programs, several days

[Page 23]
program, in which other admissions directors throughout the country talk to them about methods of recruiting and talk to them about things dealing with financial aid, and any number of issues that both the high school people and the college people would be -- might find useful in their day-to-day operations.

Q. And that includes strategies for admissions and financial resources involving underrepresented minorities?

A. It does.

Q. And have you spoken at the Harvard Institute on those subject matters?

A. I have, yes.

Q. And how long have you been working with the Harvard Institute?

A. I would say about eight years, perhaps.

Q. Okay. And do you have -- do you hold a particular position with respect to the Institute?

A. No. No.

Q. But you're a featured speaker?

A. I'm one of the faculty members, as they call it.

Q. How many faculty members are there?

A. There are about 10.

Q. Okay. And you also used the phrase a few moments ago, "agent of change of admission directors."

[Page 24]
A. Yes.

Q. What does that mean?

A. Just in terms of the kind of work we do in admissions. The article had to do with how we in many cases look at -- we're given a task by our universities to go out and meet the missions of those universities. And it's important for us to develop techniques that will make those kind of things happen, and how we do that in encouraging students to come to our campus, and making them -- making them aware of worthwhile experiences once they attend is one of the things that I think is -- that we in the admissions profession have a responsibility for, and we take it very seriously. And that was what the general text of the article and discussion was about, how we go about doing those things.

Q. That's what you love about your job?

A. That's what I love about the job, yes.

Q. And because you're passionate about this, you have actively investigated all methods to determine what is the most effective way, for example, to recruit underrepresented minorities to these universities?

A. I think to date we have just -- we have exhausted most of the things that we think that we need to look at for many of those kinds of -- yes, for that purpose.

[Page 25]
Q. Okay. I want to move, Mr. Spencer, if I can, and direct your attention to the period of time post-Grutter and post-Gratz. Okay?

A. Yes.

Q. You testified in the Grutter case; is that right?

A. I did.

Q. And --

A. Well, should I say testified or was deposed?

MR. NIEHOFF: And actually, I believe he would have been deposed in the Gratz case.

MR. ROSENBAUM: I'm sorry. Of course that's right.

THE WITNESS: Yes. Yes.

MR. ROSENBAUM: But with the exception of that, I got the question exactly right.

BY MR. ROSENBAUM:

Q. You were deposed in Gratz; is that right?

A. Yes.

Q. And then when the Supreme Court decision came down, I take it that you read the decision, or some summaries of the decision; is that right?

A. I did, yes.

Q. And after that decision came down, the University of Michigan undertook certain changes in its admission policies and practices to become compliant with the

[Page 26]
Supreme Court decision; is that correct?

A. That's true.

Q. You took that very seriously?

A. We did.

Q. And help me understand a time frame here. Those changes began to occur in or about August, 2003; is that right?

A. That is correct.

Q. I take it there had been planning in advance of that, some planning in advance of that.

A. I think it's true to say that we are -- we're prepared for a lot of different -- we were in a position to go in many different directions. We were not certain what

the decision was going to be, so we were looking at several approaches to admission, depending on which way the decision went.

Q. Okay. And then you went about the business of developing policies and practices to become compliant with the June 23 ruling in Gratz and in Grutter; is that correct?

A. That is correct.

MR. NIEHOFF: Let me just interpose a cautionary note to the witness. It's certainly fine, Mark, for you to ask him about what was done and how they did it, and so forth.

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I am assuming that in the course of this process, there were discussions with counsel – with the General Counsel's Office, and I would just remind the witness that as he describes actions that were taken, he should not testify to the content of any conversations with the General Counsel's Office.

THE WITNESS: Oh, yes. Yes.

BY MR. ROSENBAUM:

Q. And I appreciate that. Let me say, if I'm not careful, I'm not -- I'm not ever interested in any contents or discussions you had with Mr. Niehoff or any other counsel for the university, okay?

All right. And then the post-Gratz process, the first time that went into effect, am I right that that

was for students applying for winter, summer, spring and fall 2004 admissions?

A. Yes.

Q. I'm not sure if that's --

A. Well, it would be --

Q. Fall 2004?

A. Yes.

Q. Fall 2004, and then 2005 afterwards?

A. Well, fall 2004. And, of course, there's winter, as you correctly stated, spring and summer. And then 2005 would be the next year, which would be the fall

[Page 28]
class entering that following year.

Q. Okay.

A. All terms, as we call them.

Q. All right. Now, help me understand some of the changes that your office began to design and implement. One of the areas was with respect to initial evaluation of the application; is that right?

A. That is true.

Q. And help me understand what happened there. What were the changes that took place?

A. Well, the primary change was that we went from a single evaluation to a multiple evaluation. And what that in summary really means is that every application is reviewed at least twice. And so the readers that we hired, the 16, 18 readers that we hired, will review an application and then they will write remarks and evaluation of those -- of that particular file.

And then it moves to the counselor who is responsible for that particular territory or high school. And then they do what we call a blind read; in other words, they have no idea what the first person wrote. And then they make their evaluation of the student, and then they will put their evaluation on -- in the computer.

The third read then comes about in the event

[Page 29]
that there are significant gaps between reader No. 1 and reader No. 2. And that third read is then generally done by people who are part of the management staff, our assistant directors and our associate directors and myself. I should also add that the third read may also include faculty members, both at LS&A and engineering, who will also look at those records in some cases.

Q. And the readers you're talking about that you hired, those included former educators; is that right?

A. There was a great pool of folks who acquired the positions. Many were former educators. Some were people who worked at the University of Michigan, who retired. We had civic leaders who were also involved in that, who had recently retired. So it was a very broad

group of folks who felt as though -- and did do a very good job working in the office.

Q. And what criteria did you apply in deciding who should be hired to be readers? How did you decide who to choose?

A. Well, we did want to look at some people who had had some background in education, either at the K through 12 level or high school, or had some involvement with students and parents in programs, that might give us some idea that this person might -- these people might

[Page 30]
be better able to very quickly catch onto what the process of admissions is.

And so we really interviewed each one. And then as a result of the interview, that's how we sort of made our final decision.

Q. And then these readers, they received extensive and ongoing training?

A. They did, and they do, yes.

Q. And can you briefly describe for us what that training entails?

A. Well, the training entails everything from, first of all, looking at the guidelines that each of the schools and colleges provide. And it also gives them an opportunity to do case studies on students from perhaps the previous year, to sort of make certain that everyone who reviews our files, if they really are

looking at things in a very similar way, and that they're fairly consistent in what they view as being strengths and weaknesses of the students in our files.

Q. In fact, the office prepares packets of sample applications and then works with the readers to say look, this is how we scored it and this is how we evaluate it, for purposes of consistency; is that right?

A. For purposes of consistency, but not telling them this

[Page 31]
is how you have to view every case. It is absolutely for purpose of consistencies to say are you considering the right kind of things in evaluating each student.

Q. And then does your office have methods by which the work of these readers are supervised, to make sure that they are in keeping -- they're acting in keeping with your basic principles and policies?

A. We do. We meet with them monthly, in some cases weekly, to go over in some cases individually how well they're doing with respect to how they're rating students. And we train them and -- on an ongoing way to understand the nuances of reviewing applications and the context in which they should be reviewed.

Q. And I take it that one part of this training was to familiarize the readers and the counselors with the understanding of what the Supreme Court was looking for in the area of race and ethnicity; is that right?

A. That is very true.

Q. And in the -- in the admissions process, Mr. Spencer, was there a role that was defined for the faculty of schools and colleges to determine what the criteria for admissions would be?

A. Yes.

Q. And what was that about?

[Page 32]
A. Well, as I mentioned earlier, as a part of the multiple review process, very often in a third read, which would involve the management team or in many cases faculty, there may be a reason why a particular student we might feel would be -- would be better if the faculty reviewed this student and to make a decisions as to whether or not they thought the student would be a good fit for their particular unit.

Q. And you actively solicited input from the faculty and from the different colleges as to what was important in the admissions process for admitting students to those colleges?

A. We have written guidelines from each of the colleges that describe the kinds of things that they are, in fact, l king for with students who come to – who enroll at their particular units.

Q. At this period of time, you were very interested in soliciting input from those schools as to what their needs were and what they understood their mission to be as a college; is that right?

A. At that particular time, yes, we were really interested in that.

Q. And why is that?

A. Well, of course, it was right after the decision, and so we wanted to make certain that they were, one,

[Page 33]
abiding by the guidelines of the decision, but also give us some information on the types of students they would like to have enrolled at the university.

Q. Okay. Now, you correct me if I'm wrong here, Mr. Spencer, but I take it that the most important criteria at this time in considering a student for admission would be characterized as academic factors; is that right?

MR. NIEHOFF: I'm sorry, Mark, when you say "at this time," at what time do you mean?

MR. ROSENBAUM: Post-Grutter -- Gratz and Grutter.

MR. WASHINGTON: And before Proposal 2 you're talking about?

MR. ROSENBAUM: Yes.

THE WITNESS: Well, you know, context and grade point averages, test scores, and student involvement in activities, their essays, counselor recommendations certainly would be part of that examination.

BY MR. ROSENBAUM:

Q. Okay. So let's break that down. When we're talking about academic factors, that includes a student's high school grades?

A. It does.

[Page 34]
Q. And the quality of his or her high school curriculum?

A. The quality of curriculum, yes.

Q. And the quality of their high school, generally?

A. Quality of their high school, generally.

Q. And the competitiveness of their high school?

A. Yes.

Q. And their scores on the standardized tests?

A. Yes.

Q. And you also mentioned essays that they wrote.

A. Yes. But scores on standardized testing in the context of that school, as well as in the context of the university. And yes, essays, as well.

Q. Okay. And then there also is a range of -- and if you're not comfortable with this phrase, you correct me, of non-academic factors?

A. Yes, there are non-academic factors.

Q. And those -- I'm going to give you some and you tell me if I've got these right. One set of non-academic factors would be personal interest and achievements?

A. Yes.

Q. Another would be geography?

A. Yes.

Q. Another would be alumni connections?

A. Yes.

Q. Another would be family income?

[Page 35]
A. Yes.

Q. Another would be family educational background?

A. Yes.

Q. Another would be race and ethnicity?

A. Prior -- prior to 2003, the answer is yes.

Q. I'm sorry. This is pre-Prop 2 but post-Gratz and Grutter.

A. Right.

Q. And unless I say differently, that's the range I'm using for all my questions.

A. Okay.

Q. Okay?

A. I understand. Thank you.

Q. Am I leaving out any non-academic factors?

A. Well, there are several others that are not there, that -- overcoming obstacles, work experience, any extraordinary awards, both inside the classroom and outside the classroom. There are really over 50 to 80 different categories that we look at in evaluating each student. And the largest portion of those might -- would fall into the category of perhaps the non-academic and cognitive kinds of things. And so if I had my list in front of me, I could go through each of those and let you know which ones they were.

Q. All right. And one of the reasons that these factors

[Page 36]
were considered was to help demonstrate the ways in which an applicant might contribute to the overall diversity of the student body?

A. And be successful, yes.

Q. Let me -- I'm going to have marked as Exhibit 1 to your deposition, Mr. Spencer, it's a three-page document. On the front page, it says "University of Michigan Record." It appears to be dated September 2, 2003. It's been Bates stamped UM 01223738 and 39. And could I ask the reporter to please mark this and hand it to Mr. Spencer.

MR. TALIAFERRO: Mark, would you mind reading the Bates numbers slower?

MR. ROSENBAUM: Sure. It's UM -- they're all going to be UM, and it's 01223738 and 39.

MR. TALIAFERRO: Thank you.

MARKED BY THE REPORTER:

DEPOSITION EXHIBIT NUMBER 1

10:55 a.m.

BY MR. ROSENBAUM:

Q. Have you had a chance, Mr. Spencer --

A. I have.

Q. I just need to finish the question. Have you had a chance to review what's been marked as Exhibit 1?

A. I have.

[Page 37]
Q. Okay. And have you seen this document previously?

A. I probably have, yes. I probably have. I'm certain I have.

Q. The University Record Online, what is that?

A. That is the university's official, I guess is the best way to describe it, newspaper.

Q. Okay. And you just read this over?

A. I did.

Q. Is there any statement in here that you disagreed with?

A. No, not -- not really. The only one that says – that we're looking primarily as educators, for readers, certainly was a little bit broader; but other than that, that's the only one that was a little different than what I said earlier.

Q. To the best of your knowledge, this is an accurate description of the new undergraduate admissions policy?

A. Yes, it is.

Q. And at least twice in this document, to my read, Mr. Spencer, the word "holistic" or "holistically" is mentioned. It's on the second paragraph, and it is in the second to last paragraph on Bates No. 12237. Do you see those?

A. I do.

[Page 38]
Q. Okay. And you previously in this deposition used the word holistic.

A. Sure.

Q. Tell me what your understanding of that word is.

A. Well, after the decision in Grutter, with the law school, we had a great road map of what a holistic review process should look like. And so we really began with that document and that process of looking at many, many different factors in reviewing the

student's application and doing it in a multiple review process.

And so holistic means that the decisions are not just based on grades and test scores, it means that it's not just based on perhaps being an alum or any one particular factor, race or anything else, but rather on the composite review of all the information that the student provides, and then to come up with a recommendation to whether or not we think this student would be a good fit for the university.

Q. And that -- my understanding, Mr. Spencer, is that marked a change in policies and practices from pre-Gratz to post-Gratz; is that right?

A. Yes. Yes. Generally speaking, that's true.

Q. Okay. And directing your attention, sir, to the second paragraph, on 12237 -- and again, you feel free

[Page 39]
to read as much or as little as you like -- the Court said that, "Achieving the educational benefits of diversity is a compelling government interest, and that the universities may consider race as one of many factors in admissions, provided that they do so in a manner that is flexible, holistic and individualized." Do you see that sentence?

A. I do.

Q. That's what you've just been telling me?

A. That is exactly right, correct.

Q. And when you say the phrase "compelling government interests," I'm not asking you to speak as a lawyer here -- in fact, I will never ask you to speak as a lawyer, something my son asks me to do all the time -- but what is your understanding of the phrase "compelling government interest"?

A. Well, I think in -- my personal understanding of it is that it is -- it benefits the -- not only the University of Michigan, but in fact the country, to have a very diverse enrollment in most of the colleges in this country. And when you can achieve that sort of diversity, that it does benefit the military, it benefits the private industry, it benefits the government, it benefits higher education, K through 12, as well.

[Page 40]
Q. And you agree with that; is that right?

A. I agree with that, yes.

Q. Ever see any evidence in your life to disagree with that?

A. I have not.

Q. Okay. And again directing your attention back to this period of time, that definition of diversity included race and ethnicity; is that right?

A. It does.

MS. NELSON: Sir, what definition of diversity are you referring to?

MR. ROSENBAUM: What Mr. Spencer just talked about in terms of compelling government interests.

BY MR. ROSENBAUM:

Q. Okay. Mr. Spencer, I'm going to have marked as Exhibit 2 to your deposition a seven-page document. J.D., the Bates numbers are UM 012210, 12211, 12212, 12213, 14, 15 and 16. And I'm going to hand what I want marked as Exhibit 2 to the reporter and ask her to mark it and put it in front of the witness, please.

MARKED BY THE REPORTER:

DEPOSITION EXHIBIT NUMBER 2

11:03 a.m.

BY MR. ROSENBAUM:

Q. I'm going to ask you, Mr. Spencer, to take a look at

[Page 41]
this document and take as much time as you need.

MR. NIEHOFF: Mark, it might help the witness in deciding how closely to read this if we just had some idea, are you just going to ask him to authenticate this or are you going to ask more detailed questions about the document?

MR. ROSENBAUM: I'm going to ask him to do exactly what you said, to express his familiarity and his general agreement with the overall document. And then I'll ask him a handful of specific questions under race, and ethnicity, and socioeconomic educational background.

MR. NIEHOFF: Take your time.

BY MR. ROSENBAUM:

Q. Okay. You know, Mr. Spencer. I'm going to pull a fast one on you here. Can you go back to Exhibit 1 for just a minute? And on Bates page 12238, do you have that in front of you?

A. I do.

Q. Right before it says, "More stories," three paragraphs up there is a statement, "'We're changing things and they'll change more,' Courant said, indicating that the new process will be subject to regular review and evaluation over the coming months and years." Do you see that?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, et al,
Plaintiffs, Case No. 06-15024
vs. Hon. David M. Lawson
JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF THE UNIVERSITY OF MICHIGAN, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES of any other public college of university, community college or school district,
Defendants.

CHASE CANTRELL, et al, Case No. 06-15637
Plaintiffs Hon. David M. Lawson
vs.
JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan,
Defendant.

EXHIBIT 5 TO AUGUST 17, 2007 DEPOSITION OF THEODORE SPENCER

Office of Undergraduate Admissions

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COLLEGE OF LITERATURE, SCIENCE AND THE ARTS GUIDELINES FOR ALL TERMS OF 2007

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I. ADMISSION OF FRESHMAN

A. DEFINITION OF A FRESHMAN APPLICANT: FTIAC (first time at any college).

A freshman is defined as an entering student who has never attended any college following high school graduation. This definition includes students enrolling in the fall term who take college classes as guest students who enter with advanced standing by earning college credit though Advanced Placement Examinations or courses taken at a college prior to high school graduation.

All other students will be designated as transfer students (Type 4) with Level (1, 2, 3, 4) being determined by the about of transferable credit projected to the term of entry, e.g. Level 1, 1-24 credits. This will include those freshman level students who attend college in the fall and apply for admission to LSA for the winter semester. They will be coded as transfer students (Type 4) at the freshman level (Level 1) and be evaluated according to transfer guidelines for Winter *2007.*

B.OVERVIEW OF ADMISSION POLICIES

1. TERMS OF ADMISSION

Admission to LSA will be highly selective for all four semesters of the academic calendar. Admission is granted to applicants with very competitive credentials from early fall to October 1 for winter semester, and until February 1 for spring, summer, and fall semesters.

Winter freshman applicants who meet competitive criteria based on the 2007 guidelines, or who were previously admitted, did not accept admission, and did not enroll in another institution for the fall term, will be admitted through the October 1 equal consideration deadline. * All other applicants with lower credentials will be denied admission. There will be no deferred group for the winter term. (Note: It is necessary to delay for a final, official high school transcript if it has not been previously submitted to receive confirmation of h.s. graduation date and final senior grades. A decline in the senior year grades is cause to deny admission even if the student was admissible based on 10th and 11th year academic recalculated GPA.)

*Students with the same credentials who do enroll in another college for the fall semester will be coded as transfer students

and admitted if there was no decline in senior year grades.

Spring admissions standards require the same competitive criteria as for all other terms. Applications will be accepted through the February 1 equal consideration deadline. Students who do not meet the competitive guidelines will be denied admission. There will be no deferred pool for spring semester.

The summer and fall group of applicants whose credentials fall in the range designated as qualified/non-competitive will be deferred for a second review following the February 1 equal consideration deadline.

Summer and fall applicants whose credentials fall below the guidelines set for deferred applicants will be denied admission on the first review.

2. ASSIGNED EVALUATOR

Each high school is assigned to a counselor who will read all the LSA applications from the school. An Evaluation Recommendation will be determined based on the student's accomplishments and the factors on the Freshman Rating Sheet.

3. GENERAL REQUIREMENTS

a. High School Graduation

(1) *All* freshman students are required to earn a high school diploma (or GED equivalent for older students) prior to enrolling in the College.

(2) Exceptions to the graduation requirement may be made for extremely gifted and brilliant students who meet YSEP standards and are admitted under those conditions. (Look in Table of Contents for YSEP location in guidelines)

(3) *Home schooled students whose grades do not reflect a measure of accomplishment from participation in a typical classroom with other students will have to provide additional evidence of preparation such as earning scores on specific SAT Subject exams at a level which will assure they are as competitively admissible as students who attend public or private high schools (usually scores in the 600 or higher range). Home schooled students will be assigned to OUA liaison Sally Linsdley.*

b. Course Preparation. All students are expected to take a demanding college preparatory curriculum in the 9th through 12th grades. Beginning with the freshman class entering in the Summer or Fall of 2000, the following minimum preparation is required for all students applying for admission to LSA: English – 4 years, foreign language – years (4 years recommended), mathematics – 3 years (through intermediate algebra), science – 3 years

(including biology), history and social sciences – 3 years, and 3 additional academic courses to earn a total of 18 academic units of study (20 is recommended and preferred).

c. Grade-Point Average. Grades earned in academic courses taken during the sophomore and junior years will be used in the first review of the application. Senior fall semester grades will be a factor for students who are deferred for March review.

d. ACT/SAT scores.

(1)All freshman applicants are required to have their ACT/SAT scores sent directly from the testing agencies (composite ACT/total SAT).

(2) Beginning summer 2006, freshman applicants will be required to submit the results from the new SAT with the writing section or the ACT with optional writing test for admissions purposes.

(3) The highest set of scores will be used to make the admission decision. For new SAT, the total of the critical reading (formerly verbal) and math sections will be used.

(4) A report of applicants with new scores that reflect a higher test range will be run weekly after the receipt of Fall test tapes. Counselors may update the

Evaluation Recommendation on the Freshman Rating Sheet to reflect the increase in test scores.

4. EVALUATION RECOMMENDATION

Admission is based on several factors that combine to produce a freshman class that provides a mixture of attributes and characteristics valued by the University. The process for building the class is found in the Guidelines for the Evaluation Procedure Freshman Undergraduate Admissions Applications for all Schools and Colleges, 2007. The guidelines are to be used to determine an evaluation recommendation which will be entered on the student's record by the reviewing counselor. This Evaluation Recommendation will be the used to select students for admission, deferral, or denial at each phase of the review process.

C. SPECIAL PROGRAMS

1. HONORS PROGRAM
http://www.lsa.umich.edu/honors/

OUA Liaison:	Sally Lindsley, Senior Associate Director sallyhl@umich.edu	936-2786
OUA Back-Ups:	Erica Sanders, Associate Director, yale@umich.edu	647-0104

	Josh Greenwald, Associate Counselor I Greenwaj@umich.edu	615-6403
Honors Program Contact:	Liina Wallin, Associate Director lmwallin@umich.edu	764-6274
	Stephen Darwall, Director John Dewey Collegiate Professor of Philosophy sdarwall@umich.edu	764-6285
	Donna Wessel Walker, Associate Director dlww@umich.edu 1330 Mason Hall. 1027	763-5853 FAX: 763-6553

a. Honors Consideration. The Honors Program reviews the files of students admitted to LSA, using a number of queries on the database to find potential candidates. The Honors Program searches for students whose admission files strongly indicate that they are well suited to an especially challenging academic program. They are looking for students who want to engage in active inquiry and who are eager for a vigorous intellectual community. They no longer publish threshold figures, although they use their former thresholds as *one* of our queries. Instead, we have published on our website the median *ranges* for SAT

(1370-1480), ACT (31-33), and HS unweighted GPA (3.8-4.0). As always, they welcome requests for review from students who wish to be considered. They also welcome recommendations from high school counselors and OUA counselors and leaders. They no longer promise that a student will hear within four weeks of admission to LSA; they do, however, commit to informing students of their decision in time for them to matriculate by May 1st.

b. Individual Referrals. If you encounter in talking to students who would like Honors to review their applications files, please have them contact the LSA Honors Program directly: honors.admissions@umich.edu. LSA Honors will ask students who request a review to send a short statement (<500 words) about why they're excited about the program, what interests them, why they're a good fit. LSA Honors will use that in conjunction with the admissions app & its wealth of narrative & information, to make decisions about these students.

International Students. Many international students have GPAs, which appear on our system as "inc." (incalculable "0.00") due to international academic experience. Honors identifies and considers international students who have 0.00 gpa's if the test scores meet the 32/1400 standard. Honors may consider international students with strong academic

backgrounds and may allow some flexibility in test score requirements for these students. Non-native speakers of English whose lower verbal scores cause their ACT/SAT total to be below the specified 32/1400 minimum, may be given special consideration provided their academic record and TOEFL/MELAB scores are outstanding. Counselors should discuss such cases with CG and then refer internationals applicants to Honors with CG's approval. Honors will review the file via imaging.

d. How to check on Progress of an Honors Review Application.

(1) Access the Honors Checklist for the individual student to review the following information:

(2) ACONAU: Consider for Honors automatically

(3) ACONRO: Consider for Honors by student request

(4) AINVIT: Honors invitation to student

(5) AINVAC: Honors invitation accepted by student

(6) AINVDC: Honors invitation declined by student

(7) AINVNO: Not invited to Honors.

e. Transfer Students:

Transfer students should be told to contact the Honors Office directly at 647-4486. Transfer admission to the Honors Program is possible, but is handled on an individual basis by the Honors Program personnel.

2. COMPREHENSIVE STUDIES PROGRAM (CSP) http://www.lsa.umich.edu/csp/

OUS Liaison:	Tyrone Winfrey, Associate Director rwinfrey@umich.edu	647-1443 or (313) 872-7608
OUA Backups:	Lauren Rice, Admissions Counselor I ricela@umich.edu	647-7869 or (313) 872-7608
	Makeda Turner, Admissions Counselor I mksander@umich.edu	647-1452 or (313) 872-7608
	Katrina Williams, Admissions Counselor I katwill@umich.edu	647-5684
CSP Contact:	William (Nick) Collins, Director wcollins@umich.edu 1159 Angell Hall, 1003	764-9129

Students admissible to LSA with an Evaluation Recommendation by management team member may be assigned the CSP option. Factor to weigh when determining whether a student would benefit from CSP services include disadvantaged educational background or other similar circumstances that may have affected preparation for higher education. Because space is limited, consult the student's record carefully to

determine whether CSP support services are needed for success at the university.

Counselors will update the CSP Checklist for individual students or if necessary, create and enter appropriate values. If a student requires a CSP consideration after a regular admission to LSA has been granted, and is accepted into the program by approval from the OUA Liaison, an update to the CSP must be marked up on the application folder, the Checklist created and values entered. The CSP admit letter must be ordered.

Summer Bridge Program:
The LSA or ARC Review Committee must approve all admissions to the Summer Bridge Program.

If admission to the Summer Bridge Program is approved, the term of entry must be changed to Summer prior to the final EVALUATION RECOMMENDATION being entered on the database.

All CSP and Summer Bridge Program Applicants:
In all instances where a student is admitted to CSP or the Summer Bridge Program, the CSP checklist must be updated to reflect the designation. If denied admission to the College, no CSP designation is entered.

The final EVALUATION RECOMMENDATION is only entered on the database when the application is ready for a final decision.

3. RESIDENTIAL COLLEGE

RC Contact: Lana Kanitz 647-4361
lkanitz@umich.edu

In the M-Pathways System, students who apply to the Residential College will be coded as applicants to the College of Literature Science, and the Arts, their Residential College interest will be recorded on the database. If offered admission, the Dean will mail a letter acknowledging the student's interest in the Residential College and also introduce other Michigan Learning Community opportunities within the College. The RC Admissions Coordinator (RCAC) will send RC's follow up correspondence to admitted students after the Dean's letter is sent.

All movement in and out of RC will be managed at the college level and not through OUA once an admitted student has been matriculated.

New Transfer applicants may be considered for RC is they have 40 or fewer transferable credit hours. Please direct potential RC applicants to meet with Lana Lanitz.

4. PREFERRED ADMISSION

The professional units of Architecture, Ross Business School, Dental School, School of Education, Information, Pharmacy, and Social Work participate in second, third year or graduate program preferred admission programs.

The applications are coded at the time of initial data entry based on the student's request for consideration. *The coding appears in the Application Maintenance Recruiting Data Panel.*

In early March each school or college will produce a roster, which includes all admitted students who completed preferred admission question on the application. The applications of these students can be viewed through imaging. The schools or colleges send letters in April inviting the applicants they wish to include in their Preferred Admission group. Ross Business School will manage their sophomore level preferred admission program on a rolling basis beginning in November 2005. To learn more about Preferred Admission, refer to the LSA leaflet on the LSA web page: http://www.LSA.umich.edu/saa/

D. DUAL ADMISSION

1. GENERAL POLICY

Students may select one school or college at the time of application. However, after the completion of one academic year, it is possible to enroll in a second academic career and complete degree requirements for both school and college as an internal process. This is an internal process between the units involved.

2. EXCEPTION

School of Music and LSA or Residential College (RC), (or Engineering).

a. Students may apply to both the School of Music and LSA or RC, (or Engineering) for the same semester. Their credentials will be evaluated on the qualifications specific to each academic unit. By permitting this dual degree opportunity, the School of Music is in a better position to recruit top musicians who are also solid academic students.

b. Territory counselors will review the applications for LSA or RC (or Engineering). Review of the School of Music segment of the dual application is the responsibility of the counselors assigned to the School of Music. Communication to the students regarding LSA or RC (or Engineering) will be independent of communication regarding music.

c. The applications of students who commit to be dually enrolled in two units at the time of orientation will be re-coded to reflect dual enrollment status.

E. INTERNATIONAL STUDENTS

1. STUDENTS WITH INTERNATIONAL ACADEMIC CREDENTIALS.

Designated International Team counselors have various countries assigned to them for review of freshman applications. It is

important to understand the educational pattern of that country and what would be equivalent in our system. Official copies or officially certified copies of transcripts (and official English translations in some cases), proof of English proficiency, and certification of financial support are some of the important documentation that is necessary. For non-native speakers of English, the TOEFL/MELAB/IELTS is usually given more weight than the SAT critical reading or writing scores. Scores of approximately 90-106 on the new Internet-based TOEFL (IBT), with sections scores of at least 23 in listening, reading, and speaking and at least 21 writing, are required. Total scores of approximately 250 on the Computer-based TOEFL (CBT), with section scores of at least 23, or approximately 600 on the Paper-based TOEFL (PBT) with section scores of at least 57 are required. Michigan English Language Assessment Battery (MELAB) scores of approximately 84-85 are required, with subscores of at least 80. International English Language Testing System (IELTS) scores of 7.0 with section band scores of at least 6.5 are required. Exceptions are to be discussed with CG. Applicants, in exceptional cases, can be admitted on the basis of TOEFL/MELAB/IELTS scores, but SAT or ACT scores are required to be on file before enrollment. THE 142 letter must be sent to the student to inform him/her of this requirement.

2. STUDENTS WITH MIXED (INTERNATIONAL/DOMESTIC) EDUCATIONAL EXPERIENCES.

In order to accurately access the academic performance of applicants with mixed educational backgrounds. applicants who have completed one or more semesters of high school outside the United States (US) with one or more non-US accredited schools, will be required to have official transcripts from each non-US high school submitted in addition to the current or final US high school transcript. Documentation not issued originally in English must be accompanied by an official English translation.

In cases where transcripts with grades are not normally issued, an official statement of achievement from each school/teacher for each subject studied may be required. This should serve as a measurement of the student's academic performance and achievement. and may be provided in paragraph format.

The reviewing counselor will be responsible to delay for the international documentation if it is not included in the application. Once received, the credentials are to be referred to the appropriate international counselor, check country assignment list for interpretation.

F. ADDITIONAL FACTORS AFFECTING COMPOSITION OF STUDENT BODY

1. SPECIAL INTEREST:

A limited number of students may be admitted from the following groups:

a. Provost's Discretion
b. Evans Scholars
c. Non traditional (CEW/EONS) Applicants
d. ROTC scholarship recipients
e. Tendered athletes (T-1)
f. University Employees

2. SPECIAL CONSIDERATIONS:

For a variety of reasons, a counselor may want to advocate for a student whose academic credentials fail to meet the guidelines and who is not an applicant from one of the priority groups. These special considerations may include hardship cases, students with disabilities, severe earlier life experiences that affected performance, or students with a significant imbalance of GPA and test scores. Counselors may refer such cases to the LSA committee.

G. APPLICANTS FROM UNACCREDITED SCHOOLS

An accrediting body for their particular type of education accredits most high schools. The public schools in the Michigan area, for instance, are accredited by North Central Accrediting Agency. A school can lose its accreditation for many reasons. When this

happens, it is important to learn the reason for the loss of accreditation. If it does not apply directly to the quality of teaching or classroom opportunities, it may not be an issue for admission and students will be evaluated on the same criteria as all other students. However, if the reason for loss of accreditation affects the quality of education, students applying from that school will be required to submit additional evidence of high achievement such as SAT test scores in 4 subject areas (Social Science, Natural Science, Mathematics, and Foreign Language) and the SAT writing (English) test. Furthermore, higher ACT or SAT scores may be required to compensate for the lack of solid classroom experience. Counselors should contact SL or ES in all cases.

As more incidents of unorthodox education are occurring, adaptions will be made to assess the students for their potential to be successful.

H. DISABILITIES

We need to be sensitive to those applicants with confirmed disabilities. This should include a professional evaluation done prior to application. Mateo Carrillo or Joshua Greenwald will assist in the initial review of such applicants. These are often appropriate cases to bring to a team review committee. Information can be obtained from other offices such as the Services for Students with Disabilities to aid in making a decision, but

applications are not to be referred to any other office for admissions decisions. Students with disabilities are expected to present the same qualitative credentials as other students. The team may wish to grant an exception based on all materials in the applications. Consideration will be given to special administrations of tests, adjustments made in the high school curriculum and assistance provided and used while in high school.

I. DEFERRED GROUP REVIEW

We expect to admit approximately 85% of the entering freshman class by the February 1 equal consideration date. Students, who are deferred on the initial review of their application, will receive consideration at each phase of the Mass Action process, with the possibility of admission if the threshold for admission is lowered to the final EVALUATION RECOMMENDATION level of the applicant.

Those applicants who remain in the deferred group beyond the February 1st equal consideration date will receive a final decision by mid-April. Our goal is to admit students from the deferred group with sufficient time for them to learn about financial aid packaging and to submit their enrollment deposit prior to the May 1 student reply deadline.

J. EXTENDED WAIT LIST

A reasonable number of students will be invited to keep their names on an extended wait list beyond the May 1 student reply deadline, in the event we need to add to the number of students admitted to reach target enrollments.

K. INAPPROPRIATE ACADEMIC CAREER DESIGNATION

Occasionally it appears the student has indicated a school or college for entry inconsistent with their educational goals as stated in their application. It is appropriate to contact the student to find out if they did select the right academic career. If a student is fluctuating between a professional school and LSA, it is usually a good decision to enter the professional school. If the student later finds this is not what they want to do, it is less difficult to transfer to LSA than from LSA to a professional school or college.

L. YOUNG SCHOLAR EDUCATION PROGRAM (YSEP)

LSA will consider the admission of young people who are *far beyond* the academic challenges of their high schools, have exhausted the academic courses, earned mostly A grades in all courses, have extremely high test scores, and need to have an educational environment where they can continue to grow.

To be considered for YSEP admission, he/she is invited to meet with the Honors personnel, with the OUA and Honors liaisons to LSA prior to a decision being made. Please consult with Sally Linsdley regarding process.

In most circumstances, students are better served remaining in their high schools and taking some advanced courses as dually enrolled students in a local community college or four year institution.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, et al.
Plaintiffs, Case No. 06-15024
vs. Hon. David M. Lawson
JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF THE UNIVERSITY OF MICHIGAN, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES of any other public college of university, community college or school district,
Defendants.

CHASE CANTRELL, et al, Case No. 06-15637
Plaintiffs Hon. David M. Lawson
vs.
JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan,
Defendant.

EXHIBIT 8 TO AUGUST 17, 2007 DEPOSITION OF THEODORE SPENCER

President Mary Sue Coleman
ACE Summit for
College and University Presidents and
Chancellors of Color

- ✓ June 9, 2005 - 6:30 p.m. Pendleton Room, Michigan Union
- ✓ Audience: Presidents and chancellors of 23 colleges and universities; various presenters, including former UM-Dearborn Chancellor James Renick
- ✓ Guests include David Ward, ACE president; William Harvey, vice president, ACE Center for Advancement of Racial and Ethnic Equity (CAREE)
- ✓ You will speak after dinner and will be introduced by Lester Monts

Good evening. Thank you for inviting me, and welcome to the University of Michigan. It is an honor for us to host this most important summit.

I'd like to extend a special welcome to ACE President David Ward and thank him for his leadership. Thank you, too, to Bill Harvey for his remarks and for organizing this meeting.

I know several presidents and chancellors here tonight either attended school in Michigan or held administrative jobs at one of our public universities. We have with us leaders whose stomping grounds include Michigan State, Wayne State, Eastern Michigan, Ferris State and Wayne County Community College - and I want to say, "Welcome back to Michigan."

I'd like to extend a special welcome to Jim Renick, president of North Carolina A&T State University,

who spent more than six years as chancellor of the University of Michigan-Dearborn.

I've been looking forward to this dinner because I'm eager to talk with you about the paths we are venturing down as a country, and where they might lead us in the days following the University of Michigan's long journey to the Supreme Court.

As college and university presidents, you know the critical role our institutions play in fostering diversity in this country. More often than not, students came to our campuses have grown up in segregated neighborhoods and having attended schools that were far from diverse.

It is at the University of Michigan - and other universities and colleges across the country - where the word "diversity" takes on true meaning through the complexity of our student body. With our doors open to talented students of all backgrounds, higher education - especially public higher education is the great bridge-builder.

It is a role we welcome and continually seek to improve. Yet for all that we are doing to develop graduates who are equipped to succeed in a multicultural world, and even with the U-M's successful U.S. Supreme Court fight to defend affirmative action and the use of race in admissions, *we are under attack*, and that is something that should concern everyone in this room.

Let me paint the current picture for you and explain why I am so worried, and in fact angry, about the

current climate we are operating in as we work to produce graduates prepared for a diverse world.

We know that affirmative action works, and the Supreme Court provided us with moderate guidelines that we are following. We know that creating a diverse student body makes for a stronger educational experience. We have an impressive and growing body of social science research that demonstrates the positive educational outcomes linked with diverse class environments.

Students learn better in a diverse class. They are more analytical, and more engaged. These students are more open to perspectives that differ from their own and they are better prepared to become active players in our society.

Most people recognize the value of having students of different races and ethnic origins live and learn together. I wish we lived in a society free of social inequities, with fully integrated neighborhoods, churches and schools. But we all know there is so much more to do before we can say we have succeeded.

Affirmative action is one just one of the many different tools we can use to help make a difference in society. We defended its use all the way to the high court because we believe it helps us achieve a rich student body that mirrors society, and a majority of justices agreed with us. What disturbs me is that we - and by we, I mean higher education - we are acting as if we did not prevail before the highest court in the land!

We are on fair legal ground yet we are running scared. and that is a senseless, dangerous mode of behavior that threatens the progress we have made on our campuses. Colleges and universities across the country are succumbing to a chilling effect that is paralyzing scholarships, admissions and programs for minority students, for fear of being challenged in court.

We must pay attention to race. We must pay attention to ethnicity. We must pay attention to socioeconomic class. If we look away, the future is bleak, and one need only visit the state of California to see what happens when we go down a road that ignores these factors.

A few weeks ago, our campus hosted Dr. Richard Atkinson, the president emeritus of the great University of California system. Dick was president in 1995 when the UC Board of Regents voted to ban affirmative action in admissions, an action that was followed by a statewide referendum that applied that same ban to all public bodies in California. Out went any consideration of race, gender, ethnicity and the like in public employment.

In banning affirmative action, the UC Board of Regents also directed UC administrators to achieve a diverse student body. Dick will tell you that affirmative action had been a critical tool to UC, and without it administrators found themselves challenged to admit underrepresented minority students, particularly at UC-Berkeley, their most selective campus.

Many, many steps were taken to recast the methods UC used to admit minority students. Faculty and administrators strengthened their outreach to high

schools. They put more emphasis on achievement tests rather than aptitude tests such as the SAT. They intensified reviews of admissions applications, and asked students to share more about the obstacles they faced in preparing for college. UC opened the doors to the top-performing four percent of students from all California high schools, and took in more transfer students from California community colleges.

It has been a massive, lengthy undertaking by thoughtful leaders like Dick Atkinson, and you know what? (Pause)

It hasn't worked. It simply hasn't worked. The state of California a state that is the most diverse in this country and which represents the fifth-largest economy in the world - is educating fewer and fewer underrepresented minority students at a time when its citizenry is growing more and more diverse.

Here are the numbers: In 1995, before the ban on affirmative action, underrepresented minorities made up 38 percent of California high school graduates and 21 percent of UC's entering freshman class. Last fall, underrepresented minority students represented 45 percent of high school graduates, but had fallen to just 19 percent of incoming freshmen. And the statistics are even more grim at the most selective campuses of Berkeley and UCLA.

The gap is widening. not closing, and it is particularly troubling when you consider that African Americans and Latinos make up more and more of the public high school graduates in California.

As a matter of comparison, last year's combined freshman class at UCLA and UC-Berkeley was 2.9 percent African American, where at Michigan we saw 5.7 percent black students in our incoming class. That was a drop from the previous year's 7.3 percent a decline I attribute to the lawsuits and one we expect to fully rebound from this fall. Just this week we announced that the number of applications we received increased from every minority group, and our paid enrollment deposits are up 20.1 percent among African American students and 15.3 percent among Hispanic students.

Our increase comes because we redoubled our outreach efforts this year, and we asked our entire University family to help us extend a warm welcome to minority families in the face of any anxiety they were feeling because of the lawsuits. We invited faculty, students and alumni to join us at recruiting events. They came by the dozens, and attendance went through the roof. I visited churches and community centers across Michigan. And we launched a Spanish version of the University's website.

I'm digressing a bit from California. Here is one more sobering figure that Dick Atkinson provided. Of that incoming freshman class at UC-Berkeley and UCLA-schools that, like Michigan, are highly selective -- a combined total of 83 African-American men were enrolled. *Eighty-three black men* starting college at two of our country's leading universities. And half of them were there because they were on athletic scholarships.

That number alone should make every leader in this country stand up and demand change. Because if our public universities - particularly selective schools like

Michigan, Berkeley, and Virginia, known for preparing tomorrow's CEOs and policymakers - if these universities do not produce graduates of all backgrounds, our nation will stumble as a global leader. We will not have an educated workforce equipped to compete in a world economy where we are already facing tremendous challenges.

If we are leaving behind talented black students, talented Latino students, and talented Native American students, we are abandoning this country's future, and I will not allow the University of Michigan to be party to that. We simply have too much work to do to move forward.

(pause)

Just as we looked to our friends throughout higher education for support before the Supreme Court, I am once again asking for your leadership in speaking out about the need for greater diversity on our college campuses.

If we look at the University of Michigan and at the California system, we know that there is one major difference: we both have the will, but Michigan also has the tool of affirmative action. We have the ability to consider a student's whole experience, his or her background, race and ethnicity, as individual factors among many others. We know it is critically important to do the kind of outreach we did this year, to create a welcoming climate, and to lower perceived barriers. But we also know that those efforts are not enough on their own. We need affirmative action in our toolbox.

I learned an important lesson on the steps of the Supreme Court: The power of our voice matters. Our persistence and our unwillingness to accept anything less than broad diversity on our campuses send a strong message in this country. Since our court victory, higher education has sometimes tread too cautiously when what we must do is lead decisively, and I want you to stand alongside us.

There are three ways you can join us.

Our greatest challenge is a statewide ballot initiative in 2006 to end affirmative action in Michigan. It is grossly misnamed the Michigan Civil Rights Initiative and I believe the political debate surrounding it will divide our communities, when our efforts *should* be focused on constructive ways to build broad diversity within the moderate guidelines outlined by the Supreme Court.

I encourage you to speak out against this initiative. Why should a college president from Maryland or Louisiana or Wisconsin stand on the soapbox about a ballot question in Michigan? Because I guarantee you, regardless of whether this flawed initiative passes or fails here. its organizers will move on to another state, perhaps your state, and we cannot allow the scenario unfolding in California to be repeated elsewhere.

I feel strongly about working hard to educate Michigan citizens about the serious implications of such a ballot decision. I want people to hear Dick Atkinson when he says: "Any state tempted to emulate the example of California should think long and hard about it."

A second way you can join us is to provide greater access for low-income students. In particular, we *must* find ways to support our neediest students if we hope to achieve true economic diversity on our campuses. We cannot afford to leave these talented young people behind, and data show us that qualified students from low-income families are sometimes turned away because the barrier is just too steep.

At Michigan, we have always guaranteed our in-state students that if they qualify to attend our university, we will not turn them away because of an inability to pay. We are deepening that commitment by increasing our financial aid to them and reducing the amount of debt they take on.

We call this program M-PACT, and we are launching it with $9 million from private gifts. In our first year, we will help 2,900 students and their families. We then want to grow the program with a major fundraising initiative of at least $60 million to endow M-PACT for both in-state and out-of-state students.

Lastly, you can help by supporting our new initiative, the Center for Institutional Diversity.

With the national spotlight from the Supreme Court cases and the University's long track record of diversity initiatives, many people around the country are looking to Michigan and saying, "What now? What next?"

This Center is one answer to that question. It is the work of many, many people, with Lester Monts as its driving force. I want to thank him for his leadership in helping this university bring our aspirations to life.

We will launch the Center for Institutional Diversity in the fall of 2006. With financial support from the Ford Foundation and input from intellectual leaders from across the country, we are framing this Center to develop methods and best practices for creating, exploring, and embracing diversity.

We will always need quality research, and our Center will encourage and support that. Yet we must move beyond research and find new, innovative ways to address the disparities we see in health care, upward mobility, K-12 education, and higher education.

(pause)

In preparing to argue before the Supreme Court, the University of Michigan received tremendous support from corporations, the military, and colleges and universities across this country. We cannot do this work alone. We looked to you in the past to speak out for diversity, and you responded admirably.

In ruling in the University's favor, the Supreme Court said, "The path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity."

Please remain by our side, remain vigilant and vocal, and together we will continue to forge that path for generations to come.

Thank you.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, et al,
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vs. Hon. David M. Lawson
JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF THE UNIVERSITY OF MICHIGAN, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES of any other public college of university, community college or school district,
Defendants.

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Defendant.

EXHIBIT 12 TO AUGUST 17, 2007 DEPOSITION OF THEODORE SPENCER

undergraduate admissions

mission statement & overview

evaluation guidelines

evaluation procedure

evaluation procedure

evaluation categories

Under the evaluation procedure, reviewers will assign a specific rating for Secondary School Academic Performance, Educational Environment, and Counselor and Teacher Recommendation and an overall rating to each file. When evaluating an applicant's record and assigning a rating in each category above, reviewers have an opportunity to exercise and apply their professional experience and judgment. Reviewers can then balance the different ratings and decide which overall rating best fits the applicant's achievements and potential.

rating sheet (pdf)

All of the evaluation ratings are to be used only as guides to help the reviewer manage the composite evaluation and make an appropriate recommendation regarding the decision whether to admit a particular applicant. The evaluation ratings are as follows: Outstanding; Excellent; Good; Average/Fair; and Below Average/Poor. Also, reviewers may assign a plus or minus to an evaluation rating. Where the applicant's personal characteristics and attributes (e.g., personal background, geographic considerations, and extenuating circumstances) are being evaluated, this

rating scale is not applicable; rather. in these areas, as in all areas. reviewers will be able to draw attention to special circumstances or characteristics that stand out in an application and merit particular consideration.

GENERAL DESCRIPTION OF EVALUATION RATINGS AND RECOMMENDED DECISIONS:

Description Of Evaluation Ratings

Reviewers are asked to exercise their professional judgment and experience and rate each applicant with respect to Secondary School Academic Performance, Educational Environment, and Counselor and Teacher Recommendation, and to then provide an overall rating for the application. based on the following scale:

Outstanding
All of the applicant's materials exemplify superior and/or exceptional characteristics that contribute the specific evaluation categories.

Excellent
The applicant's materials illustrate extremely strong, but not exceptional, characteristics. The reviewer; may have a reservation, but there are enough redeeming features to compensate for, or outweigh, reservation.

Good
The applicant's materials demonstrate competitive average characteristics in most of the criteria, they may be particularly strong in one or more areas. The reviewer may have reservations about the applicant's academic competitiveness.

Average/Fair
While the applicant's materials are competitive in each of the criteria, the reviewer has substantial concerns about the overall strength of the application and may have reservations about the applicants' academic competitiveness. The applicant does not stand out.

Below Average/Poor
In the applicant's materials, the reviewer detects serious deficiencies in most of the evaluation criteria in comparison to other applicants. In addition, several of the evaluation criteria may not be met or may not have been addressed in the applicant's materials.

Recommended Decisions

After conducting a comprehensive, holistic and individualized review of an application, reviewers make an admissions decision recommendation based on the composite evaluation rating and comments. Reviewer may assign a plus or minus to any of the following decision recommendations.

HA = High Admit
- Consistent outstanding evaluation
- Students who would be considered for top merit scholarship programs

A = Admit
- Consistent outstanding or excellent evaluation
- No deficiencies

AR = Admit with Reservation
- Mostly outstanding or excellent evaluations, possibly good in select areas

- A single deficiency, or very few minor deficiencies
- Student is competitive for admission

DR = Deny with Reservation

- Consistent good or average evaluation
- Several deficiencies, or a major deficiency
- Student is qualified for admission

D = Deny

- Consistent average or below average ratings
- Student is not qualified for admission

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The following are the general guidelines reviewers should use when rating an applicant on the following criteria:

- I. ACADEMIC ACHIEVEMENT, QUALITY, AND POTENTIAL
- II. PERSONAL CHARACTERISTICS AND ATTRIBUTES
- III. OFFICIAL RECOMMENDATIONS

I. ACADEMIC ACHIEVEMENT, QUALITY, AND POTENTIAL

Secondary School Academic Performance

This area will combine recalculated academic grade point average, strength and quality of curriculum, test scores, and class rank (if provided) into one category of academic achievement. After reviewing all application materials, the reviewers can give the best assessment of the applicant's overall academic accomplishments. Before rating the applicant's academic achievement, reviewers should consider many factors. Because it is impossible to list all of the sources a reviewer may find important in making the academic assessment, reviewers will not be limited to those cited in these guidelines.

Transcript

What kind of grades has the applicant received over the high school years? Is there a trend an upward or downward one? What kind of program does the applicant plan to take in the senior year - Is it challenging or weak? If available, where does the applicant rank?

Curriculum

The transcript is extremely important in noting the grades the applicant has achieved as well as the rigor and quality of the curriculum. Given the wide disparity in high school course selection and offerings, it is imperative that the choice of strong courses, particularly those courses clearly identified as honors and AP/IB should be considered in the context of that

particular high school. What is the quality and strength of courses offered? Has the applicant taken advanced and/or challenging classes? Does the high school have strict prerequisites for entrance into these courses? What are the applicant's curricular interests and strengths? Did the applicant dual enroll? Or, has the applicant extensively studied a particular subject?

Reviewers will also have the flexibility to give an outstanding rating to applicants who took college-level courses in academic subjects and received excellent to outstanding grades. Reviewers may exercise their judgment when giving below average, average, good, excellent, or outstanding ratings to curriculum, as part of the overall academic achievement rating.

Test Scores

SAT/ACT/SAT Subject Tests/AP/IB/A Levels

We will accept either the SAT or the ACT, but we require at least one test score that includes a writing assessment. Reviewers will consider the highest composite score, no matter when the test was taken (other than Engineering, which will add additional consideration to the highest math sub score). Reviewer should consider many factors when assessing standardized test scores. Are there subscores that are significantly higher or lower? How strong are the SAT Subject Tests/AP/IB/A level scores, if provided? Do they show special proficiencies in specific subject areas? How do the scores fit the score ranges on the U of M freshman profile? Do the SAT/ACT scores correlate with the applicant's GPA? Is one significantly higher than the other? Does the student demonstrate English proficiency through the TOEFL/MELAB/IELTS?

Educational Environment

High School/College Profiles

What can the reviewer learn from the high school profile that might assist them? How might the high school profile help determine which applicant might be the best fit for the college to which he/she is applying? Does the high school profile provide information that might better help assess the applicant's educational opportunities and accomplishments? Does the school provide a grade distribution? By considering the composite strength of the high school's grading system, course offerings, and the percentage of applicants attending post-secondary schools, the admissions committee can better assess the strength of the school's academic environment.

Reviewers should also evaluate the quality of the school GPA by considering whether applicants from that high school generally achieve a B+ average or higher once enrolled at the University of Michigan.

There is no single indicator of an academically disadvantaged or economically disadvantaged region. What is the socioeconomic status of the geographic area from which the applicant is applying, e.g. rural or urban, high cost-of-living, depressed local economy? Other factors to consider are whether the high school is in the state of Michigan, whether the school is underrepresented at the University of Michigan Ann Arbor campus, and whether the school is academically disadvantaged. Reviewers should also consider whether a school is part of a cluster of schools that are underrepresented in the undergraduate class, because students from such schools may also have experiences

that will contribute to the overall diversity and learning environment at the University.

Evaluative Measures

In determining the applicant's academic potential, reviewers should use the high school counselor and teacher recommendations to note academic awards or recognition received, evidence of Intellectual Curiosity, and in-depth commitment to particular academic areas of interest. In addition to the recommendations, reviewers should also examine the applicant's short-answer questions and essay to assess the applicant's written communication skills such as writing quality content style and originality/risk taking, as well as any other evidence of academic potential. Discretionary consideration may be awarded for an outstanding essay.

II. PERSONAL CHARACTERISTICS AND ATTRIBUTES

The University of Michigan is committed to providing a vibrant and enriching educational experience for all of its students. This challenging and lively atmosphere requires a broadly diverse student body that facilitates opportunities for interaction among students from across geographic regions, socioeconomic and educational backgrounds, and cultural identities, who bring to campus a wide variety of ideas, experiences, skills, talents, and abilities. Reviewers should consider all indicators on the application in evaluating the applicant's potential contributions to the University of Michigan community. For example, they should consider extracurricular involvement, the applicant's short answers and essay, comments from the high

school counselor and teacher, and/or letters of recommendation.

Cultural Awareness/Experiences

Does the applicant demonstrate evidence of familiarity with, or interest in, other cultures?

Socioeconomic And Educational Background

Variety in life experience and challenges also contributes to the diversity on campus that enriches the learning environment for all students. Accordingly, consideration will be given to applicants with particular indicators such as parents' lack of exposure to higher education, single-parent upbringing, a deceased parent, necessary and excessive work hours while attending school, and overcoming extraordinary obstacles. Neighborhood and High School clusters that are characterized by families with limited access to educational opportunities, low income, and high interest in financial need, can also be helpful in identifying a an applicant's socioeconomic background

Geographic Considerations

Variety in geographic backgrounds also contributes to the diversity of the class. As a public institution, the University also gives consideration to in-state applicants. An applicant may receive discretionary consideration for residency in an underrepresented In-state or out-of-state geographic area, or underrepresented neighborhood or high school cluster.

Awards And Honors

Consideration may be given for outstanding high school, state, regional or national honors. Academic, athletic, artistic, musical, and civic awards may be considered. What type of and how many awards did the applicant receive? Do the applicant's achievements' demonstrate high school, community, regional and/or national involvement and/or recognition? Reviewer should reserve the highest ratings for the applicants who receive the highest level and number of awards.

Extracurricular Activities, Service and Leadership

Was there an opportunity for the applicant to participate and achieve in school and community activities? Many factors should be considered when rating leadership and service, but the highest ratings should be reserved for applicants who are well above average.

The following is a list of some of the general factors reviewers should consider:

- Do the applicant's materials illustrate the highest level of achievement and special talents, in academic competition, athletics (applies to non-recruited athletes only), and/or the fine and performing arts?

- Does the applicant present meaningful activities and experiences, which reflect a commitment to a variety of school activities through continued participation across the four years?

- Does the applicant hold leadership positions (elected or appointed)? Does he/she demonstrate an increase in responsibility and leadership across the four years as reflected by increasingly higher elected office held?

- Do the counselor and/or teacher recommendations indicate the student possesses a high degree of character or is particularly well respected by students, staff, and faculty alike?

- Did the applicant sustain significant employment while maintaining academic excellence?

- Did the applicant show evidence of forging frontiers in any activities not simply presenting a laundry list of activities?

- What is the quality and depth of involvement in activities?

- Do the activities show evidence of impact on the school and community?

Reviewers should consider whether the school requires community service as part of its graduation requirement.

Alumni Relationships

The University of Michigan values the relationship it has with current and former students. These students are part of the Michigan community; they provide services and support to the larger University community. As such, reviewers should take into

consideration applicants who have a direct relationship, or stepfamily relationship, with someone who has attended the University of Michigan-Ann Arbor as a degree-seeking student.

Strongest consideration should be given to applicants whose parents or stepparents attended the University of Michigan-Ann Arbor, followed by applicants who have a grandparent, sibling, or spouse, who has attended or is attending the University.

Consideration is not cumulative. In other words, additional consideration should not be given to applicants who have multiple generations of family who have attended Michigan.

To recognize the continuing service and support provided to the University, consideration will be given for certain alumni relationships:

Legacy The applicant, whose parent or stepparent attended UM-Ann Arbor as a degree-seeking student should be awarded discretionary consideration.
Or
Other Alumni Relationships - The applicant, whose grandparents, siblings, or spouse attended UM-Ann Arbor as degree-seeking students, should be awarded discretionary consideration. Consideration cannot be awarded for both categories.

Scholarship Athletes

In anticipation of their contributions to the University and in recognition of the traditions and national prominence of Michigan Intercollegiate athletics, applicants being officially recruited and considered for

athletic scholarships will be carefully reviewed, in accordance with the Universities academic standards and NCAA guidelines and regulations.

Extenuating Circumstances

Is there anything about the applicant's background or family information that stands out in relation to the college to which they are applying? Are there any special circumstances of which you should be aware when evaluating the rest of the application?

- Do the applicant's materials reflect barriers overcame and a desire to succeed in all his/her high school endeavors?

- Did the applicant sustain significant employment while maintaining academic excellence and service in school and community activities?

- Has the applicant overcome adverse family, social, or economic conditions, including prejudice or discrimination, and still achieved academically?

Character And Commitment To High Ideals

- *Do the applicant's materials demonstrate a* strong respect for others and their perspectives?

- Do the applicant's materials reflect a strong ability to work effectively with others?

- Do the applicant's materials show considerable evidence of having taken advantage of

opportunities. by displaying maturity in commitment. Initiative, and responsibility?

- Do the applicant's materials show evidence of being a self-starter and role model?

Other Personal Attributes and Characteristics

Other factors for consideration may include the applicant's demonstrated specific interest in attending the University of Michigan. and the applicant's characteristics and/or attributes that directly correspond with school Or college's particular objectives or mission

III. OFFICIAL RECOMMENDATIONS

High school counselors and teacher recommendations should endorse the academic achievement. quality and potential of the applicant, and validate the level of participation for personal achievement.

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http://www.admissions.umich.eduiprocess/categorics.html

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN 24 2013
OFFICE OF THE CLERK
SUPREME COURT

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION,
INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR
EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

AND

CHASE CANTRELL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

PARTIES TO THE PROCEEDING

Petitioner is Bill Schuette, Michigan Attorney General. Respondents are Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), United for Equality and Affirmative Action Legal Defense Fund, Rainbow Push Coalition, Calvin Jevon Cochran, Lashelle Benjamin, Beautie Mitchell, Denesha Richey, Stasia Brown, Michael Gibson, Christopher Sutton, Laquay Johnson, Turqoise Wiseking, Brandon Flannigan, Josie Human, Issamar Camacho, Kahleif Henry, Shanae Tatum, Maricruz Lopez, Alejandra Cruz, Adarene Hoag, Candice Young Tristan Taylor, Williams Frazier, Jerell Erves, Matthew Griffith, Lacrissa Beverly, D'Shawnm Featherstone, Danielle Nelson, Julius Carter, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Dante Dixon, Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 386, AFSCME Local 1642, AFSCME Local 2920, and the Defend Affirmative Action Party. Additional Plaintiffs below are Chase Cantrell, Karen Nestor, Paula Uche, Joshua Kay, Sheldon Johnson, Matthew Countryman, Brenda Foster, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, Cathy Alfaro, Michael Weisberg, Casey Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, Edward Kim, M.C.C. II, Carolyn Carter, and Matthew Robinson. Additional Defendants below are the Regents of the University of Michigan, the Board of Trustees of Michigan State University, the Board of Governors of Wayne State University, Mary Sue Coleman, Irvin D. Reid, Lou Anna K. Simon, and Eric Russell.

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OPINIONS BELOW

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JURISDICTION

The en banc judgment of the Sixth Circuit was entered on November 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 1, § 26 of Michigan's 1963 Constitution provides:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

(4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan anti-discrimination law.

(7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or

federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

(8) This section applies only to action taken after the effective date of this section.

(9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

INTRODUCTION

In November 2006, 58% of Michigan's voters adopted a proposal that amended Michigan's Constitution to prohibit discriminating or granting preferential treatment in public education, government contracting, and public employment based on race, sex, ethnicity, or national origin. Mich. Const. art. I, § 26. The Sixth Circuit struck down § 26 as to public education, holding that a constitutional provision requiring equal treatment violates equal protection.

It is curious to say that a law that bars a state from discriminating on the basis of race or sex violates the Equal Protection Clause by discriminating on the basis of race and sex. Yet the Sixth Circuit held that § 26 violates the "political-restructuring doctrine" because an individual who supports race- or sex-conscious admissions policies cannot lobby admissions officials for that policy but must instead amend the state constitution. The Sixth Circuit was wrong.

To begin, this Court has applied the political-restructuring doctrine only to laws that impede protection against unequal treatment, never to laws that preclude *preferential* treatment. E.g., *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982). Indeed, the majority opinion in *Seattle School District* disclaimed that its holding would prevent a higher level of government from overruling a university's affirmative-action policy, explaining that admissions policies had "nothing to do with the ability of minorities to participate in the process of self-government." *Seattle School Dist.*, 458 U.S. at 480 n.23.

And if the Sixth Circuit is right that a political-restructuring claim voids a provision that eliminates discrimination and preferences, it is difficult for *any* law to require equal treatment. That is because every state and federal law elevates decisions to a higher political level. For example, the federal Fair Housing Act would be suspect because it stops homebuyers from lobbying state officials for race- and sex-based preferences. That result cannot possibly be correct.

Finally, when this Court upheld race-conscious admissions policies in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), the Court said such policies "must be limited in time," *id.* at 342, and would likely be "unnecessary" within 25 years, *id.* at 343. But under the Sixth Circuit's view, Michigan cannot pursue this option; race-conscious policies must remain until universities (or their faculty) say it is time to eliminate them.

Affirmative action has been one of the most hotly contested social issues of the past few decades. Some people support it because they believe affirmative-action policies are necessary to ensure equal opportunity and to achieve campus diversity. Others oppose it because they believe such policies deny equal treatment and perpetuate the myth that students with the same skin color, ethnic heritage, or sex share the same background and think the same way. This Court has held that race-conscious admissions policies are presumptively unconstitutional, but permissible in some narrow situations. With that backdrop, the people of Michigan concluded that not having affirmative action in higher education was the best policy for the state. Nothing in the Constitution bars the people of Michigan from making that choice.

STATEMENT OF THE CASE

A. Article 1, § 26

The genesis for the Article 1, § 26 ballot initiative was a recognition that the public-university admissions process was insulated from political accountability to the public—it could not be affected by those who wanted public universities to move away from race-and sex-conscious policies.

For example, at the University of Michigan, the tenured faculty are the primary architects of all the admissions criteria and protocols. J.A. 35. There is no process by which members of the public, prospective students, or others who are not faculty or part of the college can comment or even submit suggestions for admissions criteria. J.A. 35. The same practices are followed at the University of Michigan's Law School and Medical School; faculty members develop and adopt the admissions criteria, and there is no formal process by which the public "petitions" or submits suggestions for consideration. J.A. 11–13, 27–29.

Similarly, at Wayne State University Law School, a faculty committee develops the "Discretionary Admissions Criteria." Only the law school faculty has the authority to approve the admissions policy; it is not subject to approval by the Wayne State University Board of Governors. J.A. 21. And as the law school's dean testified, if the Wayne State Board of Governors sought to change the policy, that action "would precipitate a constitutional crisis." J.A. 22.

Lacking an ability to impact the process by which faculty committees adopt admissions policies, opponents of race- and sex-conscious policies had two options: amending the Michigan Constitution or going to court. They initially chose the latter. (Ordinary legislation was not an option. Michigan's Constitution includes a provision that the Michigan courts have consistently construed as granting autonomy to universities. E.g., *Federated Publ'ns, Inc.* v. *Bd. of Trustees of Mich. State Univ.*, 594 N.W.2d 491, 497–98 (Mich. 1999) ("Legislative regulation that clearly infringes on the university's educational or financial autonomy, must, therefore, yield to the university's constitutional power.").)

Litigation initiatives resulted in the pair of 2003 decisions in which this Court invalidated the University of Michigan's point-system admissions policy, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), and upheld the holistic admissions policy at the University of Michigan Law School, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). But in the wake of those decisions, reliance on race apparently increased. Statistical analyses of admissions patterns show an even heavier weight for race and a reduced weight for socioeconomic factors. In other words, race became an even more prominent admissions factor than under the point system.

The Michigan Civil Rights Initiative began a state ballot process to amend the Michigan Constitution and prohibit all race- and sex-based discrimination, including preferences, in public employment, education, and contracting. Michigan voters approved the proposal in November 2006.

B. Proceedings below

Immediately after the election, a group of plaintiffs led by Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) filed suit in the U.S. District Court for the Eastern District of Michigan, challenging § 26's constitutionality as to public education. The district court entered a stipulated order postponing § 26's implementation until after the next university-admissions cycle. Pet. App. 255a–259a.

The Sixth Circuit granted a motion for a stay pending appeal, concluding there was a "strong likelihood" the preliminary injunction would be reversed on the merits. Pet. App. 235a–251a. The court rejected BAMN's political-restructuring claim and followed *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692 (9th Cir. 1997), Pet. App. 247a, stating that the Equal Protection Clause "prevents official conduct discriminating on the basis of race, and on the basis of sex, not official conduct that bans 'discriminat[ion] against' or 'preferential treatment to' individuals on the basis of race or sex." Pet. App. 244a. (citations omitted).

On remand, the district court upheld § 26 on the merits, Pet. App. 197a–223a. But a second Sixth Circuit panel reversed, in a 2-1 vote, Pet. App. 101a–183a, and the Sixth Circuit then granted en banc review, Pet. App. 265a–266a. The en banc Sixth Circuit invalidated § 26 in an 8-7 decision.[1]

---

[1] Judges McKeague and Kethledge recused themselves because they sit on university boards. Senior Judge Daughtrey sat en banc because she had also participated in the panel decision.

Relying on the political-restructuring theory of equal protection outlined in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), the en banc majority held that a political enactment deprives minority groups of equal protection when the enactment "(1) has a racial focus, targeting a policy or program that 'inures primarily to the benefit of the minority'; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process." Pet. App. 21a–22a (citations omitted).

The majority concluded that § 26 has a racial focus, because the targeted program—race- and sex-based admissions preferences—"at bottom inures primarily to the benefit of the minority, and is designed for that purpose." Pet. App. 22a. In addition, said the majority, § 26 reordered the political process. Pet. App. 26a–38a. Whereas a Michigan citizen may "use any number of avenues to change the admissions policies on an issue outside" § 26's scope, a future amendment to the Michigan constitution is the only available recourse for a citizen seeking the adoption of race- or sex-based preferences. Pet. App. 35a–36a. Thus, while admissions committees, university presidents and provosts, and university boards are all "free to repeal" race- or sex-based preference programs "without any infringement on the right to equal protection in the political process," Michigan voters cannot do the same by state constitutional amendment. Pet. App. 44a.

Chief Judge Batchelder and Judges Boggs, Cook, Gibbons, Griffin, Rogers, and Sutton dissented. Pet. App. 51a–100a. Judge Gibbons wrote the primary dissent: "Although it has convinced a majority of this court, plaintiffs' argument must be understood for the marked departure it represents—for the first time, the presumptively invalid policy of racial and gender preference has been judicially entrenched as beyond the political process." Pet. App. 56a–57a (Gibbons, J., dissenting).

Judge Gibbons explained that neither *Hunter* nor *Seattle School District* supported the majority's result. Pet. App. 58a–64a (Gibbons, J., dissenting). "*Hunter* considered only the political-process implications of repealing a law that required *equal* treatment[;] it cannot be read broadly to apply to the repeal of a law requiring *preferential* treatment." Pet. App. 59a (Gibbons, J., dissenting). And § 26 "is quite unlike the narrow anti-busing measure struck down in *Seattle*; it represents 'a sea change in state policy, of a kind not present in *Seattle* or any other 'political structure' case." Pet. App. 60a (Gibbons, J. dissenting).

Judge Gibbons also concluded that § 26 did not reallocate political power. Pet. App. 66a–78a (Gibbons, J., dissenting). "[T]he people of Michigan['s] . . . vote removed admissions policy from the hands of decision-makers [university admissions personnel] who were unelected and unaccountable to either minority or majority interests and placed it squarely in an electoral process in which all voters, both minority and majority, have a voice." Voters did not "restructure" the political process, they "employed it." Pet. App. 67a, 78a (Gibbons, J., dissenting).

Other dissenting judges raised complementary points. Judges Boggs and Sutton both observed that race- and sex-conscious programs will sometimes have the effect of discriminating against members of groups that such programs purportedly protect by effectively creating ceilings and not just floors for minorities. Pet. App. 54a–55a (Boggs, J., dissenting); Pet. App. 92a (Sutton, J., dissenting). As a result, "various groups, sometimes defined as racial minorities, may be discriminated against." Pet. App. 54a–55a (Boggs, J., dissenting).

Judge Sutton also noted that *Seattle School District* itself undermines any argument that *Seattle* or *Hunter* dictates § 26's constitutionality. Pet. App. 93a (Sutton, J. dissenting). In *Seattle*, Justice Powell's dissent raised the concern that the majority's reasoning might cause a later court to find it unconstitutional for a higher level of government to intervene in response to an admission committee's affirmative-action plan. "No worries, the majority responded: . . . Justice Powell's hypothetical . . . had nothing to do with the ability of minorities to participate in the process of self-government.'" Pet. App. 93a–94 (Sutton, J. dissenting) (quoting *Seattle School Dist.*, 458 U.S. at 480 n.23).

And Judge Rogers observed that "[u]nder the majority opinion, it is hard to see how any level of state government that has a subordinate level pass can pass a no-race-preference regulation, ordinance, or law. . . . Whatever *Hunter* and *Seattle* hold, the Supreme Court cannot have intended such a ban." Pet. App. 79a–80a (Rogers, J., dissenting).

SUMMARY OF ARGUMENT

Article 1, § 26 does not violate equal protection. A law that infringes equal protection classifies a group and then treats that group differently without adequate justification. But § 26 does not single out groups for differing treatment; quite the opposite, it *prohibits* public universities from classifying applicants by race or sex and treating them differently. So § 26 "does not violate the Equal Protection Clause in any conventional sense." *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (holding that California's nearly-identical constitutional amendment did not violate the Equal Protection Clause under a political-restructuring theory).

The question then becomes whether § 26 violates the political-restructuring doctrine this Court articulated in *Hunter* v. *Erickson*, 393 U.S. (1969), and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982). For three basic reasons, it does not.

1. *Hunter* and *Seattle School District* involved laws that created political obstructions to equal treatment. Section 26 is an impediment to achieving *special* treatment. A state law that restructures the political process only violates equal protection if it burdens the right to equal treatment; § 26 does not. That is why the *Seattle* majority refuted the suggestion that its holding would make it unconstitutional for a higher level of government to end an affirmative-action program that an admissions committee had created. *Seattle School Dist.*, 458 U.S. at 480 n.23 (responding to Justice Powell's dissent, which raised the concern that a court might someday apply the majority's reasoning the way the en banc Sixth Circuit did here).

2. Section 26 does not reallocate the political structure in Michigan. The trial-court record established that the governing boards of Michigan's public universities "have fully delegated the responsibility for establishing admission standards to several program-specific administrative units within each institution, which set admissions criteria through informal processes that can include a faculty vote." Pet. App. 68a (Gibbons, J., dissenting). These academic processes are not equivalent to political processes, and the Constitution does not require admissions decisions to be made only at the lowest level of government.

3. Under a political-restructuring analysis, a reallocation of political decisions violates equal-protection principles only if there is evidence of purposeful racial discrimination. *Seattle School Dist.*, 458 U.S. at 484–85; see also *Washington* v. *Davis*, 426 U.S. 229, 238–48 (1976). Given the myriad of non-discriminatory reasons that support the abolishment of race- and sex-conscious admissions programs, it is not possible to say that § 26's purposely discriminates. And to the extent § 26 "burdens" certain groups, the groups so encumbered are a majority of Michigan's electorate.

In sum, *Hunter* and *Seattle School District* do not support the invalidation of a state constitutional provision that Michigan voters ratified in the reasonable belief that not having affirmative action in higher education was the best policy for the state. It is "surely the case that the Fourteenth Amendment does not dictate the level of government at which a State must enact a statewide ban on race discrimination." Pet. App. 86a (Sutton, J., dissenting).

ARGUMENT

I. Section 26 does not violate the Equal Protection Clause when assessed under a "traditional" analysis.

The Equal Protection Clause's central purpose is to prevent "official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). Accordingly, this Court applies strict scrutiny to "all racial classifications" and to "laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227, 213 (1995); *Davis*, 426 U.S. at 239–42.

Section 26 does not classify on the basis of race. Just the opposite, the provision "*prohibits* the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender." *Wilson*, 122 F.3d at 702; accord *Coral Constr., Inc.* v. *City & County of San Francisco*, 235 P.3d 947, 959 (2010); Pet. App. 78a (Gibbons, J. dissenting); Supp. Pet. App. 313a (the district court concluded that § 26 is "facially neutral").

Nor was § 26 motivated by a racially discriminatory purpose. To begin, this Court has never "inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the *only* possible motivation behind the referendum results." *Arthur* v. *City of Toledo*, 782 F.2d 565, 573 (6th Cir. 1986). In part, this is due to the realities of a secret ballot: "[s]ince a court cannot ask voters how they voted or why they voted that way, a

court has no way of ascertaining what motivated the electorate." *Id.* Also, if "courts could always inquire into the motivation of voters even when the electorate has an otherwise valid reason for its decision, a municipality could never reject a low-income public housing project because proponents of the project could always introduce race as an issue in the referendum election." *Id.* at 574.

So was it possible for Michigan voters supporting § 26 to have been motivated by any reason other than racial discrimination? The district court said yes. "Based on the evidence presented, the Court cannot say that the only purpose of [§ 26] is to discriminate against minorities." Supp. Pet. App. 317a. The court cited testimony from one of the ballot organizers that "he was motivated to eliminate affirmative action programs because he thinks they are harmful to minorities." *Id.* The court also cited testimony from another organizer who "appears to have been motivated by the desire to gain admission to the University of Michigan herself without having to yield to a minority candidate who would take her place with the benefit of a racial preference." *Id.*

There were undoubtedly other voters motivated by a belief that it is harmful to perpetuate stereotype-reinforcing assumptions. See, e.g., *Time to scrap affirmative action*, THE ECONOMIST, Apr. 27, 2013, at 11, 11 (although "colleges benefit from a diversity of ideas, to use skin colour as a proxy for this implies that all black people and all Chinese people view the world in a similar way. That suggests a bleak view of the human imagination."). And still others who desired a shift to more socioeconomic-based admissions policies.

See, e.g., Bill Keller, *Affirmative Reaction*, N.Y. TIMES, June 9, 2013 ("Racial preferences don't help all that much in promoting class diversity, because selective colleges heavily favor minorities from middle-class and affluent families; but class-based preferences favor minorities, because blacks and Hispanics are more heavily represented among the poor."). Indeed, it is the multiplicity of viewpoints regarding affirmative action which "illustrate that racial discrimination is not the only rationale behind" § 26. Supp. Pet. App. 318a.

The district court also could not find a discriminatory intent based on the factors this Court articulated in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977). The ballot proposal's history did "not suggest discriminatory intent." Supp. Pet. App. 318a. And the public arguments made in support of § 26 "did not appeal to racism or amount to a call for segregation; rather, they attempted to appeal to the public's belief in fairness and just treatment." *Id.* "To impugn the motives of 58% of Michigan's electorate, in the absence of extraordinary circumstances which do not exist here, simply is not warranted on this record." Supp. Pet. App. 319a.

Given the district court's factual findings, which the record supports, § 26 is not subject to heightened review. And under a rational-basis review, § 26 is justified for many of the reasons noted above. While both sides of the affirmative-action debate have policy arguments to advance, it was not irrational for a majority of Michigan's voters to end race- and sex-conscious admissions practices.

II. Section 26 does not violate the political-restructuring doctrine.

A. *Hunter* and *Seattle School District* do not prohibit a ban on preferences.

Race-conscious admissions are presumptively unconstitutional except when necessary to remedy the effects from historic discrimination. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). A *Grutter* plan is supposed to be an optional, transient response to anemic campus diversity, available only when "no workable race-neutral alternatives would produce the educational benefits of diversity." *Fisher* v. *Univ. of Texas at Austin*, 570 U.S. __, slip op. at 11 (2013).

Plaintiffs do not allege any lingering effects from historic discrimination at Michigan's public universities. And they conceded that race-neutral programs like the top 10% plan in place at the University of Texas can actually result in *improved* minority achievement. Coalition Sixth Cir. Supp. Br. 11. So in a context where equal-protection principles tolerate race- or sex-based admissions criteria on a limited basis, the question is whether *Hunter* and *Seattle School District* prohibit a state categorically from eliminating the use of such criteria. The answer is no, because neither *Hunter* nor *Seattle School District* involved a policy that prohibited preferential treatment. In fact, the *Seattle School District* majority disclaimed that its reasoning would apply to prevent a higher level of government from intervening when a university admissions committee adopts an affirmative action policy. See *Seattle School Dist.*, 458 U.S. at 480 n.23.

In *Hunter*, an Akron, Ohio realtor refused to show homes to an African-American buyer, and the buyer sued the city to compel enforcement of its fair-housing ordinance. 393 U.S. at 387. But the city's voters had repealed the ordinance and amended the city charter to require a referendum before adopting any new fair-housing ordinance. *Id.* So the *Hunter* referendum barred laws that merely required equal treatment in the sale and lease of real estate; nothing in this Court's opinion striking down the charter amendment suggested that the case involved preferences.

In *Seattle School District*, a Washington public-school board adopted a busing plan to end *de facto* racial segregation in the Seattle schools. 458 U.S. at 461. The state's voters responded by amending the state's constitution to allow school busing for most any reason, but to prohibit busing if used to desegregate the schools. *Id.* at 461–64. In striking down the constitutional amendment, this Court recognized that before Initiative 350, the local school authorities employed desegregative busing to solve problems related to the denial of "*equal* educational opportunity." *Id.* at 479 (emphasis added, quotation omitted). This is because "the segregated housing patterns in Seattle ha[d] created racially imbalanced schools." *Id.* at 460. Such racially divided schools, even if created through *de facto* segregation, would provide unequal opportunities to racial and ethnic minorities. See *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.").

Again, nothing in the *Seattle School District* opinion says anything about providing unequal preferences. And the opinion itself distinguishes § 26. In his *Seattle* dissent, Justice Powell warned that the majority opinion could be read to mean that "if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies." 458 U.S. at 498 n.14 (Powell, J., dissenting). The *Seattle* majority dismissed Justice Powell's concern as "entirely unrelated to this case" because admissions policies had "nothing to do with the ability of minorities to participate in the process of self-government." *Id.* at 480 n.23. So even the *Seattle School District* majority did not view the opinion as controlling the outcome in a case like this one. Pet. App. 94a (Sutton, J., dissenting) ("I am . . . hard-pressed to understand how anyone can insist our hands are tied in today's case" by *Seattle*.).

Seattle School District is also distinguishable based on its historical context. When this Court decided the case in 1982, the assignment of public-school students to achieve racial balancing fell "within the broad discretionary powers of school authorities" to formulate "educational policy" and to "prepare students to live in a pluralistic society." *Swann* v. *Bd. of Educ.*, 402 U.S. 1, 16 (1971). Although Justice Powell's dissent argued that using racial considerations to effect pupil assignment was "presumptively invalid" and requires an "extraordinary justification," *Seattle School Dist.*, 458 U.S. at 491 n.6 (Powell, J., dissenting), the majority did not respond to that argument.

But today, school busing programs that employ racial classifications are presumptively unconstitutional and subject to strict scrutiny. *Parents Involved*, 551 U.S. at 720. So it is not at all clear that *Seattle School District* would be decided the same way today. As post-*Seattle School District* decisions have recognized, it is a gross exaggeration for school officials to assume that a student thinks a certain way, represents certain views, or behaves in a stereotypical fashion due solely to skin color, race, ethnic heritage, or sex. Citizens may reasonably believe that an individual is not a "representative" of his or her "group," the very kind of stereotype-reinforcing approach that § 26 rejected. After all, "one of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000). In fact, the very endeavor of categorizing students into discrete racial and ethnic groups is becoming an increasingly outmoded, dubious way of identifying people. See, e.g., 2010 U.S. Census Form (providing 57 possible multiple race combinations, not considering Latino).[2]

At bottom, § 26 makes it more difficult for individual students to receive special treatment—a preference. And this Court has never applied the political-restructuring doctrine to protect against obstructions to preferential treatment. Such a holding would unnecessarily expand the political-restructuring doctrine, and it would also conflict with the spirit of *Grutter*.

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[2] See http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

Grutter recognized that racial-preference programs stand in a precarious position because they deviate from the equal treatment mandated by the Equal Protection Clause, 539 U.S. at 342 ("[R]ace-conscious admission programs . . . [are a] deviation from the norm of equal treatment of all racial and ethnic groups."). There is a difference "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Crawford* v. *Bd. of Educ. of the City of Los Angeles*, 458 U.S. 527, 538 (1982). The former is unconstitutional while the latter is not. And when a "state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or [sex], it has promulgated a law that addresses in neutral fashion race-related and [sex]-related matter." *Wilson*, 122 F.3d at 707. Thus, a key component of *Grutter*'s holding was that a narrowly tailored, race-conscious admissions policy "must be limited in time." 539 U.S. at 342. After all, a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Id.* at 341–42 (quotation omitted)

The *Grutter* Court noted that universities in California, Florida, and Washington State, "where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches." *Id.* at 342. And the Court encouraged universities to draw on the most promising aspects of such "race-neutral alternatives," *id.*, and emphasized its expectation that "25 years from now [2028], the use of racial preferences will no longer be necessary to further the [diversity-in-education] interest approved today." *Id.* at 343.

Nothing in *Grutter* suggests that a state cannot achieve that salutary goal (the phase-out of race-conscious admissions programs) early by enacting a law or amending the state constitution. Indeed, "it is hard to see how any level of state government that has a subordinate level can pass a no-race-preference regulation, ordinance or law. . . . Whatever *Hunter* and *Seattle* [*School District*] hold, [this] Court cannot have intended such a plan." Pet. App. 79a–80a (Rogers, J., dissenting).

Of course, a separate problem with the political-restructuring doctrine's application here is the doctrine's requirement that the underlying law or policy have a "racial focus." *Seattle School Dist.*, 458 U.S. at 474. In other words, does a race-conscious admissions policy, "at bottom inure[ ] primarily to the benefit of the minority, and is [it] designed for that purpose"? *Id.* at 472.

Plaintiffs have to answer that question "yes." But that contradicts the key underpinning of *Grutter*. The *Grutter* majority made clear that a narrowly tailored, race-conscious admissions policy could be implemented for one and only one compelling interest: "obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. The Court rejected alternative justifications, such as reducing the "historic deficit" of minorities in higher education, remedying societal discrimination, or attempting to increase a professional minority pipeline. That means a *Grutter* policy cannot benefit primarily a minority group; it must be a policy that benefits *all* students. *Id.* at 330–33 (describing the "substantial" educational benefits to all students brought about by a diverse student body).

And this is where race-conscious admissions policies run into trouble. If § 26 targets a policy that benefits primarily a minority group, the policy violates *Grutter*, making it unnecessary to reach the political-restructuring issue. Conversely, if § 26 targets a policy that benefits all students, Plaintiffs cannot assert a political-restructuring claim. A *Grutter* plan and a political-restructuring theory are incompatible.

In addition, Plaintiffs' theory leads to the awkward result that many laws requiring equal treatment could fall under a political-restructuring claim. Consider the Fair Housing Act of 1968. When Congress adopted that law, it had the effect of preempting any state law requiring that minority home buyers be given preferential treatment and preventing states from adopting such a law. 42 U.S.C. § 3604(b) (prohibiting discrimination in housing transactions "because of race, color, religion, sex, familial status, or national origin"). Unlike other discrete and insular groups, minority home buyers were unable to lobby for preferential treatment at the state or local level unless they first succeeded in repealing the federal law. The same would be true if it was the state that enacted the fair-housing legislation—the state law would need to be repealed before local legislation creating preferential treatment could be sought.

Similarly, when Congress enacted the Equal Credit Act, Pub. L. 94-239, 90 Stat. 251 (1974), that law had the effect of preempting any existing laws and preventing the enactment of any new laws that required lenders to grant minority borrowers credit at a preferential rate. 15 U.S.C. § 1691(a) (prohibiting discrimination in credit transactions "on the basis of

race, color, religious, national origin, sex or marital status, or age"). Individuals who might have benefitted from and thus desired such a policy would not have been able to lobby their state officials; they would have been forced to first repeal the federal statute requiring equal treatment.

It gets worse. Imagine a state statute that required lenders to grant credit to minority borrowers at a preferential rate, say half a point below prime. Such a law would have the effect of preventing minority borrowers from lobbying their local officials for a one- or two-point reduction. Under Plaintiffs' theory, the state law would have to fall. So, if Plaintiffs are correct, then many laws of general applicability prohibiting discrimination—or even granting a preference—are unconstitutional. That result cannot possibly be a correct reading of *Hunter* and *Seattle School District*.

B. Admissions policies are not part of the political process.

A second, independent problem with the en banc majority's analysis is that "the academic processes at work in state university admissions in Michigan are not 'political processes' in the manner contemplated in *Seattle*." Pet. App. 72a (Gibbons, J., dissenting). "Unlike the Seattle School Board and the Akron City Council, the various Michigan university admissions committees and faculty members are unelected." *Id.* And although Michigan universities are generally governed by either an elected or Governor-appointed board of trustees, Pet. App. 28a, the record evidence shows that admissions decisions are made by unaccountable faculty members.

Judge Gibbons summarized that record as follows:

> As they currently stand, the faculty admission committees are islands unto themselves, vested with the full authority to set admissions policy for their respective university programs. . . . [T]he testimony of the law school dean demonstrates that, whatever the formal legal structure, the faculty committees set admissions policies without significant review by the boards—thus insulating them from the political pressures the boards themselves face. [Pet. App. 72a (Gibbons, J., dissenting).]

To the extent it is even possible to hold such committees "politically accountable," the political gymnastics involved are far worse than simply achieving a 51% vote in a statewide referendum. As Judge Sutton explained, a Michigan citizen seeking to implement § 26's policy through the "political process" would have to elect a majority of Michigan, Michigan State, and Wayne State's eight-member boards of trustees (which would take an eight-year process spanning at least three statewide election cycles) willing to abolish preference programs, then hope that the trustees would stand up to the faculty committees that believe that they alone have exclusive control over the admissions process. Pet. App. 86a–87a (Sutton, J., dissenting). And anyone wishing to change admissions policies at Michigan's other public universities "faces an equally elaborate process." *Id.* (citations omitted).

It makes no sense to say that the federal constitution limits a state's means of eliminating affirmative action in its universities to an eight-year election process involving the election of at least 15

different board members (just with respect to Michigan's three largest state universities), who might not even control the faculty committees that make admissions policies, and who are elected by partisan ballot based on many competing educational issues. Nothing in the Constitution suggests that Michigan is barred from pursuing a simpler means of addressing the issue. And it is a remarkable intrusion on the state's processes to say that it may end affirmative action in higher education only through a Byzantine route with no guaranteed result.

Moreover, § 26 does not even disadvantage groups that account for a minority of Michigan's population (if it can be determined who is "disadvantaged" at all). Both *Hunter* and *Seattle* involved initiatives targeted solely at minorities attempting to buy houses, and those benefitting from a racially integrated public-school system, respectively. But § 26 does not burden minority interests and minority interests alone. Because § 26 prohibits discrimination that is sex-, ethnicity-, and national origin- as well as race-based, "[t]o the extent it disadvantages anyone, it disadvantages groups that together account for a majority of Michigan's population." App. 92a (Sutton, J., dissenting). It "make[s] little sense to apply 'political structure' equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate." *Id.* (quoting *Wilson*, 122 F.3d at 704).

Compounding the problem, it is not even clear which discrete group § 26 "helps and hurts, or when each group will be affected." App. 92a (Sutton, J., dissenting). Given the reality that "female high school

students increasingly outperform their male classmates," it is entirely possible that a sex-based preference program would favor men, rather than women. *Id.* And the overrepresentation of certain minority groups (such as Asian students) within higher-education institutions necessarily means that preference programs have the perverse effect of benefitting some minority groups at the expense of others. App. 54a–55a (Boggs, J., dissenting).[3] It is not at all clear who race- and sex-conscious admissions programs "disadvantage." And to the extent § 26 can be characterized as "disadvantaging" any groups, those groups constitute a majority of Michigan's population.

Plaintiffs' theory also does real damage to the democratic process. As the Ninth Circuit explained in upholding Proposition 209, if a court "relies on an erroneous legal premise [to strike down a public initiative], the decision operates to thwart the will of the people in the most literal sense." *Wilson*, 122 F.3d at 699. "A system which permits [the courts] to block with the stroke of a pen what [millions of] residents voted to enact as law tests the integrity of our constitutional democracy." *Id.*

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[3] This problem is exacerbated by admissions politics. In *Grutter*, Justice Kennedy shed light on this problem with a troubling admission from the University of Michigan's former Law School Dean. "He testified that faculty members were 'breathtakingly cynical' in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans." 539 U.S. at 393 (Kennedy, J., dissenting).

Within our federalist system, it is no small matter for a federal court to strike down a properly enacted state constitutional provision. See *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism . . . allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."). That is why the United States Constitution generally does not meddle in the way that states choose to structure their government. See *Sailors* v. *Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 109–10 (1967). Given the special respect that should be accorded to state constitutional provisions, the Court should be especially cautious before extending the political-restructuring doctrine in the manner Plaintiffs urge.

Plaintiffs' theory also has the strange effect of elevating local over state authority. Michigan's public universities could themselves do away with race-based admissions criteria in favor of race-neutral criteria, as even the Sixth Circuit concedes. Pet. App. 44a ("admissions committees, the universities' presidents and provosts, and the universities' boards remain free to repeal [race-conscious admissions policies], without any infringement on the right to equal protection in the political process"). But once universities adopt race-based criteria, Plaintiffs say it is impossible for the State of Michigan to do anything about it. It is "surely the case that the Fourteenth Amendment does not dictate the level of government at which a State must enact a statewide ban on race discrimination." App. 86a (Sutton, J., dissenting).

C. Section 26 did not result from a discriminatory intent or purpose.

Even under a political-restructuring analysis, reallocation of political decision-making violates equal-protection principles only when there is a "racial classification," 458 U.S. at 485, or evidence of purposeful racial discrimination. *Seattle School Dist.*, 458 U.S. at 484–85 ("[P]urposeful discrimination is the condition that offends the Constitution. . . . Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislature in some sense was designed to accord separate treatment on the basis of racial considerations.") (citations and internal quotation marks omitted).

Unlike *Seattle*, where the government categorized students based on race so it could bus them to specific schools in government-prescribed proportions, there is no classification here: students of any race or sex are treated the same. Accordingly, proof "of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194 (2003) (internal citations omitted), even when a neutral law has a disproportionately adverse effect on a racial minority, *Washington* v. *Davis*, 426 U.S. at 238–48.

Hunter and *Seattle School District* exemplify this principle. In *Hunter*, the city charter amendment prevented the city council from requiring equal treatment and eliminating racial discrimination in residential real estate transactions. And in *Seattle School District*, the constitutional initiative prevented

school boards from ensuring equal educational opportunity. Both cases relied on findings of "discriminatory intent in a challenge to an [ ] enacted initiative." *Cuyahoga*, 538 U.S. at 196, 197.

In determining the electorate's intent, it is not enough to point to racially animated views of isolated voters. The "bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis." *Metro. Hous. Dev. Corp.* v. *Vill. of Arlington Heights*, 558 F.2d 1283, 1292 (7th Cir. 1977). So a court should not inquire into the electorate's individual motivations; it should look to see whether the referendum discriminates facially or, though facially neutral, engenders discrimination based on an obvious racial classification. E.g., *Seattle School Dist.*, 458 U.S. at 471 ("despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes").

Here, the district court could not say "that the only purpose of [§ 26] is to discriminate against minorities," because the proposal's sponsor and leading proponent both posited nondiscriminatory purposes: to eliminate preferential treatment based on race and sex. Pet. App. 78a (Gibbons, J. dissenting). And an abundance of careful social-science research examining alternatives to race- and sex-conscious admissions policies shows that a voter could have reasonably concluded that there were better alternatives. See generally Richard K. Kahlenberg, *A Better Affirmative Action*, available at http://tcf.org/assets/downloads/tcf-abaa.pdf.

First, universities have experienced success without race- and sex-based preferences. California's public universities have used race-neutral admissions policies since 1998, following the passage of Proposition 209. California weighed socioeconomic status more heavily and also addressed pipeline issues, seeking to assist minority and low-income students in becoming college-ready. Richard Pérez-Peña, *In California, Early Push for College Diversity*, N.Y. TIMES, May 8, 2013, at A1. And in 2001, the Regents approved a plan that essentially admitted the top 4% of California graduating seniors, though it applied to only some University of California campuses.

By 2002, African-American enrollment at California's public universities returned to pre-Prop 209 levels, and from 2007 to 2010 averaged 40% higher. Latino enrollment established a system record in 2000 and doubled its pre-Prop 209 levels by 2008.[4] Comparing the period 1992 to 1994 (pre-Prop 209) with 1998 to 2005 (post-Prop 209), African-American four-year college graduation rates improved by more than half, six-year graduation rates by one-fifth; Latinos experienced similar improvements.[5] And African-American and Latino grade-point averages increased post-Prop 209, even while minority students enrolled in more difficult science and engineering classes.[6]

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[4] *UC Application, Admissions, and Enrollment of California Resident Freshmen for Fall 1989 through 2010*, at http://www.ucop.edu/news/factsheets/flowfrc_10.pdf.

[5] Richard Sander, *An Analysis of the Effects of Proposition 209 Upon the University of California*, available at http://www.seaphe.org/pdf/analysisoftheeffectsofproposition209.pdf.

[6] *Id.*

The record level in African-American and Latino college-graduation rates in California is consistent with studies documenting that large race-based preferences can sometimes harm minority students by creating an academic "mismatch," where under-prepared students must compete with far better-prepared classmates. "[A]s a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher*, 570 U.S. _, slip op. at 18 (Thomas, J., concurring). This hurts mismatched students' self-confidence and may result in less learning. *Id.* But mismatch can be remedied when schools replace stereotype-reinforcing admissions policies with alternatives. See generally Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *Fisher* v. *University of Texas*, No. 11-345 (filed May 29, 2012), at 2–14; Richard H. Sander & Stuart Taylor, Jr., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012).

Texas was compelled to follow California's lead, though it adopted a different approach. In response to *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit Court of Appeals' invalidation of the University of Texas School of Law's use of race in admissions, the Texas Legislature enacted a 1997 law requiring the University of Texas at Austin (UT) to admit all Texas high-school seniors ranked in the top 10% of their classes.

By 2000, UT had already returned African-American and Latino freshman-enrollment levels to those of 1996, the last year the pre-*Hopwood* policy was in effect.[7] In a widely circulated editorial published in October 2000, UT's President credited the race-neutral system as enabling the university "to diversify at UT Austin with talented students who succeed." The system helped "us to create a *more* representative student body and enroll students who perform well academically," evidenced by the fact that "minority students earned higher grade point averages . . . than in 1996 and ha[d] higher retention rates."[8] Indeed, Plaintiffs in this case have tacitly conceded the academic success of UT's race-neutral system:

> The University of Texas, for example, recently discovered that students admitted from small rural and large urban high schools under the top "ten percent" plan achieved higher grades at UT than students admitted under other criteria . . . . [Coalition En Banc Supp. Br. 11.]

Second, there is a campus diversity problem in that universities tend to under-recruit students from low-income households.[9] And ""[r]acial preferences don't

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[7] Larry R. Faulkner, Editorial, *The "Top 10 Percent Law" is Working for Texas* (Oct. 19, 2000), available at http://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.html.

[8] *Id.*

[9] Caroline M. Hoxby & Christopher Avery, *The Missing "One-Offs": The Hidden Supply of High-Achieving, Low Income Students* (2013), available at http://www.brookings.edu/~/ media/projects/bpea/spring%202013/2013a_hoxby.pdf (among students with grades and test scores in the top 4% of the high school Class of 2008. 34% from the poorest household-income quartile attended the nation's most selective colleges versus 78% of the wealthiest).

help all that much in promoting class diversity, because selective colleges heavily favor minorities from middle-class and affluent families; but class-based preferences favor minorities, because blacks and Hispanics are more heavily represented among the poor." Bill Keller, *Affirmative Reaction*, N.Y. TIMES, June 9, 2013 (online).

In other words, a greater emphasis on recruiting students from low-income households inevitably improves minority-student enrollment. When comparing the percentage of minority students among the high-achieving, low-income group to high-achieving students generally, both African-American students (5.7% to 1.5%) and Latino students (7.6% to 4.7%) are more prevalent in the low-income group than in the general population.[10] Thus, at the University of California's Irvine campus, for example, the number of students "who are the first in their families to attend college has risen dramatically, and black and Hispanic enrollment has roughly doubled" after Prop 209. Keller, *Affirmative Reaction*. Accord Kahlenberg, *A Better Affirmative Action*. The takeaway is that a minority student from a low-income household and living in an underperforming school system is far more likely to be recruited and admitted under a program that focuses on a class-based admission formula than a race-based policy. And "enrolling students from poor and working-class backgrounds is likely to increase [campus] ideological diversity" as well. Keller, *Affirmative Reaction*.

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[10] *Id.*

There are other cascading effects for disadvantaged students. Evidence from Texas suggests that "the lure of assured admission and a few college scholarships significantly raised the aspirations and performance of students" in disadvantaged high schools. *Id.*[11] That excitement manifested itself: "Attendance was up, college applications were up, test scores were up, [and] enrollment in advanced courses was up." *Id.*

Third, supporters of race- and sex-conscious admissions policies argue that such policies are necessary to persuade minority students that they are welcome, and that eliminating such policies has a "chilling effect." But research based on Prop 209 suggests that minority applications among those likely to be admitted did not fall after elimination of race-conscious policies, David Card & Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants?*, 58 INDUS. & LABOR RELATIONS REV. 416 (2005), and there was a modest (~15%) "warming effect" on African-American and Latino student propensity to accept an admissions offer from and enroll at Berkeley, which previously used the largest preferences. Kate L. Antonovics & Richard H. Sander, *Affirmative Action Bans and the "Chilling Effect,"* 15 AM. LAW & ECON. R. 252 (2013).

This outcome should not be a surprise. A survey of some 140 colleges and universities across the nation, involving 1600 students, discovered that 71% of minority students rejected the use of race- or ethnic-based admissions preferences, and 62% disapproved of

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[11] Citing Thurston Domina, *How Higher Ed Can Fix K-12* (Oct. 12, 2007), available at http://www.insidehighered.com/views/2007/10/12/domina.

relaxed academic standards as a policy to increase minority-student representation. Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve University Education?*, 15 INT'L J. PUB. OPINION RES. 8 (2003). See also David Leonhardt, *Better Colleges Failing to Lure Talented Poor*, N.Y. TIMES, Mar. 16, 2013.

In sum, sociological and academic reasons justified voters' decision to end race-conscious admissions, and that is precisely the path that Michigan's citizens chose for their own public universities. Where § 26's language and purpose is to eliminate, not foster, discrimination, it is not possible to conclude that § 26 reallocated "the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests." *Seattle School Dist.*, 458 U.S. at 474. So while § 26 has obvious racial implications, its facial neutrality—and the facially neutral justifications for its enactment—counsels strongly against a conclusion that § 26 violates equal protection. Cf. *Fisher*, 570 U.S. ___, slip op. at 6 ("It is therefore irrelevant that a system of racial preferences in admissions may seem benign. *Any* racial classification must meet strict scrutiny . . . . Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect.") (emphasis added, quotations omitted.)

III. If this Court interprets *Seattle School District* as shielding policies requiring unequal treatment, then it should overrule *Seattle School District*.

Michigan citizens may—consistent with the Equal Protection Clause—no longer wish to categorize every person into a neat assignment of race, sex, or ethnicity. The time for these kinds of categorizations is passing, just as this Court predicted. And as explained above, it is difficult to see how *Seattle School District* prevents Michigan citizens from adopting a state-wide policy that prohibits race- and sex-based classifications.

If this Court concludes that *Seattle School District* does invalidate § 26, then *Seattle School District* should be overruled. Its ongoing significance is already waning. Consider *Romer* v. *Evans*, 517 U.S. 620 (1996), in which this Court struck down a Colorado constitutional amendment that repealed an ordinance prohibiting discrimination based on sexual orientation. In its essentials, *Romer* was on all fours with *Hunter* and *Seattle School District*, because the Colorado amendment was an impediment to protection against unequal treatment. In fact, the Colorado state courts enjoined the amendment on just that basis, relying on *Hunter* and *Seattle School District*.

But this Court's decision striking down the amendment relied "on a rationale different from that adopted by the State Supreme Court." *Romer*, 517 U.S. at 624. Citing *Hunter* and *Seattle School District* only in describing the lower-court decisions, the opinion relied on the fact that "the amendment seems inexplicable by anything other than animus." *Id.* at 632.

It is that crucial factor—animus, or discriminatory intent—that the Sixth Circuit en banc majority did not find in *Seattle School District*'s test. Instead, the majority reduced the political-restructuring test to a two part inquiry: (1) whether the policy or program targeted had a "racial focus" that inured "primarily to the benefit of the minority," and (2) "reallocate[d] political power . . . in a way that places special burdens on a minority group's ability to achieve its goals through that process." Pet. App. 21a–22a (citations omitted). If that is an accurate description of *Seattle*, it cannot be squared with this Court's holding in *Washington* v. *Davis* that it is not possible to have an equal-protection violation in the absence of a racial classification or disparate treatment paired with discriminatory intent. *Davis*, 426 U.S. at 239–42. And as explained above, the district court found no racial classification or discriminatory intent in § 26.

In assessing the modern-day validity of *Seattle School District*, then, the Court must ask itself whether *Seattle School District* may survive if it strikes down provisions that guarantee race neutrality and ensure non-discrimination. The elimination of discrimination and preferences based on race, sex, or ethnicity—the requirement of equal treatment—should never contradict Equal Protection. And if *Seattle School District* is interpreted as though it did reach that result, it should be overruled.

* * *

Plaintiffs say that § 26's supporters are "appeal-[ing] to prejudice" and "endorse race-based policies that disfavor racial diversity." Cantrell Br. in Opp. 4, 1. That is not true. The voters who supported § 26 cannot

be so easily categorized, because their views represent a myriad of legitimate reasons why it is time to end race-conscious admissions policies.

Section 26's supporters do not deny that there may be countervailing reasons for keeping race-based admissions policies. But debate and difference of opinion are the harbingers of the democratic process. The issue is whether the Constitution prohibited § 26's supporters from deciding that bringing an end to affirmative-action policies in higher education was the best policy for Michigan. And the answer to that question is a resounding no. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748. Accordingly, this Court should uphold Michigan's desire to require its public universities to recruit diverse student bodies without resort to race or sex.

CONCLUSION

The court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

SUPREME COURT, U.S.
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In The Supreme Court of the United States

BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY AND IRVIN REID

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INTRODUCTION

This case presents to the Court a question of great significance: whether the State of Michigan violated the Equal Protection Clause by amending its constitution to prohibit the otherwise lawful use of affirmative action in public university admissions decisions. The Board of Governors for Wayne State University and Irvin Reid (together "Respondent Wayne State University") submit this brief to address a single but important component of the ultimate question before the Court: whether its University admissions procedures are part of a "political process" within the meaning of this Court's decisions in *Hunter v. Erickson*, 393 U.S. 395 (1969) and *Washington v. Seattle School District*, 458 U.S. 457 (1982). Respondent Wayne State University submits that the answer to this question is "yes."

On November 7, 2006, the voters of the State of Michigan amended the State Constitution to prohibit Michigan's public colleges and universities from utilizing otherwise Constitutional affirmative action programs in admissions decisions. Prior to that date, Michigan's state universities, like other universities across the nation, had the option of utilizing narrowly tailored race-conscious admissions programs to pursue the recognized compelling state interest of achieving the educational benefits that flow from a diverse educational environment. *See Grutter v. Bollinger*, 539 U.S. 306 (2003). Michigan's constitutional amendment, codified as Michigan Constitution Article I, § 26 ("§ 26") and entitled "Affirmative Action Programs,"

prohibited Michigan's public universities and colleges from granting "any preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const. 1963 art. I, § 26.

Following the enactment of § 26, two groups of plaintiffs, the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary (Plaintiff-Respondent "BAMN") and Chase Cantrell, *et al.* (Plaintiff-Respondent "Cantrell") (together "Plaintiffs-Respondents"), filed suit, claiming that § 26 violates the Equal Protection Clause of the United States Constitution.[1] Among other arguments, the Plaintiffs-Respondents asserted that § 26 unconstitutionally reordered the political processes of the State of Michigan in a way that denies equal protection to minorities, as proscribed by this Court's decisions in *Hunter* and *Seattle School District*.

This argument was rejected by the District Court in its consideration of summary judgment motions, and the Plaintiffs-Respondents appealed. A three-judge panel of the Sixth Circuit reversed. The Sixth Circuit then reheard the case *en banc*, and made the

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[1] Plaintiff-Respondent BAMN sued not only the State of Michigan, but also Respondent Wayne State University, as well as the Regents of the University of Michigan and Board of Trustees of Michigan State University and their respective presidents (collectively "other University Respondents").

same determination as did the three-judge panel: that § 26 was an unconstitutional reordering of the political process. Pet. App. 21a-22a. The Court concluded that § 26 has a racial focus, that university admissions policies and procedures are part of a "political process," and that § 26 reordered that political process in a way that burdens racial minorities. Pet. App. 22a, 26a-38a.

The decision was not unanimous. Dissenting judges asserted the view that university admissions processes are not part of any "political process." Pet. App. 66a-78a (Gibbons, J., dissenting). They based this conclusion on the premise that the universities have irrevocably delegated responsibility for such matters to non-elected faculty committees. *Id.* The Michigan Attorney General ("Petitioner") also advanced this argument below, and cites it again to this Court.

This premise is simply untrue.

Respondent Wayne State University and the other University Respondents are uniquely situated in this case in that they are neither responsible for the enactment of § 26, nor parties who would have standing to file suit independently concerning its constitutionality.[2] These parties are also uniquely

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[2] The University Respondents argued below that they were not properly joined in the case (their involvement being only that they were required to comply with the law). The District Court denied the University Respondents' motion to dismiss,

(Continued on following page)

situated in at least one other critical respect: their ability to assist this Court in understanding the true nature of their admissions policies. The Universities need not attempt to draw general inferences from isolated depositions. Rather, they bring to the discussion a comprehensive and detailed understanding of university governance developed over a period of decades. Respondent Wayne State University believes that in a case of this moment, it is essential that this Court's opinion be predicated on an accurate factual basis concerning the Universities' processes, particularly when the record of such processes is so substantial.

While Respondent Wayne State University adopts the positions taken by the other University Respondents, we write separately as to the nature of admissions processes at Wayne State University. We do so because the public record and record below abundantly establish the active engagement of Wayne State University's Board of Governors in decision-making and oversight of admissions matters, and its ongoing exercise of authority in that area.

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and this determination was not reversed on appeal. Record 179 and 246; Pet. App. 152a-153a. The issue was not appealed to this Court.

STATEMENT OF THE CASE

Respondent Wayne State University accepts Petitioner's Statement of the Case only as it pertains to the chronology of the proceedings. Petitioner's assertions as to the genesis of and motivations for § 26 are without record support, and are simply speculation. Petitioner's depiction of Wayne State University's admissions policies and practices as having been irrevocably delegated to faculty committees is also factually inaccurate. Such policies are the province of an active and engaged Board of Governors elected directly by the voters of the State of Michigan.

Petitioner's assertions regarding Wayne State University's admissions process are not based upon evidence of record as to University-wide policies, but rather on an extrapolation of the deposition testimony of a then-newly appointed dean of a single professional school within the University. Reliance upon such testimony is inapposite for several reasons. The authority of the governing boards is a matter of law. The admissions practices of professional schools differ from both graduate and undergraduate schools and colleges, which represent the overwhelming proportion of university admissions. The dean upon whose testimony Petitioner relies presided over the law school, which is only one of thirteen schools and colleges that comprise Wayne State University.[3] The

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[3] Wayne State University Code Annotated ("WSUCA"), § 2.12.01.

law school's entering students consist entirely of those who have previously completed their baccalaureate degrees, and so are atypical of other schools and colleges at the University, except as linked by the commonly applicable policies of the Board of Governors. Most significantly, the testimony is starkly and amply contradicted by the public record, as presented in the proceedings of this case.

In contrast to the isolated and incorrectly characterized evidence upon which Petitioner relies, the record as demonstrated through Wayne State University's published governing Statutes, bylaws, and minutes of proceedings of the Board of Governors confirms that Wayne State University's Board of Governors approves and reviews admissions policy for its component schools and colleges – and does so routinely. Indeed, the requirements for undergraduate and graduate admissions are set forth in codified statutes that are enacted solely by the Board of Governors.

Finally, the Petitioner's Statement of the Case offers to this Court wholly unsupported assertions regarding the beneficial impact of § 26 on educational diversity in Michigan. Inasmuch as this litigation followed almost immediately upon the adoption of § 26, there is simply no record at all to support such assertions.

SUMMARY OF ARGUMENT

Respondent Wayne State University joins the other University Respondents in their positions regarding the nature of their admissions processes and the continuing importance of *Grutter* to the Universities' ability to achieve the benefits of a diverse student body, but advances in this brief a focused argument based on record information concerning its own admissions policies and procedures. The record of such matters confirms that the setting of admissions policy is part of a "political process" as contemplated by *Hunter* and *Seattle School District.*

This conclusion is supported first by the Constitution of the State of Michigan. The Board of Governors of Wayne State University, the Regents of the University of Michigan, and the Board of Trustees for Michigan State University are all constitutionally created entities, each vested by the Michigan Constitution with the plenary authority to control and manage its respective institution. Mich. Const. 1963 art. VIII, § 5. Michigan is one of a few states in which the governing boards are free-standing and autonomous. The members of these governing boards are elected directly by statewide vote. Governors serve eight year terms of office, with two from each University elected every two years. There is no appointed statewide board, no superior authority setting educational direction or policy. There is no intermediary. The Universities' governing boards are directly answerable to the people of the State of Michigan through the

electoral process. The governing boards are thus inherently "political."

Each governing board elects its institution's president and has "supervision of its institution and the control and direction of all expenditures from the institution's funds." *Id.* The governing boards retain broad authority over university policy. Each governing board is a "constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature." *Bd. of Regents of the Univ. of Michigan v. Auditor General,* 167 Mich. 444, 450, 132 N.W. 1037 (1911).

The policies of Wayne State University's Board of Governors are maintained in the form of a statutory code (the Wayne State University Code Annotated or "WSUCA"), and confirm that the Board of Governors' authority extends to admissions matters. Only Wayne State University's Board of Governors may enact, amend, or rescind the statutes. The WSUCA statutes set forth the University's undergraduate admissions standards and graduate admissions standards, as well as other matters of policy closely related to admissions.

Independently of the WSUCA, the bylaws of the Wayne State University Board of Governors reflect the Board's authority over admissions policy matters. The bylaws establish standing committees for the purpose of reviewing and making recommendations to the Board concerning various University matters,

including an Academic Affairs Committee which is responsible for reviewing and making recommendations to the Board regarding academic and educational policies and goals. Board policy recognizes an advisory role for faculty in academic matters, primarily through a University-wide faculty body known as the "Academic Senate."

The Board of Governors publishes detailed minutes of its meetings and decisions, and these also demonstrate the Board's authority over and engagement in admissions policy matters. The minutes reflect the Board and its committees in action, and so answer the question of whether published policy is consistent with actual operations. They demonstrate an active and fully engaged Board, revealing a multitude of instances in which the Board has established or modified admissions criteria, voted on admissions standards as a part of its decisions whether to approve new programs, received public comment on matters of admissions policy, and has requested and received information regarding admissions policy and related matters.

The Petitioner's argument to the contrary conflates policy control and delegation, decision-making and implementation. The Board of Governors does not directly decide whether this person or that should be admitted to a particular course of study, just as it does not ordinarily make decisions as to whether this individual or that should be hired for entry-level employment, or whether this textbook or that will best serve a particular curriculum. Universities are far too

large and far too complex to manage affairs at so retail a level. Rather, the Board of Governors makes the policy by which such decisions are to be made (while soliciting the input of faculty and others in the process), delegates implementation to others, and oversees the process.

The Sixth Circuit, in recognition of the nature of this relationship, determined that admissions policy decision-making at the universities is part of a political process, and that § 26 impermissibly reordered this process by removing the opportunity for persons to petition the universities' governing boards for racially focused changes to university admissions policy, and placing the venue for consideration of such matters at the most remote and fixed level of the political process, the Michigan Constitution. Pet. App. 21a-26a. To the extent this holding rests on whether the University Respondents are engaged in a "political process" in setting admissions policy, Wayne State University believes it is supported by a correct understanding of the record.

ARGUMENT

I. Wayne State University's Admissions Procedures Are Part of a Political Process.

A. Michigan Law Evidences that the Board of Governors' Decision-Making is a Political Process.

The Constitution of the State of Michigan provides the members of the governing boards of Wayne State University, the University of Michigan, and Michigan State University and their respective successors in office each constitute a "body corporate." Mich. Const. 1963 art. VIII, § 5. Each board consists of eight members directly elected by the people of the State of Michigan in statewide elections. *Id.* Once elected, the members of the governing boards sit for rotating eight-year terms, with two seats open for election every two years. *See generally,* Mich. Comp. Laws §§ 168.282, 168.286 (2013). Each board elects its institution's president and has "supervision of its institution and the control and direction of all expenditures from the institution's funds." Mich. Const. 1963 art. VIII, § 5.

The courts of the State of Michigan have long recognized that this constitutional grant of autonomy vests the governing boards of the state's universities with "the absolute management of the University, and the exclusive control of all funds received for its use." *State Board of Agriculture v. State Administrative Board,* 226 Mich. 417, 424 (1924). The courts have "jealously guarded" these powers from legislative interference. *Federated Publications, Inc. v.*

Board of Trustees of Michigan State University, 460 Mich. 75, 594 N.W.2d 491 (1999); *Board of Control of Eastern Michigan University v. Labor Mediation Board*, 384 Mich. 561, 565, 184 N.W.2d 921 (1971). As the Office of the Michigan Attorney General has itself acknowledged, the governing boards' authority extends specifically to admissions matters. *See* OAG, 1979-1980, No. 5637, p. 578 (Jan. 31, 1980)[4] ("It is therefore my opinion that the governing board of a state university has the discretion to determine the prerequisites for admission to a medical school course in eye enucleation.").

Michigan's constitutional structure for the governing boards of its public universities is uncommon.[5] The independence afforded to the governing boards has contributed greatly to the success of Michigan's public universities. Their constitutional autonomy affords them a measure of insulation from short-term political winds while their direct election ensures that the boards are accountable to the people of the State of Michigan.

There can be no more fundamentally political structure than one in which policy makers are selected or removed by popular election. Indeed, Michigan

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[4] Also available at http://www.ag.state.mi.us/opinion/datafiles/1980s/op05637.htm (last accessed August 20, 2013).

[5] While the more common structure is a statewide "system" comprised of several universities, leading institutions typically exercise very considerable autonomy in governance.

courts have acknowledged the political nature of the governing boards. *Regents of University of Mich. v. Labor Mediation Bd.*, 18 Mich. App. 485, 171 N.W.2d 477 (1969) (Michigan university regents are a "constitutional body politic").

B. Wayne State University's Code of Statutes and Bylaws Evidence the Board's Authority Over Admissions Policy and Related Matters.

At Wayne State University, the Board of Governors' policies are designated as "statutes" and are codified in the WSUCA. R. 12/23/2011 Supp. Br. 5-6. The WSUCA contains many provisions addressing and setting admissions standards and related criteria. These include policies governing undergraduate admissions (WSUCA § 2.34.09), graduate admissions (WSUCA 2.34.12), transfer students (WSUCA § 2.34.04), undergraduate student retention (WSUCA § 2.34.13), undergraduate probation (WSUCA § 2.34.11), grading policy (WSUCA § 2.34.07), financial aid (WSUCA § 2.34.01), undergraduate general education requirements (WSUCA § 2.43.03), and requirements for a baccalaureate degree (WSUCA § 2.43.11). R. 12/23/2011 Supp. Br. 6. The Board has expressly reserved solely to itself the authority to establish and terminate degrees and to establish the principal requirements for earning degrees, while delegating to the president operational program decisions. (WSUCA §§ 2.43.01.010,

020.) R. 12/23/2011 Supp. Br. 6-7. Amendments to WSUCA are accomplished by vote of the Board. *Id.*

Petitioner argues that matters of admissions policy have been irrevocably delegated to faculty committees, and thus removed from the political process. Pet'r's Br. 24-25. On the contrary, Wayne State University's statutes reflect that, while faculty serves an important advisory role in recommending educational policy, they do not control admissions.

The Board of Governors recognizes both a Graduate Council (WSUCA § 2.22.01) and an Academic Senate (WSUCA § 2.26.04), and through these bodies receives valuable advice on matters of educational policy. R. 12/23/2011 Supp. Br. 7. The advisory nature of these bodies is reflected explicitly in statutes governing their existence. For example, the statute pertaining to the Academic Senate states: "The Senate may consider matters referred to it by the President, by other councils, or upon its own initiative, and may make recommendations with reference thereto to the President and/or such other councils, and pursuant to the procedures herein set forth, to this Board." (WSUCA § 2.26.04.120).[6]

The WSUCA statutes further specify that the Board delegates responsibility for admissions matters, not to committees, but to the President, who is

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[6] *See* http://bog.wayne.edu/code2_26_04.php (last visited August 19, 2013).

by the Michigan Constitution an *ex officio* member of the Board without vote. Mich. Const. 1963 art. VIII, § 5. "After consultation with the College or School, the President or his/her designee is authorized to establish specific admissions standards for degree programs." (WSUCA § 2.34.09.090). R. 12/23/2011 Supp. Br. 7. To the extent admissions committees have a role in establishing admissions practices at the school or college level, it is only by subdelegation of Board authority from the President:

> "The Board of Governors authorizes the President to subdelegate the authority vested in him/her by this statute. No authority whatever is vested in any person to exercise any of the authority granted by the Board of Governors except pursuant to a specific subdelegation by the President."

(WSUCA § 2.43.01.040). R. 12/23/2011 Supp. Br. 7. The President being elected by and answerable to the Board, and the Board retaining the authority to amend the statutes and bylaws, the Board does not relinquish authority by virtue of any such subdelegation. *Id.*[7]

As evidenced by its bylaws, the Board of Governors has structured itself to optimize its continuing engagement in University affairs, including admissions

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[7] The Wayne State University statutes and Board of Governors bylaws specify the President's relationship to the Board. *See* WSUCA § 2.12.01.020; *see also* Bylaws of the Board of Governors, § 2.2. R. 12/23/2011 Supp. Br. 7.

and other academic matters. The bylaws establish standing committees for the purpose of reviewing and making recommendations to the Board concerning various University matters. Bylaws of the Board of Governors, § 3.1. R. 12/23/2011 Supp. Br. 8. The Board's Academic Affairs Committee is responsible for reviewing and making recommendations to the Board regarding academic and educational policies and goals. *Id.* The Board's Student Affairs Committee is responsible for reviewing and making recommendations to the Board regarding student matters. *Id.*[6] These committees are key vehicles for the Board's exercise of authority over and involvement in admissions-related matters.

C. The Public Record of the Board's Activities Evidences the Board's Authority Over and Engagement in Determining Admissions Policy Matters.

As shown by Board and Committee Minutes, the Board of Governors, through its Academic Affairs Committee and its Student Affairs Committee, engages in robust and regular review of administrative actions involving admissions policy and related matters. The minutes reflect that the Board votes on changes to admissions criteria, that it approves admissions criteria as a part of its consideration and

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[6] The Board also maintains standing committees for budget and finance, and for personnel. R. 12/23/2011 Supp. Br. 8.

voting on the establishment of new academic programs, and that the Board is otherwise actively and regularly involved in shaping matters directly involving or related to student admissions.

1. The Board Votes on Recommended Changes to Established Admissions Standards.

On several occasions, the Board has voted on proposed changes to program-specific admissions criteria. For example:

- On April 30, 2008, the Board voted on a recommendation to revise guidelines for establishment of honors curricula, including admissions criteria. R. 12/23/2011 Supp. Br. 9.
- On August 4, 2010, the Board voted on a recommendation to modify the honor point criteria for graduate admission. *Id.*
- On September 29, 2010, the Board voted on a recommendation to modify the maximum number of transfer credits that the University would allow in certain cases where articulation agreements rendered modification appropriate. *Id.* R. 12/23/2011 Supp. Br. 9-10.
- On February 1, 2012, the Board voted to approve recommended changes to the statute on undergraduate admissions.[9] At that time,

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[9] *See* February 1, 2012 Board of Governors Academic Affairs Committee Meeting Minutes, available at: http://bog.wayne.edu/meetings/2012/02-01/index.php (last visited August 8, 2013).

> the Board also established an oversight advisory group, to " . . . assure positive, effective, and successful implementation of programs involving enrollment, admission, retention and completion and to assure that those programs fulfill WSU's urban mission."[10]

Decisions to modify established admission-related criteria are clearly subject to Board review and are not isolated from the Board's influence or authority.

2. The Board Votes Upon Admission Criteria in Connection with Reviewing Proposed New Academic Programs.

The Board regularly reviews and passes upon admissions requirements in the course of voting on broader issues, such as the implementation of new

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[10] This Board action occurred following the submission of briefs to the Sixth Circuit below. Because Respondent Wayne State University and the other University Respondents are constitutionally-created entities, and the status of their governing boards has been recognized as "the highest form of juristic person known to the law . . . which, within the scope of its functions is co-ordinate with and equal to that of the legislature," Pet. App. 28A, *quoting Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*, 167 Mich. 444, 132 N.W. 1037, 1039 (Mich. 1911), the Court may take notice of their statutes, bylaws, and proceedings as legislative facts, similar to the manner in which the Court could consider the enactment of a legislative body. *See* Fed. R. Evid. 201, Notes of Advisory Committee. If the Court deems necessary, it can and should take notice of them as adjudicative facts. Fed. R. Evid. 201(b)(2).

academic programs at the University. While not exhaustive of the many times the Board has been called to approve or modify academic programs between 2005 and the present, representative examples include:

- On January 19, 2005, the Board considered proposed admission requirements in connection with a vote whether to institute a proposed Doctor of Physical Therapy program. R. 12/23/2011 Supp. Br. 10.
- On June 8, 2005, the Board considered proposed admission requirements in connection with a vote whether to institute a proposed Master of Science in Alternative Energy Technologies program. R. 12/23/2011 Supp. Br. 10-11.
- On January 13, 2008, the Board considered proposed admission requirements in connection with a vote whether to institute a proposed Master of Arts program with a major in Marriage and Family Psychology. R. 12/23/2011 Supp. Br. 11.
- On April 20, 2011, the Board considered proposed admission requirements in connection with a vote whether to institute a proposed Graduate Certificate Program in Complementary Therapies in Health Care. *Id.*
- On June 27, 2012, the Board considered proposed admission requirements in connection with a vote whether to approve a proposed

J.D./M.S. in Criminal Justice Joint Degree Program.[11]

3. The Board Is Otherwise Engaged and Instrumental in Shaping Admissions Policy.

In a university as large and complex as Wayne State University, the Board necessarily delegates operational detail to others. The Board pays close and detailed attention to the progress and outcome of such engagement, and Board committees are actively and routinely engaged with regard to admissions-related matters. Such involvement has taken place on a longstanding basis. Examples include the Board's consideration of: (1) the relationship between alternative admissions programs and retention;[12] (2) alternative admissions policies;[13] (3) the potential impact of modifying admissions criteria for the Honors Program on diversity;[14] (4) the need to enhance provisional admissions programs and monitor general admissions standards to improve retention;[15] (5) potential modifications to curricula of certain programs to allow

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[11] *See* June 27, 2012 Board of Governors Academic Affairs Committee Meeting Minutes, available at: http://bog.wayne.edu/meetings/2012/06-27/index.php (last visited August 20, 2013).

[12] R. 12/23/2011 Supp. Br. 12.

[13] *Id.*

[14] *Id.*

[15] R. 12/23/2011 Supp. Br. 13.

for the acceptance of a higher number of applicants;[16] (6) the number of high school graduates applying for admission to particular programs;[17] and (7) regular review of a multitude of additional issues related to student admissions, enrollment, and retention, which occurs at numerous board meetings every academic year.[18]

The Board regularly receives public comment at such meetings, further underscoring that its decision making remains part of a political process.[19] This active and robust engagement, continuing over a period of years, demonstrates that the Wayne State University Board of Governors has not "completely and irrevocably delegated away" its authority over this important area of University operations.

Petitioner's conclusion that admissions policy is set by program-specific faculty admissions committees which are not politically accountable to the people of Michigan relies entirely upon the deposition

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[16] *Id.*

[17] *Id.*

[18] A non-exhaustive review of Board meeting records indicates that the Board addresses issues related to student admission, enrollment, and/or retention on an average of three or more Board meetings per academic year. R. 12/23/2011 Supp. Br. 14.

[19] *See* February 1, 2012 Board of Governors Academic Affairs Committee Meeting Minutes, available at: http://bog.wayne.edu/meetings/2012/02-01/index.php (last visited August 8, 2013) (public comment received concerning proposed change to undergraduate admission criteria).

testimony of Assistant Dean Zearfoss of the University of Michigan Law School, and of Dean Wu of Wayne State University's law school, individuals not charged with knowledge of their respective Board's processes, and who testified with limited knowledge and experience outside of their immediate frame of reference. Indeed, Dean Wu testified over counsel's objection that he was not competent to answer legal questions as to University admissions policy. J.A. 22. The Board of Governors' authority over admissions policy is a question of law. Even were this not the case, the Dean's competence as a factual witness did not extend to any admissions processes apart from the University's law school.[20] Dean Wu neither had nor purported to have knowledge as to admissions policy at any other school or college at Wayne State University, much less the admissions processes of the other University Respondents.

While faculty consultation is certainly involved in admissions decisions, it is simply not the case that the respective universities' governing bodies have so fully delegated their authority over admissions

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[20] The reliance upon this objectionable testimony is particularly troublesome in light of the fact that as a professional school, the law school's admissions policies are not readily analogized to admissions policies applicable to either graduate or undergraduate admissions. The law school's admissions, in contrast to the vast majority of admissions that occur through other schools and colleges of Wayne State University, consist entirely of students who have previously completed baccalaureate degrees.

matters to groups within the university as to make their own engagement peripheral to the process. Both by policy and practice, it is well borne out that Wayne State University's Board of Governors retains authority over, and remains actively involved in, matters relating to student admissions.

This is illustrated even in Board decisions specific to the law school at Wayne State University. In 2007, the Board reduced out-of-state tuition for law school students to 110 percent of in-state tuition. The purpose, as articulated by the Board, was to "recruit and enroll a more geographically diverse class."[21]

Petitioner's argument fails to differentiate decision-making from implementation. The Board does not and should not review applications from the many thousands of individuals who apply for admission to Wayne State University every year. That extraordinarily detailed process is subdelegated, in part to administrators, in part to faculty groups. Whether this student or that satisfies the criteria for admission is important often requires a careful and individualized review of grade point, test scores, essays, and the like. No more does the Board determine which text best serves to teach a particular curriculum, or determine what equipment best allows the administration to care for some aspect of

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[21] *See* July 25, 2007 Board of Governors Minutes of Official Proceedings, available at: http://bog.wayne.edu/meetings/2007/07-25/ (last visited August 10, 2013).

the physical plant, or any of a myriad of important but essentially local determinations that cumulatively go into the day-to-day operations of a large and sophisticated educational institution. The Board's Constitutionally-committed role is to establish and oversee the policies and processes by which such determinations are to be made, consulting and receiving advice in doing so.

Wayne State University respectfully submits that the factual predicate upon which the Petitioner relies, that admissions policy decisions are made by unaccountable faculty members, is absent. The Board's codified written authority, taken together with numerous examples of the Board's exercise of such authority, are far more reliable indicators of the processes in place at the University than is the limited and misapplied testimony upon which Petitioner relies. The Sixth Circuit correctly noted that one would need to "look the other way" in order to draw the conclusion Petitioner requests on this issue. Pet. App. 27a.

CONCLUSION

Respondent Wayne State University respectfully requests that this Court, in the course of deciding the broader constitutional question presented by this case, find that the University Respondents' admissions procedures are part of a "political process" as

contemplated by this Court's decisions in *Hunter* and *Seattle School District*.

Respectfully submitted,

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RESPONDENT'S BRIEF

RECORD AND BRIEFS

No. 12-682

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FILED
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IN THE

Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,

-AND-

CHASE M. CANTRELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

PARTIES TO THE PROCEEDING

Petitioner is Bill Schuette, Michigan Attorney General. Respondents are Chase Cantrell, M.N., a minor child, by Karen Nestor, Mother and Next Friend, Karen Nestor, Mother and Next Friend of M.N., a minor child, C.U., a minor child, by Paula Uche, Mother and Next Friend, Paula Uche, Mother and Next Friend to C.U., a minor child, Joshua Kay, Sheldon Johnson, Matthew Countryman, M.R., a minor child, by Brenda Foster, Mother and Next Friend, Brenda Foster, Mother and Next Friend of M.R., a minor child, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, T.J., a minor child, by Cathy Alfaro, Guardian and Next Friend, Cathy Alfaro, Guardian and Next Friend of T.J., a minor child, S.W., a minor child, by Michael Weisberg, Father and Next Friend, Michael Weisberg, Father and Next Friend of S.W., a minor child, Casey Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, Edward Kim, M.C.C., II, a minor child, by Carolyn Carter, Mother and Next Friend, Carolyn Carter, Mother and Next Friend of M.C.C., II, a minor child, J.R., a minor child, by Matthew Robinson, Father and Next Friend, and Matthew Robinson, Father and Next Friend of J.R., a minor child (together, the "Cantrell Respondents").

In the consolidated case, there is a separate group of Respondents, which includes the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), United for Equality and Affirmative Action Legal Defense Fund, Rainbow Push Coalition, Calvin Jevon Cochran, Lashelle Benjamin, Beautie Mitchell, Denesha Richey, Stasia

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INTRODUCTION

Before Proposal 2 was enacted in November 2006, the Michigan Constitution granted plenary authority over *all* matters relating to the state's public universities, including authority to establish admissions criteria, to each university's Board of Regents. Supporters of Proposal 2 mobilized in direct reaction to this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306, 340, 343 (2003), holding that Michigan Law School's policy of considering race as one factor among many in a holistic, individualized review of admissions applications was constitutionally permissible. Proposal 2's supporters sought not only to repeal the constitutionally permissible race-conscious admissions policies that universities had developed in the wake of *Grutter*; instead, they sought to permanently ban such policies by embedding a prohibition against them in the state constitution and thereby changing—along explicitly racial lines—the political structure traditionally employed by the State of Michigan to make higher educational policy.

Following Proposal 2's enactment, the Boards of Regents are prohibited by the state constitution from retaining their constitutionally permissible race-conscious admissions programs or from adopting new constitutionally permissible policies. They retain plenary authority over all other matters, however, including whether to include countless other constitutionally permissible criteria in their admissions programs. Consequently, a student who believes that her family's alumni connections (or experience as a member of a Christian service group or living in Michigan's Upper Peninsula) should

receive greater weight in the admissions process can advocate to the Boards of Regents—or to the university officials to whom they have delegated authority over admissions policy—with a chance of success. In contrast, post-Proposal 2, if a student believes that the admissions process should consider how she would contribute to promoting diversity within the university community based on her experiences as an African-American woman, she has no choice but to undertake the far more onerous process of amending the state constitution to authorize again constitutionally permissible race-conscious admissions programs.

Launched by opponents of constitutionally permissible race-conscious admissions programs after they lost in *Grutter*, Proposal 2 explicitly refers to race and was unquestionably about race. It not only prohibited constitutionally permissible race-conscious admissions programs but also made it substantially more onerous for proponents of such programs to advocate their adoption successfully in the future, thereby (among other consequences) reducing the enrollment of underrepresented minorities on individual campuses. Based on overwhelming evidence, the Sixth Circuit adopted the district court's factual findings that Proposal 2 effected a significant change in the ordinary political process and that it was fundamentally about race. Relying on *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), the Sixth Circuit, sitting en banc, concluded that Proposal 2 was therefore a racial classification subject to strict scrutiny under the Equal Protection Clause and, because the state

did not advance a compelling governmental interest, was unconstitutional.

In the context of racial classifications, this Court has most often applied strict scrutiny when the government expressly classifies individuals by race and differentially allocates benefits and burdens based upon individual membership in a racial or ethnic group. *See, e.g.*, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (reviewing public university admissions program); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (reviewing programs to assign individual students to particular K-12 public schools); *Grutter*, 539 U.S. 306 (2003) (reviewing public law school admissions program); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (reviewing program to award government contracts).

But this Court also has identified a category of cases where strict scrutiny applies to governmental action that does not allocate benefits or burdens directly to individuals but rather controls how decisions related to that allocation occur. When race is "*the predominant* factor," *Bush v. Vera*, 517 U.S. 952, 959 (1996), motivating the manipulation of the political process, that change in the political process itself creates a racial classification that is subject to strict scrutiny. For example, this Court has held that redistricting decisions are subject to strict scrutiny when they disregard traditional race-neutral districting principles and otherwise are "unexplainable on grounds other than race," even when there is *no* resulting substantive harm to any individual's voting strength. *Shaw v. Reno*, 509 U.S. 630, 641-43 (1993); *see also Bush*, 517 U.S. at 958.

Likewise, strict scrutiny applied in *Hunter* and *Seattle*, which this Court subsequently characterized as "precedents involving discriminatory restructuring of governmental decisionmaking," *Romer v. Evans*, 517 U.S. 620, 625 (1996), because the challenged governmental action in those cases created uniquely onerous political processes for deciding whether to adopt constitutionally permissible race-conscious programs.

The narrow application of strict scrutiny beyond decisions that directly allocate governmental benefits and burdens reinforces the core rationale supporting this Court's conclusion that *all* racial classifications must be subject to strict scrutiny: they "delay the time when race will become a truly irrelevant, or at least insignificant, factor" in society. *Adarand*, 515 U.S. at 229. It is, of course, the political process that determines the allocation of governmental benefits and burdens, so efforts like Proposal 2 to structure the political process along overtly racial lines unmistakably mandate that race be "outcome determinative," *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting), in the way government operates and "threaten[] to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire," *Shaw*, 509 U.S. at 657. The suggestion that changing the political process along racial lines to prevent the state from taking constitutionally permissible race-conscious action is somehow justified because it may ultimately reduce the importance of race within society is irreconcilable with settled doctrine. *See, e.g.*, *Parents Involved*, 551

U.S. at 782 (Kennedy, J., concurring) ("To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome.").

Because the state plainly has a compelling interest in prohibiting race-conscious action that violates the Equal Protection Clause, the political restructuring doctrine is necessarily implicated only in the limited circumstances where race-conscious governmental action is *constitutionally permissible*. Under those circumstances, the state must make a choice whether to take race into account; there is consequently a need for public discourse regarding whether or not to adopt such measures. In this case, for example, Michigan was free to maintain the race-conscious admissions program upheld in *Grutter* or to abandon it. *See, e.g.*, *Crawford v. Bd. of Educ.*, 458 U.S. 527, 539 (1982). Proposal 2, however, effected far more than a mere repeal of race-conscious legislation. While otherwise leaving intact the Boards of Regents' plenary authority over university affairs, Proposal 2 stripped the Boards' power only with respect to an inherently racial issue and entrenched that issue at a higher and more burdensome level of political decisionmaking. Although history instructs that the targeted restructuring of the political process has often been used, as here, to the disadvantage of racial minorities, this Court has cautioned that allowing *either* side of a debate to manipulate the political process for making such decisions introduces a racial divide into the political system. *See Shaw*, 509 U.S. at 650-51 ("[E]qual protection analysis is not dependent on the race of those burdened or benefited" (internal quotation marks omitted)).

Recent empirical analysis demonstrates that racial polarization was substantially greater in Michigan on the question of whether to amend the constitution to prohibit race-conscious admissions programs than on the more general question of whether affirmative action programs should be adopted. *See generally* Brief of Amici Curiae Political Scientists Donald Kinder *et al.* (hereinafter "Kinder Br.").

The political restructuring doctrine is a necessary bulwark of equal protection jurisprudence: it ensures that the debate over whether to adopt constitutionally permissible race-conscious programs does not lead to racial balkanization if one side attempts to racially gerrymander the political process to rig the outcome in its favor. It also reflects a clear and narrow rule: when *race is the predominant factor* explaining a state's decision to establish a *distinct political process*, the governmental action creates a racial classification subject to strict scrutiny. Although courts may be called upon to determine whether *race is the predominant factor* behind the governmental action and whether the action creates a *distinct political process*, those determinations are guided by tests that are amenable to commonsensical and objective application.

Accordingly, the Court should affirm the Sixth Circuit's conclusion that Proposal 2 was a distortion of the political process related to constitutionally permissible race-conscious policies and therefore a racial classification that is subject to, and fails, strict scrutiny, especially in light of Petitioner's failure even to articulate a compelling state interest.

STATEMENT

A. Background

Under its state constitution, Michigan's public universities are controlled by independent Boards of Regents, each of which has the power of "general supervision of its institution and the control and direction of all expenditures from the institution's funds." Mich. Const. art. VIII, § 5. Board members have always enjoyed autonomy over admissions policies, and they have delegated the responsibility to establish admissions standards, policies, and procedures to units within the institutions, including central admissions offices, schools, and colleges. Pet. App. 27a-29a; Supp. C.A. Br. of Universities 19-21. Students, faculty, and other individuals have always been free to lobby Michigan's public universities for or against the adoption of particular admissions policies. They have historically done so on numerous occasions. By the 1990s, for example, in response to decades of robust, hard-fought political debate, admissions decisions in many of Michigan's public universities' graduate and undergraduate programs included consideration of race as one of a multitude of factors. Supp. Pet. App. 270a-71a.

In 2003, this Court in *Grutter*, 539 U.S. 306, upheld as constitutional the University of Michigan Law School's holistic, race-conscious admissions policy. On the same day, the Court invalidated the admissions policy of the University of Michigan's undergraduate college as not narrowly tailored to serve the State's compelling interest in obtaining the educational benefits of student-body diversity. *See Gratz v. Bollinger*, 539 U.S. 244 (2003).

Following these decisions, Michigan's public universities amended their admissions policies as needed to comply with *Grutter*. For instance, the University of Michigan's undergraduate admissions officers crafted a policy that engaged in an "individualized inquiry into the possible diversity contributions of all applicants," *Grutter*, 539 U.S. at 341, considering race along with another "50 to 80 different categories," such as personal interests and achievements, geographic location, alumni connections, athletic skills, socioeconomic status, family educational background, overcoming obstacles, work experience, and any extraordinary awards, both inside and outside the classroom, Supp. Pet. App. 283a-284a.

As Petitioner acknowledges, Pet. Br. 7, in direct response to this Court's rulings in *Gratz* and *Grutter*, opponents of race-conscious admissions programs organized to place a proposal to amend the Michigan Constitution on the November 2006 statewide ballot. The initiative, Proposal 2, sought "to amend the State Constitution to ban affirmative action programs," Pet. App. 8a, and its principal author stated that its purpose was "to prohibit programs that granted racial preferences, that is, affirmative action programs," Supp. Pet. App. 327a. Once adopted by the voters, Proposal 2 amended the Michigan Constitution to include the following provisions, entitled "Affirmative Action," in Article I:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant

> preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

Pet. App. 8a-9a (citing Mich. Const. art. I, § 26). No prior constitutional amendment in Michigan had dealt with any matter relating to university admissions or, for that matter, with anything related to higher education governance or affairs.

In December 2006, Proposal 2 took effect and generated two major changes to the admissions policies at Michigan's public universities. First, Proposal 2 mandated that Michigan's public universities remove "race, sex, color, ethnicity, or national origin" as potential factors in the admissions process even though the Boards and their designated admissions committees could continue to

consider any and all other factors. Pet. App. 9a. Second, Proposal 2 "entrenched this prohibition at the state constitutional level, thus preventing public colleges and universities or their Boards from revisiting this issue—and only this issue—without repeal or modification of [Proposal 2]." Pet. App. 9a.

B. Proceedings Below

On November 8, 2006, the day after Proposal 2 was approved, the Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary ("Coalition Plaintiffs") filed suit in the United States District Court for the Eastern District of Michigan. About a month later, the Michigan Attorney General filed a motion to intervene as a defendant, which the court granted. Pet. App. 9a-10a.

On December 19, 2006, the Cantrell Plaintiffs, a group of students, faculty, and prospective applicants to Michigan's public universities, filed a separate suit in the United States District Court for the Eastern District of Michigan. Pet. App. 10a. The Cantrell Plaintiffs sought to prohibit Proposal 2's enforcement only as applied to university admissions, Pet. App. 10a, on the ground that Proposal 2 violates the Fourteenth Amendment by creating a separate and more burdensome governmental decisionmaking process for determining whether or not universities may adopt race-conscious admissions policies that satisfy the Fourteenth Amendment. The district court consolidated the two cases in January 2007. *See* Pet. App. 109a.

In reviewing Michigan law and the historical record, the district court found that "governance of a university, including the regulation of admissions criteria, is part of the political process" and that "race-conscious admissions programs developed" through this process "in the first place." Supp. Pet. 327a. After discovery and consideration of expert testimony, the court further found that, in terms of enrollment numbers, "Proposal 2's elimination of affirmative action programs will fall the heaviest on minorities," Supp. Pet. App. 316a, a finding that was borne out after Proposal 2 went into effect. Brief for Respondents the Regents of the University of Michigan *et al.* 23-25.

The district court also found "no question" that "Proposal 2 makes it more difficult" for proponents of constitutionally permissible race-conscious programs to achieve their adoption. Supp. Pet. App. 328a. Expert testimony established that the process of amending Michigan's Constitution is "lengthy, complex, difficult and expensive," J.A. 40, and ballot initiatives in Michigan can cost as much as $15 million, "with $5 million being a practical minimum," J.A. 47. Because Michigan requires "signatures from 10% of the total vote cast for all candidates" in the last gubernatorial election and has a relatively short window for gathering signatures, the cost of simply securing enough signatures to place an initiative on the ballot could approach $1 million. J.A. 44, 47-48.

Nonetheless, the district court denied the Plaintiffs' motions for summary judgment and granted the Attorney General's motion for summary judgment, stating that "the political restructuring effectuated by Proposal 2 does not offend the Equal

Protection Clause." Supp. Pet. App. 330a; *see* Pet. App. 11a-12a. The district court subsequently denied the Cantrell Plaintiffs' motion for reconsideration, and both Plaintiff groups appealed. Pet. App. 12a.

On appeal, the Sixth Circuit, sitting en banc, invalidated Proposal 2. Relying on *Seattle* and *Hunter*, the Sixth Circuit held that a political enactment denies equal protection when it (1) has a "racial focus" and (2) "reallocates political power or reorders the decisionmaking process" in a way that "places special burdens on racial minorities." Pet. App. 21a-22a.

As the Sixth Circuit recognized, it is undisputed that after Proposal 2, the *only* recourse available to a person seeking to restore the constitutionally permissible consideration of race as one factor in higher education admissions would be to mount a successful statewide electoral campaign to amend the Michigan Constitution, which, as the district court found, is "an extraordinarily expensive process and the most arduous of all the possible channels for change." Pet. App. 36a. In contrast, a Michigan citizen lobbying for or against consideration of such non-racial factors as religious group membership, legacy status, geographic origin, athletic skill or virtually any other dimension of experience or background treated as an identifying characteristic may use any number of less burdensome avenues to change or maintain admissions policies. For example, such a citizen could directly engage in discourse with the Boards, the appropriate university committees, or other university officials. *See* Pet. App. 35a. The Sixth Circuit also affirmed

the district court's finding that "the admissions policies affected by Proposal 2 are part of a political process," canvassing in detail Michigan law and relying also on briefing by University defendants "clarif[ying] their admissions practices." Pet. App. 27a-33a (internal quotation marks omitted).

As the Sixth Circuit explained, "[b]ecause less onerous avenues to effect political change remain open to those advocating consideration of nonracial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to traverse a more arduous road without violating the Fourteenth Amendment." Pet. App. 37a-38a. The Sixth Circuit recognized that the State of Michigan had made *no* attempt to justify Proposal 2 by advancing a putative compelling interest. Pet. App. 45a ("Likewise, because the Attorney General does not assert that Proposal 2 satisfies a compelling state interest, we need not consider this argument.").

SUMMARY OF ARGUMENT

This Court has held that *all* racial classifications are subject to strict scrutiny. *See Fisher*, 133 S. Ct. at 2421. Thus, strict scrutiny applies when the government classifies "individuals by race" and differentially "allocate[s] benefits and burdens on that basis," *Parents Involved*, 551 U.S. at 783, 789 (Kennedy, J., concurring). Strict scrutiny also applies when race is "the predominant factor," *Bush*, 517 U.S. at 959, in determining how the political process is structured because this Court has recognized that the allocation of government benefits and burdens cannot be separated from the process by

which those political decisions are made. *See Bush*, 517 U.S. 952; *Shaw*, 509 U.S. 630; *Seattle*, 458 U.S. 457; *Hunter*, 393 U.S. 385. Proposal 2 falls into this second, narrower category of racial classifications because it requires a distinct and, as the district court explicitly found and the Sixth Circuit affirmed, more onerous process for deciding whether to adopt constitutionally permissible race-conscious admissions programs than the process that applies to other decisions related to admissions criteria.

This Court should affirm the Sixth Circuit's decision and decline the invitation by Petitioner and Russell to overrule the political restructuring doctrine embodied in *Hunter* and *Seattle*, for three principal reasons:

1. The political restructuring doctrine is consistent with, and a necessary component of, this Court's equal protection jurisprudence.

This Court has long recognized that the "peculiar and disadvantageous" treatment of racial matters in the political process is a racial classification subject to strict scrutiny. *See Seattle*, 458 U.S. at 485. Like decisions impacting voting rights and the redistricting of legislative boundaries, decisions to modify other facets of the political process directly impact the allocation of governmental benefits and burdens to individuals. Applying strict scrutiny to decisions that create "distinctions based on race," *id.*, within our political system is thus consistent with longstanding doctrine.

This Court has also repeatedly explained that *all* racial classifications must be subjected to strict scrutiny because treating race differently may increase the salience of race in our constitutional democracy and sanction the view that race remains outcome determinative in our political processes. *See Shaw*, 509 U.S. at 657. These risks are particularly likely when the classification directly affects the individual allocation of governmental benefits and burdens on the basis of race. But they are equally likely when the political process itself contains a distinct decisionmaking process for racial issues.

States will always have a compelling interest in prohibiting race-conscious conduct that violates the Equal Protection Clause. Changes to the political process can therefore violate the Fourteenth Amendment under the political restructuring doctrine only in the narrow circumstances in which a state has the choice whether or not to adopt a constitutionally permissible race-conscious program. In this context, the political restructuring doctrine plays an indispensable role by assuring that the process through which the state resolves that question does not needlessly heighten the focus on race as an overly salient or outcome-determinative feature of our political system.

In *Hunter* and *Seattle*, the political process was manipulated to prohibit *constitutionally permissible* race-conscious programs or policies. In decisions that post-date *Hunter* and *Seattle*, this Court has held that *all* racial classifications, including those intended to benefit minorities, are subject to strict scrutiny. *See, e.g., Adarand*, 515 U.S. 200. Application of the political restructuring doctrine

does not, therefore, turn on whether the state has mandated or prohibited constitutionally permissible race-conscious policies. Rather, this Court's current understanding of the Equal Protection Clause requires strict scrutiny whenever racial issues are subject to a distinct and more burdensome decisionmaking process, regardless of outcome.

The political restructuring doctrine thus applies in narrow circumstances delineated by a clear rule that enforces this Court's core equal protection principles. In the limited context of constitutionally permissible race-conscious action, when *race is the predominant factor* explaining a state's decision to establish a *distinct political process*, the governmental action creates a racial classification subject to strict scrutiny. *Race is the predominant factor* behind the creation of a distinct decisionmaking process when, as here, the creation of the separate decisionmaking process is "unexplainable on grounds other than race," *see Shaw*, 509 U.S. at 643-44 (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), due to the racial character of the issue subject to the distinct process. When, as also occurred here, "race" expressly appears on the face of the political restructuring measure to define how (or to which types of action) a distinct decisionmaking process applies and nothing in the record otherwise dispels the conclusion that its application to "race" was the predominant factor behind the measure, the racial character of the issue is clear. *See Hunter*, 393 U.S. at 390-91. And a *distinct political process* exists when plenary decisionmaking authority resides at one

governmental level, *e.g.*, the Board of Regents, but the decision whether to take constitutionally permissible action with respect to race is situated at a different governmental level, *e.g.*, the state constitution, in which advocacy is necessarily substantially more burdensome. By contrast, decisions to enact (or not enact) or to repeal (or leave in place) constitutionally permissible race-conscious legislation or policies are not subject to strict scrutiny under the political restructuring doctrine because they do not create a distinct decisionmaking process.

2. The Sixth Circuit correctly concluded that Proposal 2 created a racial classification subject to strict scrutiny. Proposal 2 explicitly established a *distinct political process* for *race*-conscious admissions programs. Under Proposal 2, the Boards of Regents retain plenary authority over all other university matters, including general authority to set admissions criteria. But the specific decision whether to adopt constitutionally permissible *race*-conscious admissions programs was uprooted from that locus of political decisionmaking and entrenched at the state constitutional level. As a direct response to *Grutter* and framed by its principal author as prohibiting consideration of race in college admissions, Proposal 2 cannot be rationally explained or understood on grounds other than race.

Both Petitioner and Russell argue that Proposal 2 should not be subject to strict scrutiny because many considerations other than intent to harm minorities might lead a state to prohibit race-conscious college admission programs. But requiring plaintiffs to prove animus toward a particular racial

group as part of an equal protection claim would be incompatible with decades of this Court's precedents, including *Shaw*, *Bush*, *Adarand*, *Parents Involved*, and *Fisher*. The district court and the Sixth Circuit both found that, in addition to targeting race explicitly for different treatment, the fundamental aims of Proposal 2 were to prohibit race-conscious admissions programs *and* to create a different and more burdensome decisionmaking process to block any future effort to alter that outcome. The underlying attitudes of voters toward particular racial groups are irrelevant.

Because the state chose not even to venture to identify a compelling interest for the racial classification embodied in Proposal 2, and because Proposal 2 is not narrowly tailored even if such an interest were deemed to exist, Proposal 2 is unconstitutional. Petitioner's argument that strict scrutiny should not apply to Proposal 2 because it seeks ultimately to minimize the salience of race by prohibiting race-conscious admission programs cannot be squared with settled Fourteenth Amendment doctrine. *All* racial classifications are subject to strict scrutiny, however laudable a goal they purport to advance and even if their supporters believe the racial classification will ultimately reduce the prominence of race in society.

3. *Stare decisis* counsels against taking the dramatic step to overrule or substantially limit such longstanding precedent as *Hunter* and *Seattle*. The attacks by Petitioner and Russell on the wisdom of race-conscious admissions programs, which serve only to catalogue their continuing disagreement with

this Court's holdings in *Grutter* and *Fisher*, are irrelevant to the question presented in this case.

ARGUMENT

I. THE POLITICAL RESTRUCTURING DOCTRINE IS CONSISTENT WITH, AND A NECESSARY COMPONENT OF, THIS COURT'S EQUAL PROTECTION JURISPRUDENCE.

A. This Court Has Long Recognized That the "Peculiar and Disadvantageous" Treatment of Racial Matters in the Political Process Is a Racial Classification Subject to Strict Scrutiny.

More than a quarter century ago, this Court held that the ordinary political processes of government decisionmaking may not be intentionally skewed against particular policies because their subject matter is racial in nature. *Seattle*, 458 U.S. at 470 (holding that strict scrutiny is triggered whenever "the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process"). In *Seattle*, blacks and other citizens had achieved school board approval of a busing plan to lessen the *de facto* segregation in Seattle's schools.[1] Opponents

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[1] The constitutionality of Seattle's "race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation" was not challenged, so the constitutionality of the plan was assumed.

then mounted a successful campaign to pass a statewide initiative, Initiative 350, prohibiting school boards from using busing to accomplish racial integration, while permitting the continued use of busing for all other purposes of school transportation and otherwise leaving school governance processes intact. Initiative 350 "nowhere mention[ed] 'race' or 'integration,'" but it "in fact allow[ed] school districts to bus their students 'for most, if not all,' of the nonintegrative purposes required by [the state's] educational policies." *Id.* at 471.

This Court held that Initiative 350 created a racial classification subject to strict scrutiny: "[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." *Id.* at 485 (internal quotation marks omitted); *see also id.* at 480 ("By placing power over desegregative busing at the state level, then, Initiative 350 plainly 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.'" (quoting *Lee v. Nyquist*, 318 F. Supp. 710, 718

Seattle, 458 U.S. at 472 n.15. Unsurprisingly, Petitioner cites no authority supporting his contention that this Court's decision not to resolve a question that the parties did not raise undermines the precedent on the issue the Court did resolve. *Cf. Fisher*, 133 S. Ct. at 2421 (assuming, for purposes of decision, that *Grutter* is good law); *id.* at 2422 (Scalia, J., concurring) (concurring because petitioner did not ask Court to overturn *Grutter*).

(W.D.N.Y. 1970), *aff'd*, 403 U.S. 935 (1971))). This Court thus affirmed that a state could not selectively gerrymander the political process to impose more rigorous political burdens on those citizens seeking to promote constitutionally permissible race-conscious approaches than it imposed on those pursuing other policy agendas involving public education. *See Seattle*, 458 U.S. at 474-75; *see also id.* at 474 n.17 (noting that the constitutional evil was the creation of a "comparative structural burden" for advocating otherwise constitutionally permissible race-conscious policies within the political process).

This Court in *Seattle* relied on *Hunter*, 393 U.S. 385, which had articulated the same rule more than a decade earlier. In *Hunter*, the Court struck down an amendment to the City of Akron's charter because it explicitly established a process for deciding racial housing matters that was distinct from the process for all other housing matters. *See id.* at 389. The charter amendment provided that "[a]ny ordinance enacted by the Council of Akron which regulates the use, sale, advertising, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of *race*, color, religion, national origin or ancestry must first be approved by a majority of the electors . . . before said ordinance shall be effective." *Id.* at 387 (emphasis added). The requirement of voter approval for certain ordinances duly enacted by the city council was unique within the city charter, applying only to "laws to end housing discrimination." *Id.* at 390; *see also id.* at 391 (noting that "[t]he automatic referendum system" did not, for

example, "affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes"). The charter amendment thus forced those who sought protection from private racial or religious discrimination to run a "gauntlet" that those who sought to prevent other abuses in real estate did not have to run. *Id.* at 390.

As such, the amendment "was an explicitly racial classification treating racial housing matters differently from other . . . housing matters." *Id.* at 389; *see also id.* at 395 (Harlan, J., concurring) (observing that the amendment was a racial classification because it was not "grounded in neutral principle"); *Gordon v. Lance*, 403 U.S. 1, 5 (1971) (distinguishing facts of case from *Hunter* "in which fair housing legislation alone was subject to an automatic referendum requirement"). "Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race," the "racial classification" embodied in the charter amendment was subject to strict scrutiny under the Equal Protection Clause. *Hunter*, 393 U.S. at 391-93.

This Court thereafter relied on similar considerations in a series of cases alleging racial gerrymandering when states created majority-minority electoral districts in the wake of the 1990 Census. *See Bush*, 517 U.S. at 958-1002; *Shaw*, 509 U.S. at 642-58; *Easley v. Cromartie*, 532 U.S. 234, 241-58 (2001); *Miller v. Johnson*, 515 U.S. 900, 904-28 (1995). In those cases, the Court held that using race as the predominant factor in structuring the political process through electoral district boundaries

creates a racial classification subject to strict scrutiny under the Equal Protection Clause. The holdings in *Shaw* and *Bush* did not rest on the direct allocation of particular governmental benefits and burdens based on the race of the individuals seeking those benefits.[2] Rather, the rationale supporting application of strict scrutiny was the state's reliance on race as the predominant factor in drawing electoral district boundaries and thus in ultimately structuring the legislative process that is responsible for allocating governmental benefits and burdens to individuals.

For example, the plaintiffs in *Shaw* did not claim that the challenged reapportionment plan unconstitutionally diluted white voting strength, or even that they themselves were white. *See* 509 U.S. at 641. Instead, their claim focused on the application of race as the essential mechanism by which electoral lines were determined and government decisionmaking organized: "Racial gerrymandering, even for remedial purposes, may balkanize us into competing factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the nation continues to aspire." *Id.* at 657.

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[2] As Justice Souter observed in *Bush*, rather than "addressing any injury to members of a class subjected to differential treatment, the standard presupposition of an equal protection violation, *Shaw I* addressed a putative harm subject to complaint by any voter objecting to an untoward consideration of race in the political process." *Bush*, 517 U.S. at 1045 (Souter, J., dissenting).

Although the Court reiterated that it "never has held that race-conscious state decisionmaking is impermissible in *all* circumstances," *id.* at 642, the Court concluded in *Shaw* that the State of North Carolina's decision to enact redistricting legislation that "is so bizarre on its face that it is 'unexplainable on grounds other than race'" was subject to strict scrutiny as a racial classification, *id.* at 644 (quoting *Arlington Heights*, 429 U.S. at 266).

Likewise, in *Bush*, the Court relied on *Shaw* to apply strict scrutiny to, and ultimately void, a plan to redraw Texas electoral district lines because the plaintiffs established that race was "the predominant factor motivating the legislature's redistricting decision." 517 U.S. at 959, 970-72 (internal quotation marks and alterations omitted); *accord id.* at 996 (Kennedy, J., concurring); *id.* at 1001 (Thomas, J., concurring). The constitutional vice was not any resulting substantive harm to any individual's voting strength, but rather "the legislature's reliance on racial criteria" as the predominant factor in their redistricting efforts. *Id.* at 958. In other words, the Texas redistricting failed under the Equal Protection Clause because the "contours" of the lines drawn were "unexplainable in terms other than race," *id.* at 972, and not narrowly tailored to serve a compelling state interest, *see id.* at 976-83. *Cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 & n.12 (2006) (Stevens, J., concurring in part and dissenting in part) (recognizing on behalf of himself and one other Justice that compliance with the Voting Rights Act can be a compelling interest in legislative redistricting); *id.* at 485 n.2 (Souter, J., concurring in

part and dissenting in part) (same, on behalf of himself and one other Justice); *id.* at 518-19 (Scalia, J., concurring in the judgment in part and dissenting in part) (same, on behalf of himself and three other Justices).

Notably, the Court in *Shaw* drew from the same body of case law addressing attempts to restrict the political power of minority groups through manipulations of the machinery of governmental power upon which the Court relied in *Hunter* and *Seattle*. *Compare Shaw*, 509 U.S. at 639-41, 644-46 (discussing *Guinn v. United States*, 238 U.S. 347 (1915), *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), *Wright v. Rockefeller*, 376 U.S. 52 (1964), *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969)) *with Hunter*, 393 U.S. at 391, 393 (citing *Gomillion*, 364 U.S. 339, *Reynolds*, 377 U.S. 533, and *Avery v. Midland Cnty.*, 390 U.S. 474 (1968)), and *Seattle*, 458 U.S. at 485-86 (discussing *Hunter*'s reliance on voting rights cases).

These cases recognized that, although government can discriminate directly in the allocation of benefits and burdens based on the race of individuals, subtle changes in the political process can accomplish essentially the same ends because decisions about the allocation of governmental benefits and burdens ultimately flow from the political process. *See generally* Brief for Amici Curiae Constitutional and Local Government Scholars Michelle Wilde Anderson *et al.* in Support of the Cantrell Respondents. *Gomillion* dramatically illustrates this functional equivalence: the City of Tuskegee had been "square in shape," but the law challenged in that case "transformed it into a

strangely irregular twenty-eight-sided figure" that "deprived the petitioners of the municipal franchise and consequent rights." 364 U.S. at 341, 347. Likewise, in *Reynolds*, the Court anchored the "one person, one vote" principle on the importance of "equal representation" within our country's "representative government," thereby recognizing that election results dictate governmental decisions. 377 U.S. at 560-61.

In *Shaw*, the Court relied on the ugly history of efforts by state and local governments to limit minority access to the franchise to demonstrate that the machinery of political power can be corrupted "through the use of both subtle and blunt instruments" to limit, along racial lines, the ability of citizens to influence governmental decisions. 509 U.S. at 639-41 (internal quotation marks omitted). And in *Hunter* and *Seattle*, these historical examples illustrated an analogous means through which the political system could be manipulated along racial lines to affect the allocation of governmental benefits and burdens to individuals. *See Hunter*, 393 U.S. at 391 (holding that restructuring the political process to disadvantage advocates of programs that benefit minorities "is no more permissible than denying them the vote, on an equal basis with others"); *id.* at 392-93 (comparing political restructuring to efforts to "dilute any person's vote or give any group a smaller representation than another of comparable size"); *accord Seattle*, 458 U.S. at 486-87.

The shared reliance on this case law underscores that *Hunter* and *Seattle*, like *Shaw* and *Bush*, rest on the recognition that, because governmental decisions regarding the allocation of benefits and burdens

among individuals flow directly from the political process, using race as the predominant factor in restructuring that process is no less suspect than using race to decide directly which individuals will receive which benefits or be subject to which burdens and can be sustained only if narrowly tailored in support of a compelling state interest. That conclusion is fully consistent with this Court's longstanding principle that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" should "be subjected to more exacting judicial scrutiny." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (cited in *Seattle*, 458 U.S. at 486). *Hunter* and *Seattle* thus fit within the framework of cases that pay close attention to devices that preordain the distribution of benefits and burdens as a function of race. Unsettling those precedents would erode the foundations of the entire theory of strictly scrutinizing racial classifications.

B. Structuring the Political Process Based on Racial Considerations Is Particularly Likely To Underscore That Race Is a Significant and Outcome-Determinative Factor Within Our Political System.

The political restructuring doctrine plays an indispensible role in the limited context where states must decide whether or not to adopt constitutionally permissible race-conscious programs by ensuring that the processes through which states and their political subdivisions resolve that debate do not entrench race as a central, outcome-determinative

feature of our political system. Failing to apply strict scrutiny where the political process governing that debate is transparently restructured around race would strip equal protection doctrine of any principled coherence.

This Court has held that *all* racial classifications are subject to strict scrutiny because they pose the risk of lasting harm to our society. *See Fisher*, 133 S. Ct. at 2421 (holding that "all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny" (internal quotation marks omitted)); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) ("[A]bsent searching judicial inquiry . . . , there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

This is true even when the classifications do not differentially allocate governmental benefits and burdens among individuals. *See Shaw*, 509 U.S. at 651 ("[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally."). And even purportedly benign racial classifications receive strict scrutiny because they may "lead to a politics of racial hostility" and "endorse race-based reasoning," which contribute to "an escalation of racial hostility and conflict." *Parents Involved*, 551 U.S. at 746 (plurality opinion) (internal quotation marks and citations omitted). The most sincere belief that a racial classification will reduce racial differences in the long run is insufficient to avoid the application of strict scrutiny. *Id.* at 782 (Kennedy, J., concurring) ("To make race

matter now so that it might not matter later may entrench the very prejudices we seek to overcome.").[3]

Of course, strict scrutiny is not triggered merely because governmental action is taken "with consciousness of race." *Bush*, 517 U.S. at 958; *see also Shaw*, 509 U.S. at 642 ("This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances."). Race-conscious action that does "not lead to different treatment based on a classification that tells each [person] he or she is to be defined by race" ordinarily need not satisfy "strict scrutiny to be found permissible." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring).[4] Accordingly, the state may pursue any number of legitimate ends with race in mind without risking this harm. For example, the inclusion of race and ethnicity in the federal census, collection of such data by law enforcement or other governmental agencies, or the enactment of

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[3] Applying strict scrutiny, the question is whether the risk of societal harm from the racial classification is outweighed by the compelling governmental interest advanced by the narrowly tailored program. As *Grutter* demonstrates and *Fisher* confirms, the answer to that question may be yes in some circumstances.

[4] For this reason, efforts to promote diversity in K-12 public schools through "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race" do not require strict scrutiny, even though they involve consciousness of race. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring).

antidiscrimination laws designed to promote equal treatment by eradicating racial discrimination do not trigger strict scrutiny because they do not involve the differential distribution of finite governmental resources to individuals based on their race or the redesign along racial lines of the decisionmaking processes that generate such differential distribution. *See Miller v. Johnson*, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."). This Court has never suggested that the mere consideration of racial demographics, much less the mere utterance of the word "race," by governmental actors risks lasting (or indeed any) harm to society so as to trigger strict scrutiny.

In contrast, the manipulation of the political process along racial lines, like the use of race at issue in *Shaw* and *Bush*, does trigger strict scrutiny. This Court has described the ultimate goal of the Fourteenth Amendment as advancing our society to a point where race structures neither individual opportunity nor the governmental decisions that ordain how such opportunity is allocated, and premised its decisions on precisely these grounds. *See, e.g.*, *Adarand*, 515 U.S. at 229 ("[I]t will delay the time when race will become a truly irrelevant, or at least insignificant, factor."); *Shaw*, 509 U.S. at 657 (identifying ultimate goal of Reconstruction amendments as creating "a political system in which race no longer matters"). *Hunter* itself rested on an understanding that "the core of the Fourteenth Amendment is the prevention of meaningful and

unjustified official distinctions based on race," 393 U.S. at 391.

The political restructuring doctrine vindicates that core equal protection principle in the limited contexts where race-conscious action is constitutionally permissible by ensuring that the political process for making that decision is not itself skewed on the basis of race.[5] In such circumstances, the state has a choice whether or not to take race-conscious action, so there will always be a need for public discourse regarding the enactment of such measures. Because ours is a democratic system, this Court's recognition that race-conscious action can be constitutionally permissible necessitates that the decision whether to take such action must be made through the political process. Allowing one side of the debate to selectively change the rules of the political process along racial lines to make it substantially more likely that its preferred outcome will prevail in perpetuity would demonstrate with inescapable clarity that race remains a uniquely central feature of our "political system." *Shaw*, 509 U.S. 657.

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[5] Russell observes that the Equal Protection Clause protects individuals, not groups. Russell Br. at 15-17. Exactly so. A distinct decisionmaking process makes it more difficult for one side of the debate over whether to adopt a constitutionally permissible race-conscious program to advocate successfully for its position, so a racialized restructuring injures either the proponents or opponents of the program. As *Shaw* recognized, the race of those impacted by conduct that underscores the importance of race in our political process is not relevant. *See* 509 U.S. at 641 (emphasizing plaintiffs did not "even claim to be white").

On the other hand, states plainly have a compelling interest in prohibiting racial classifications that violate equal protection. Any change to the political process to prohibit unconstitutional conduct is therefore justified and cannot cause any societal harm because any distinction based on race that it would reinforce merely repeats the Fourteenth Amendment. Petitioner makes a superficially plausible observation that it is "curious to say that a law that bars a state from discriminating on the basis of race or sex violates the Equal Protection Clause by discriminating on the basis of race and sex." Pet Br. 4. But that completely misses the point. State actions that discriminate on the basis of race or sex are substantively unconstitutional absent adequate justification without regard to the political restructuring doctrine. Petitioner glaringly leaves out the language of Proposal 2 that the Cantrell Respondents challenge: its prohibition on racial "preferences." The political restructuring doctrine is implicated in this case only because Proposal 2 *also* prohibits state universities in Michigan from adopting precisely the kinds of race-conscious admissions programs that this Court upheld in *Grutter*. Indeed, that was its explicit purpose.

Contrary to Petitioner's assertion, therefore, Proposal 2 is *not* a race-neutral enactment designed to further the goals of the Equal Protection Clause. Just the opposite. By creating a two-tier system of political decisionmaking, Proposal 2 needlessly heightens the salience of race in the political process and, by so doing, "contribut[es] to an escalation of racial hostility and conflict." *Parents Involved*, 551

U.S. at 746 (plurality opinion) (internal quotation marks omitted). This concern is far from theoretical. Empirical analysis of public polling and voting polarization data demonstrates that Proposal 2 engendered racial polarization that was unprecedented in Michigan. *See generally* Kinder Br. (finding, to a high degree of statistical certainty, that Proposal 2 caused racial polarization to an unprecedented degree, whether compared to the most racially contentious issues of the past several decades or to the division over the underlying question of whether affirmative action is desirable policy).

C. The Political Restructuring Doctrine Applies to *All* Manipulations of the Political Process That Cannot Be Explained on Grounds Other Than Race.

Because all racial classifications are constitutionally suspect, *see, e.g.*, *Adarand*, 515 U.S. at 227, the political restructuring doctrine focuses on the manner in which racial issues are resolved rather than the outcome of that political debate. Accordingly, had Proposal 2 been written to *mandate* permanent race-conscious admissions policies and embed that admission criterion in the state's constitution while otherwise leaving the Boards of Regents' plenary authority intact, the measure would also be subject to strict scrutiny as a suspect restructuring of the political process along racial lines. That the group with the deck stacked against it would have been the one that *opposes* race-conscious admissions programs would not affect the application of strict scrutiny (although a different set

of interests might lead to a different result in applying strict scrutiny).

The Court's observations in *Hunter* and *Seattle* that the programs affected by the restructuring of the political process "inure[d] primarily to the benefit of the minority," *Seattle*, 458 U.S. at 472, and that the restructuring thus "place[d] special burden on racial minorities," *Hunter*, 393 U.S. at 391, were empirically accurate based on the record in each case and do not limit the political restructuring doctrine's application, in light of *Croson* and *Adarand*.[6]

The Akron city council passed a fair housing ordinance because African-American citizens were experiencing overt racial discrimination, *see Hunter*, 393 U.S. at 386, and the Seattle schools experiencing the most dire crowding and racial isolation were predominantly located in minority neighborhoods, *see Seattle*, 458 U.S. at 464. The Court recognized the broader benefits of the race-conscious legislation in these contexts, *see id.* at 472 ("And it should be equally clear that white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom." (internal quotation marks omitted)), but the record in each case also demonstrated that members of the racial minority

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[6] Russell makes much of the Court's observation that "[t]he majority needs no protection against discrimination," *Hunter*, 393 U.S. at 391 (quoted in *Seattle*, 458 U.S. at 468). Russell Br. 19-20. The political restructuring doctrine, however, does not depend on this observation and applies to *all* racial classifications in a straightforward manner.

had a distinct interest in whether the race-conscious legislation was enacted.[7]

As such, it was unsurprising that the record in each case reflected the reality that members of minority groups generally supported and had been integral to securing the enactment of the policies affected by the political restructuring. *Cf. Carolene Prods.*, 304 U.S. at 152 n.4 (holding that changes to the political process that harm "discrete and insular minorities" should be of particular concern under the Equal Protection Clause) (cited in *Seattle*, 458 U.S. at 486). The Court nonetheless made clear that these findings did *not* rest on an assumption that racial identity dictates individual beliefs or that the views held by members of a racial group are monolithic. *See Seattle*, 458 U.S. at 472 (stating that "the proponents of mandatory integration cannot be classified by race" and "Negroes and whites may be counted among both the supporters and the opponents of Initiative 350"); *id.* ("[W]e may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance [at issue in *Hunter*].").

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[7] Petitioner's argument that "a *Grutter* policy" cannot benefit "*all* students" while also benefiting "primarily a minority group," Pet. Br. 22, is simply wrong, as he plainly admits by conceding that representation of certain minority groups *increased* after universities changed their policies to comply with *Grutter*. Pet. Br. 7. In any event, this argument is beside the point because the political restructuring doctrine applies to all racial classifications.

The Court's focus in *Hunter* and *Seattle* on the distinct harm to minorities of government action that, in fact, distinctly affected those minorities does not vitiate the doctrine articulated in those cases, just as the recognition in early voting rights cases that the challenged actions were motivated by the desire to prevent racial minorities from participating equally in our political system did not prompt the Court to revisit or revise these decisions in *Shaw* and its progeny. *See Shaw*, 509 U.S. at 639-41, 644-46 (relying on cases that emerged from our Nation's history of pervasive discrimination that uniquely harmed African-Americans to conclude that the majority-minority districts at issue were unconstitutional).

D. The Political Restructuring Doctrine Entails Straightforward Factual Inquiries and Is Integral to a Coherent Equal Protection Doctrine.

The political restructuring doctrine provides a clear test for determining whether strict scrutiny applies. When *race is the predominant factor* explaining a decision by the state or its political subdivision to establish a *distinct political process*, the governmental action creates a racial classification subject to strict scrutiny. *See, e.g.*, *Seattle*, 458 U.S. at 485 ("[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." (internal quotation marks omitted)). Each aspect of this test, in turn, involves a straightforward factual inquiry.

1. *Race as Predominant Factor. Race is the predominant factor* behind the creation of a distinct decisionmaking process when, as here, the creation of the separate decisionmaking process is "unexplainable on grounds other than race," *see Shaw*, 509 U.S. at 644, 647 (internal quotation marks omitted), due to the racial character of the issue subject to the distinct process. This inquiry is guided by *Arlington Heights*, 429 U.S. 252, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), and *Washington v. Davis*, 426 U.S. 229 (1976). The Court in *Seattle* observed that, although Initiative 350 nowhere mentioned "'race' or 'integration,'" the various exceptions built into the statute reflected that it had been "carefully tailored to interfere only with desegregative busing." 458 U.S. at 471. The Court concluded that it was "beyond reasonable dispute" that "the initiative was enacted 'because of, not merely in spite of, its adverse effects upon' busing for [racial] integration." *Id.* (quoting *Feeney*, 442 U.S. at 279) (internal quotation marks omitted).

When, as also occurred here, "race" expressly appears on the face of the political restructuring measure to define how (or to which types of action) a distinct decisionmaking process applies and nothing in the record otherwise dispels the conclusion that its application to "race" was the predominant factor behind the measure, the racial character of the issue is clear. *See Hunter*, 393 U.S. at 390. In *Hunter*, there was "an explicitly racial classification treating racial housing matters differently" from other matters, *id.* at 389, because the charter amendment, by its terms, applied to housing laws that prohibit

discrimination based on race, *see id.* at 390. The record confirmed that this explicit reference to "race" to identify which antidiscrimination measures were subject to the distinct decisionmaking process defined the measure's primary purpose: to prevent measures to combat racial discrimination by private actors from becoming law. *See id.* at 391-92. An explicit reference to "race" on the face of measure is strong evidence that race is the predominant factor behind the change to the political process.

The requirement that the underlying issue must be racial in nature explains the Court's conclusion in *James v. Valtierra*, 402 U.S. 137, 141 (1971), that the political restructuring doctrine did not apply to a state initiative that required a jurisdiction-wide referendum for approval of any low-rent public housing project. This state initiative did not facially single out race, *see id.* (noting the initiative required "referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority"), and the record did "not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority," *id.*

The federalism principles invoked by Petitioner, Pet. Br. 28, and by Russell, Russell Br. 22-24, are therefore not implicated in the narrow circumstances in which the political restructuring doctrine applies. States *generally* retain broad authority to structure their political systems (and to use initiative or referendum processes to do so), but it is axiomatic that "these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment." *Hunter*, 393 U.S. at 392; *accord Gomillion*, 364 U.S. at 342-47

(distinguishing *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907)). States remain the laboratories of democracy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The political restructuring doctrine does not dictate whether states may govern by popular initiative or legislation. States remain "free to vest" plenary decisionmaking authority over an issue at the state level or within the various political subdivisions that they create. *Seattle*, 458 U.S. at 480 n.23. States are prohibited only from building "unjustified official distinctions based on race," *Hunter*, 393 U.S. at 391, into the political system itself, in violation of the Fourteenth Amendment.

Petitioner's suggestion that the political restructuring doctrine applies only to antidiscrimination laws and not to race-conscious "preferences," Pet. Br. 17-24, is doctrinally untenable and factually incorrect. The desegregation plan in *Seattle* was adopted to remedy *de facto* segregation, 458 U.S. at 472 n.15, and, like race-conscious college admissions programs, was therefore not constitutionally mandated.[8] States generally have no constitutional *obligation* to remedy injuries caused by private actors, although they may choose to do so through constitutionally permissible means. *Cf. Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring) (stating that the Constitution does not mandate "that state and local school authorities

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[8] Because the fair housing ordinance in *Hunter* regulated *private* conduct, 393 U.S. at 386-87, it also was not constitutionally mandated.

must accept the status quo of racial isolation in schools" caused by *de facto* segregation). Any benefit conferred by a constitutionally permissible (but not constitutionally mandated) race-conscious initiative could therefore be viewed as "preferential." Petitioner's argument confuses non-mandatory efforts to promote equality in our society with programs adopted to remedy violations of constitutional equal protection. Petitioner's purported distinction is particularly incoherent when viewed in light of the core equal protection interest advanced by the political restructuring doctrine: reducing the prominence of race as a decisive factor in our political system. Creating a different political process for racial issues violates that principle, regardless of the label affixed to it. Unsurprisingly, Petitioner cites no decision from this Court recognizing that this purported distinction exists.

2. *Distinct Political Process.* A *distinct political process* exists when plenary decisionmaking authority resides at one governmental level, but the decision whether to take constitutionally permissible action with respect to race is moved to a different governmental level in which advocacy is necessarily more burdensome. In *Seattle*, the Court observed that Initiative 350 left "authority over all but one" aspect of deciding "what programs would most appropriately fill a school district's educational needs" in the "hands of the local board," placing only the "power over desegregative busing at the state

level." 458 U.S. at 479-80.[9] Likewise, in *Hunter*, passage of an ordinance by the City Council generally "sufficed unless the electors themselves invoked the general referendum provisions of the city

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[9] The Court repeatedly emphasized that this was the central (though limited) principle of its holding. *See Seattle*, 458 U.S. at 474 ("[T]he community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government."); *id.* ("The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body. . . . Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other school assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board."); *id.* at 474 n.17 (noting that "the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only racial matters"); *id.* at 480 ("By placing power over desegregative busing at the State level, then, Initiative 350 plainly 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.'" (quoting *Lee*, 318 F. Supp. at 718)); *id.* at 480 n.23 ("[W]hat we find objectionable about Initiative 350 is . . the racial nature of the way in which it structures the *process* of decisionmaking."); *id.* at 485-86 ("[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." (internal quotation marks omitted)); *id.* at 485 n.29 ("It is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan."); *id.* at 487 ("It would be equally questionable for a community to require that laws or ordinances designed to ameliorate race relations . . . be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure." (internal quotation marks and citations omitted)).

charter." 393 U.S. at 390. But as a result of the charter amendment, "approval of the City Council was not enough" for "those who sought protection against racial bias." *Id.* They had to secure passage of a charter amendment before they could even advocate for such an ordinance. *See id.*

Hence, mere decisions whether to enact or repeal constitutionally permissible race-conscious statutes or policies are not subject to strict scrutiny under the political restructuring doctrine because they do not create a *distinct political process* and, in fact, are made within the ordinary political process. Only this distinction can explain the different outcomes in *Seattle* and *Crawford v. Board of Education*, 458 U.S. 527 (1982), decided on the same day. In *Crawford*, the Court held that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539; *accord Seattle*, 458 U.S. at 485 ("This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification.").

The Court in *Crawford* contrasted the "mere repeal" of a statute requiring race-conscious policies with the racialized restructuring of the political process at issue in *Hunter* and *Seattle*. *Crawford*, 458 U.S. at 540-41. The latter represents a racial classification for purposes of the Equal Protection Clause because such restructuring "distorts the political process for racial reasons" and "allocates governmental or judicial power on the basis of a discriminatory principle." *Id.* at 541; *see also id.* at 546 (Blackmun, J., concurring) ("The Court always

has recognized that distortions of the political process have special implications for attempts to achieve equal protection of the laws."); *accord Seattle*, 458 U.S. at 485 ("But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." (internal quotation marks omitted)).

Petitioner misreads *Seattle* when he argues that the majority in *Seattle* conceded that the political restructuring doctrine does not apply to race-conscious college admissions. Pet. Br. 17. The majority was responding to the dissent's argument that the majority's holding would prevent any other entity *within a university* from overruling an admission committee's decision to adopt race-conscious admissions programs, with no discussion of whether state law changed the locus of plenary decisionmaking authority for this racial issue. *See* 458 U.S. at 480 n.23, *id.* at 498 n.14 (Powell, J. dissenting). The majority observed that this hypothetical had "nothing to do with" the political process immediately after it reiterated that its holding applied only to the "comparative burden" of creating distinct decisionmaking processes for racial issues. *See id.* at 480 n.23. Moving decisionmaking down the hall or to a different office in the university does not necessarily change the level of political decisionmaking; rather, the relevant factual inquiry under the doctrine is whether the plenary—or ultimate—decisionmaking authority was altered. Here, the district court conducted just such an

inquiry and found that Proposal 2 shifted the locus of the plenary authority over whether to adopt race-conscious admissions programs. The hypothetical that the Court in *Seattle* said was not implicated by the political restructuring doctrine is thus entirely different from the factual findings at issue here.

3. *Application of the political restructuring doctrine.* The following hypotheticals underscore that the political restructuring doctrine can be applied consistently and in a straightforward fashion. The first two hypotheticals respond to Petitioner's arguments and demonstrate that Petitioner's arguments reflect a caricature or misunderstanding of the doctrine.

- Would federal fair housing legislation that preempts state or local ordinances violate the political restructuring doctrine? *See* Pet. Br. 5. **No.** Such legislation does not effect an unconstitutional restructuring because federal law already preempts state law under Article VI, assuming Congress is acting in an area of enumerated power. Any change in the locus of decisionmaking caused by federal legislation is a function of our preexisting constitutional system of federalism and therefore is not constitutionally problematic.

- Would a state law prohibiting localities from giving preferential credit terms to minorities as a group violate the political restructuring doctrine? *See* Pet. Br. 23-24. **No.** The prohibited conduct would be unconstitutional absent any tailored remedial justification for such preferential credit or flexibility in its

application. *See Adarand*, 515 U.S. at 237-38; *Croson*, 488 U.S. at 507-08. Given the state's compelling interest in prohibiting conduct that is unconstitutional, the law would satisfy strict scrutiny. *See* Section I.B, *supra*. For the same reason, a state referendum solely prohibiting official discrimination on the basis of race would survive strict scrutiny.

- If Congress, by statute, or the President, by executive order, decided to ban affirmative action at West Point and the other military academies, would such action be subject to strict scrutiny under the political restructuring doctrine? **No.** Congress has plenary authority over the military academies and any delegated authority remains subject to ultimate congressional control. The same is true of federal agencies, whose authority extends only as far as the statutes creating them specify. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) ("Where Congress has established a clear line, the agency cannot go beyond it . . . ."). The political restructuring doctrine is implicated only when the locus of plenary decisionmaking authority is changed. Modifying or withdrawing a lawful delegation of authority to a subsidiary governmental decisionmaker does not alter the locus of ultimate decisionmaking authority. *See supra* pp. 40-41.[10]

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[10] The same analysis would apply to state legislatures. If they have plenary authority to establish the jurisdiction of

- Would a state constitutional amendment defining the state analogue to the Equal Protection Clause to include disparate-impact discrimination only for the suspect classification of race (*i.e.*, prohibiting a broader swath of discriminatory activity than is required by the federal Equal Protection Clause but only with respect to racial discrimination) be subject to strict scrutiny under the political restructuring doctrine? **Yes**, because it creates a distinct decisionmaking process and explicitly applies that process only to race, but doing so might well satisfy strict scrutiny. For the same reason, a state constitutional amendment prohibiting any level of state government from adopting a disparate-impact standard for race discrimination would be subject to strict scrutiny. On the other hand, a provision that applies a disparate-impact standard (or prohibits any level of state government from adopting a disparate-impact standard) for *all* suspect classifications likely would not trigger strict scrutiny because such a provision does not explicitly single out race, and it is unlikely that litigants could prove that race was the

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agencies or subsidiary political bodies, legislation on a racial issue would not change the *ultimate* decisionmaking authority, which remains with the legislature. But if the state constitution grants political subdivisions plenary constitutional authority over certain issues (as Michigan's constitution does for the Boards of Regents), legislation that removes or curtails a political subdivision's decisionmaking authority on a racial issue would trigger strict scrutiny.

predominant factor behind a change that applies to all suspect classifications.

II. PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE UNDER THE POLITICAL RESTRUCTURING DOCTRINE.

A. Proposal 2 Created a Racial Classification.

1. *Race as Predominant Factor.* Contrary to Petitioner's position, race-conscious admissions programs, and changes to the decisionmaking process related to such programs, are unquestionably about race. Diversity in higher education is a compelling governmental interest because it provides broad "educational benefits" to individuals of all races and benefits society at large. *Grutter*, 539 U.S. at 330. Constitutionally permissible race-conscious admissions programs advance this compelling interest, however, by increasing admissions for individuals from underrepresented groups and by providing increased opportunity for students of different races to interact in the educational process. Proposal 2 altered the ordinary political process for deciding whether or not public universities would adopt such programs. As in *Hunter* and *Seattle*, the racial nature of the topic was the predominant factor—indeed, the *only* salient factor—driving the decision to create a distinct political decisionmaking process for only certain aspects of university operations. The record amply supports the district court's factual finding, affirmed by the Sixth Circuit, that the decision to alter the ordinary political process for adopting university admissions programs

in Michigan is "unexplainable on grounds other than race," *Shaw*, 509 U.S. at 643.

Like the amendment to the city charter in *Hunter*, Proposal 2 on its face constructed a distinct and more onerous decisionmaking process governing adoption of "[a]ffirmative [a]ction" programs. Pet. App. 8a-9a (citing Mich. Const. art. I, § 26). The text of the Michigan initiative explicitly partitions the political process on the basis of "race," Pet. App. 8a. This explicit reference to race in the text of the amendment was reinforced by the principal drafter of Proposal 2, who stated that it was designed "to prohibit programs that granted racial preferences, that is, affirmative action programs," Supp. Pet. App. 327a. Just as Initiative 350 was a calculated response to the Seattle School Board's adoption of a racial desegregation program, *see Seattle*, 458 U.S. at 471-72, the campaign to place Proposal 2 on the Michigan ballot began almost immediately after this Court's holding in *Grutter* that the State may utilize race-conscious admissions programs for its colleges and universities. And also like Initiative 350, *see Seattle*, 458 U.S. at 479-80, Proposal 2 lacked any historical antecedent in Michigan: *No* prior constitutional amendment in Michigan had dealt with university admissions or with anything relating to higher education governance or affairs.

The inclusion in Proposal 2's text of "sex" and "national origin," in addition to "race," does not alter the conclusion that Proposal 2 was predominantly racial in nature. The charter amendment in *Hunter*, for example, applied to any fair housing ordinance prohibiting discrimination based on "race, color, religion, national origin or ancestry," 393 U.S.

at 387, yet the Court concluded that it created a "meaningful and unjustified official distinction[] based on race," *id.* at 391. Governmental action need not rest "solely" on race to be constitutionally suspect. *Arlington Heights*, 429 U.S. at 265; *see also Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (holding that an additional purpose behind a constitutional provision would "not render nugatory" the impermissible racial motivation). Rather, strict scrutiny is triggered when race is "the predominant factor" motivating the decision, *Bush*, 517 U.S. at 959 (internal quotation marks omitted).[11] As demonstrated above, race—and not the other characteristics included in the text of Proposal 2—was the motivating factor behind Proposal 2's enactment. *See* Pet. App. 26a n.4 ("Here, as in *Hunter*, the clear focus of the challenged amendment is race. The history of Proposal 2 and its description on the ballot leave little doubt.").

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[11] Petitioner's related argument that Proposal 2 is not constitutionally suspect because it disadvantages a majority of Michigan's population, Pet. Br. 26, is misplaced. The political restructuring doctrine's application is dependent on the *racial* nature of the issue subject to the distinct decisionmaking process, not whether members of one race or another are disadvantaged by that change. *See* Section I.C *supra*. After all, the majority-minority legislative districts created in *Shaw* were unconstitutional because race was the predominant factor behind the decision to draw them, without regard to the underlying voting strength of voters in any district or within the state as a whole. In any event, the charter amendment in *Hunter* removed fair housing protections that distinctly benefited various religious and ethnic minority groups that, grouped together, would likely represent a majority of the electorate.

Petitioner's argument that Proposal 2 should not be subject to strict scrutiny because there is no evidence that it was intended to harm minorities conflates purposeful discrimination with ill will toward a particular racial group. Pet. Br. 38 ("It is that crucial factor—animus, or discriminatory intent—that the Sixth Circuit en banc majority did not find in *Seattle School District*'s test."). This Court has made clear, however, that racial animus is not a required element of an equal protection claim: strict scrutiny applies where the racial classification is apparent on its face *or* a facially neutral decision is unexplainable on grounds other than race. *Feeney*, 442 U.S. at 272. There was, for example, no evidence in *Shaw* or *Bush* that the state legislature intended to harm white voters (or minority voters) when it drew the majority-minority legislative districts, just as there was no evidence that the University of Michigan intended to harm white applicants (or minority applicants) in *Gratz*. Petitioner's suggestion that this Court's decision in *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that the challenged initiative violated the Equal Protection Clause because it was "inexplicable by anything but animus"), somehow makes ill will toward a particular group a *necessary* element of an equal protection claim confuses necessity with sufficiency and is incompatible with decades of this Court's precedents.

For his part, Russell asserts that the political restructuring doctrine is incompatible with *Washington v. Davis* and *Arlington Heights*, premised on the conclusory assertion that the record does not establish a "discriminatory purpose."

Russell Br. 15. The district court and Sixth Circuit, however, both found that the fundamental purposes of Proposal 2 were to prohibit race-conscious admissions programs (which advance the compelling interest of promoting diversity by *increasing the likelihood* that some minority applicants are admitted) *and* to create a different and more burdensome decisionmaking process for any future effort to alter that outcome. Pet. App. 21a-22a; Supp. Pet. App. 328a. Moreover, like the amendment to the city charter at issue in *Hunter*, the text of Proposal 2 explicitly references "race" while establishing a different and more onerous decisionmaking process.

The enactment of Proposal 2 is thus "unexplainable on grounds other than race," *Shaw*, 509 U.S. at 643 (internal quotation marks omitted), and, like *Shaw* and *Bush*, satisfies the requirement in *Washington v. Davis* for purposeful conduct. Purpose may, but need not, include negative feelings toward an individual or group because of race. After all, even purportedly benign racial classifications are subject to strict scrutiny, *Croson*, 488 U.S. at 494, and a racial classification need not burden one race more than another to be deemed purposeful, *see Shaw*, 509 U.S. at 651. Establishing purpose requires only demonstrating that race is the predominant factor motivating the action. *See Bush*, 517 U.S. at 959.

2. *Distinct Political Process.* The elected Boards of Regents retain plenary authority over all university matters, including general authority to set admissions criteria. But Proposal 2 removed the decision whether or not to adopt constitutionally

permissible *race*-conscious admissions programs from that locus of political decisionmaking and embedded it at the constitutional level.

Except for Proposal 2, the Michigan Constitution includes no other provisions that create an exception to the ordinary operation of the state's colleges, universities and graduate schools. Pursuant to Article VIII, § 5 of the state constitution, Michigan's public universities are controlled by independent Boards of Regents, each of which has the power of "general supervision of its institution and control and direction of all expenditures from the institution's funds." Michigan statutes implement this constitutional provision by vesting full governing authority in the Boards of Regents, encompassing the power to enact by-laws and regulations to promote and achieve the university's educational mission. *See* Mich. Comp. Laws Ann. §§ 390.3-.5 (West 2011). Regents have *always* exercised autonomy over admissions policies, and they have historically delegated responsibility to establish admissions standards, policies and procedures to units within the institutions, including central admissions offices, schools and colleges.

As the district court held and the Sixth Circuit affirmed, Pet. App. 31a; Supp. Pet. 327a, the Boards of Regents are political bodies under state law. Regents are popularly elected or appointed by the elected governor, and thus politically accountable. For more than a century, the Michigan Supreme Court has described the Boards of Regents as "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-

ordinate with and equal to that of the Legislature." *Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*, 132 N.W. 1037, 1040 (Mich. 1911). To fulfill this role, the governing Boards hold regular public meetings, at which they receive reports from the President, Provost, and other university officials and take public comment. Pet. App. 30a-31a; Supp. C.A. Br. of Universities 21-22.

Race-conscious admissions programs have played important roles within the political dynamics of the Boards of Regents. Public meetings have specifically dealt with issues of policy regarding affirmative action in admissions. Pet. App. 30a-31a; Supp. C.A. Br. of Universities 21-23. Elections for positions as Regents have specifically focused on the positions of candidates as to race-conscious university admissions, and some candidates have in fact included their views on race-conscious admissions policies as part of their campaign platforms. Pet. App. 32a-33a (citing League of Women Voters 2005 General Election Voter Guide, *available at* http://www.lwvka.org/guide04/regents.html (last visited May 22, 2012) (noting that a candidate for the Board of Regents pledged to "work to end so-called 'Affirmative Action,' a racist, degrading system").[12]

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[12] The Boards' delegation of power to establish admissions standards does not diminish the Boards' plenary power over that aspect of university operations; Michigan law clearly authorizes them to revoke that delegation at any time or to override decisions made by the delegee. Nor does the delegation of power from an elected body to an unelected body

Proposal 2 thus constructs a distinct political process for making decisions related to higher education policy. It preserves the traditional control exercised by state universities' elected or governor-appointed boards as to all matters exclusive of the admissions process, and, as to admissions, continues to preserve the authority of the Boards of Regents to determine whether to "grant preferential treatment" based on legacy status, athletics, or most other factors or group identities other than race. However, it introduces a new requirement that a statewide constitutional amendment must be passed before the Boards can even consider whether to adopt *race*-conscious admissions policies that meet this Court's stringent Fourteenth Amendment standards (including the exact admission policy that this Court held was constitutionally permissible in *Grutter*).

Finally, this distinct process is more burdensome. The district court found that there "is no question" that requiring a constitutional amendment before "the State and its political subdivisions" can adopt race-conscious admissions programs "makes it more difficult" for those who support race-conscious programs to advocate successfully. Supp. Pet. App. 328a. The Sixth Circuit agreed with this factual finding. Pet. App. 35a-37a. The record amply supported this finding and established that a statewide initiative to

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make that power, when ultimately exercised, non-political. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 393 (1989) (referring to the United States Sentencing Commission, operating under delegated authority, as performing work of a "significantly political nature").

amend the Michigan Constitution is more onerous that the alternatives that existed before Proposal 2's enactment, Supp. Pet. App. 281a-82a; *see also* Pet. App. 36a; *see generally* Brief of Amici Curiae Political Scientists Gary Segura *et al.* in Support of Chase Cantrell Respondents.

Following Proposal 2's enactment, the only relevant decisionmaker for whether or not to adopt race-conscious admissions programs is the electorate, and the only mechanism available is a statewide initiative campaign. Yet before even beginning to advocate meaningfully before the electorate, supporters of race-conscious admissions programs must secure signatures from 10% of the total vote cast in the last gubernatorial election within a relatively short signature-gathering window or secure support from two-thirds of both houses of the state legislature. J.A. 44-45, 47-48; Mich. Const. art. XII, § 2. Success is contingent upon having millions of dollars in campaign funds. J.A. 47. In contrast, individuals who wish to advocate for other admissions criteria can pursue the informal and low-cost alternatives of lobbying university officials and speaking at admissions committee meetings, lobbying individual Regents or speaking at public meetings of the Regents, or attempting to affect elections of individual Regents to influence that body. Petitioner's reliance on Judge Sutton's en banc dissent in the Sixth Circuit to argue that amending the state constitution is less burdensome than advocating within the political process that ordinarily applies to issues affecting the state's universities simply ignores the factual findings made by the district court, and Petitioner cites no basis for

reversing those findings under appropriate legal standards, *see Easley*, 532 U.S. at 242 (holding appellate courts review trial court's factual findings "only for 'clear error'").

B. Proposal 2 Does Not Advance a Compelling Interest.

The State of Michigan never identified before the district court or the Sixth Circuit any compelling state interest that Proposal 2 serves, much less is needed to achieve. Pet. 45a. Having failed to do so below, Petitioner has waived this issue. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

If the Court concludes that this issue is not waived, it should remand so the district court and Sixth Circuit can address this fact-specific issue in the first instance. *See, e.g., Adarand*, 515 U.S. at 238-39. But if the Court believes it appropriate to decide the issue, it should hold that, even had the state attempted to advance a compelling state interest, no such interest exists.

As this Court held in *Grutter*, 539 U.S. at 334, 343, "the educational benefits that flow from a diverse student body" constitute a compelling state interest in the specific context of admissions policy in higher education, justifying use of race in a "flexible, nonmechanical way" as part of a "truly individualized consideration" of each and every applicant. The Court has never suggested, let alone held, that eradication of a compelling state interest can itself promote a compelling state interest.

Petitioner nonetheless attempts to avoid the application of strict scrutiny to Proposal 2 because he and others believe that it will ultimately reduce the relevance of race within society. This Court, however, has long held that state action drawing racial classifications is not excused from strict scrutiny simply because its ultimate aim may be laudable. *See Croson*, 488 U.S. at 493 (holding that there is "simply no way of determining what classifications are 'benign' or 'remedial'" without applying strict scrutiny to all racial classifications). Utilizing an approach that will itself increase the salience of race within our political system—and embeds the fact that a racial question necessitates a decisionmaking process distinct from other similar matters for all to see in the state constitution—cannot be justified because its supporters believe it will, on net, reduce the salience of race in society. *See Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring). As Justice Kennedy has reminded us, we make no "analytical leap forward" by assuming that if race's role in society is a problem, "race is the instrument with which to solve it." *Id.* at 797. The empirical consequences of Proposal 2, and the extreme and unprecedented racial polarization that it engendered, demonstrate forcefully why this justification cannot be accepted. *See generally* Kinder Br.

C. Proposal 2 Is Not Narrowly Tailored.

Other avenues to effect political change are available to those opposing the consideration of constitutionally permissible consideration of race as a factor in admissions. These avenues are either facially race neutral or do not balkanize the political

process by making race a predominant factor behind the establishment of a unique governmental decisionmaking process.

- Opponents of race-conscious admissions policies may advocate against such policies to members of the Boards of Regents or to the appropriate committees to which the Boards of Regents have delegated their plenary authority. Opponents may also elect new members of the Board of Regents committed to oppose race-conscious policies. These approaches focus on resolving the issue within the political process without establishing a distinct process for resolving racial issues, and thus do not unnecessarily underscore that race is a relevant feature of our political system.

- Michigan may amend its state constitution without establishing a racial classification within its political processes. This might include, for example, amending the constitution to allow admissions policies that considered only applicants' GPA and SAT scores, in effect preventing adoption of *any* individualized, holistic, multi-factor review policies that pass muster under *Grutter*, but doing so by prohibiting consideration of any factors but those enumerated in the state constitution. In contrast to changing the locus of decisionmaking selectively, this approach minimizes the focus on race as a singular feature of our political system by removing *all* authority for setting admissions criteria from the Boards of Regents. Because such an approach "remove[s] authority from local"

decisionmakers and "vest[s] all decisionmaking power in state officials" with respect to admissions criteria, *Seattle*, 458 U.S. at 480 n.23, it would implicate the political restructuring doctrine only if plaintiffs could prove that race was the "predominant factor" behind the change, *Bush*, 517 U.S. at 959 (internal quotation marks omitted); *cf. Valtierra*, 402 U.S. at 141.

- Michigan may amend the state constitution to transfer all authority over admissions policies from the Boards of Regents to the state legislature or some other political body. A state does not create a distinct political process for a racial issue by placing plenary authority over all aspects of college admissions in a different political body that a majority of citizens believes is better suited to resolve political questions or would be more responsive to the public. Vesting plenary authority over *all* admissions issues in a different political body thus does not make race an outcome-determinative feature of our political system.

Each of these approaches would achieve the end of removing race as a factor in higher education admissions. Petitioner has not demonstrated, and cannot demonstrate, that "available, workable race-neutral alternatives do not suffice," *Fisher*, 133 S. Ct. at 2420.

III. *STARE DECISIS* COUNSELS AGAINST THE DRAMATIC STEP OF OVERRULING OR SUBSTANTIALLY LIMITING THE POLITICAL RESTRUCTURING DOCTRINE.

Petitioner and Russell suggest that if the political restructuring doctrine poses a barrier to Proposal 2, the doctrine should be overruled. All of the relevant factors that this Court has identified for deciding whether to adhere to the principle of *stare decisis* counsel against taking the extreme measure of overturning such long-standing precedent.

First, the political restructuring doctrine "has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable." *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (internal citation omitted). Courts are fully capable of conducting the factual inquiry necessary to assess whether a government action merely references race or is instead a constitutionally suspect race-based political restructuring.

Second, the political restructuring doctrine is not just consistent with, but serves as a necessary component of, the Court's current equal protection jurisprudence. Overruling *Hunter* and *Seattle* would call into question numerous cases in which this Court has relied on the societal harm caused when governmental action emphasized the importance of race as a distinct characteristic in our political system. *See* Sections I.B & II.A, *supra*. Far from being "a remnant of abandoned doctrine," *Casey*, 505 U.S. at 855, the political restructuring doctrine

continues to have "significant application [and] justification" within the Court's broader equal protection jurisprudence, *id.*

Finally, Russell's assertion that the limited number of cases involving the political restructuring doctrine demonstrates that it is unnecessary to vindicate Fourteenth Amendment interests, Russell Br. 31-33, implies that the only way that reliance exists is where state governments persistently flaunt this Court's precedents. It is equally likely, if not far more likely, that the opposite is true: states and localities have attempted to change the political decisionmaking process along such overtly racial lines so rarely over the last half century because it is clear that doing so would violate the Equal Protection Clause.

At bottom, Petitioner and Russell recycle arguments used to oppose the holdings in the Court's most recent affirmative action decisions, where it declined to rule that race-conscious admissions programs are per se unconstitutional, *see Fisher*, 133 S. Ct. at 2421; *Grutter*, 539 U.S. at 343. Yet Petitioner's and Russell's assertions that race-conscious admissions are unnecessary and bad policy, Pet Br. 21-23, 31-36; Russell Br. 29-30 & n.5, are irrelevant because the constitutionality of race-conscious admissions programs is not at issue here, as Petitioner conceded up until now. *See* Pet. 13 n.2. The political restructuring doctrine prohibits only creating a distinct political decisionmaking process to govern whether to adopt *constitutionally permissible* race-conscious programs, *not* the ultimate decision whether or not to do so.

CONCLUSION

For the reasons stated above, the court of appeals should be affirmed.

August 23, 2013

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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COUNTER-QUESTIONS PRESENTED

Whether a state constitutional amendment violates the Equal Protection Clause by prohibiting minority citizens from proposing through the procedures available to all others that public universities adopt a lawful affirmative action program so that significant numbers of qualified minority students can be admitted to those universities?

Whether a state constitutional amendment violates the Equal Protection Clause by imposing a selective, substantive standard regulating the admission of minority and women students and by creating a private right of action allowing those who claim to be aggrieved by the admission of those students in violation of the amendment to seek damages and injunctive relief in state court?

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STATEMENT OF THE CASE

A. The issues at stake in this case

This case is about the protection of the political rights and educational futures of black, Latina/o and other minority residents under the Equal Protection Clause of the Fourteenth Amendment during the period of the greatest demographic change that the nation has ever faced.

On the one hand, Article 1, Section 26 of the Michigan State Constitution ("Proposal 2") denies to racial minorities the right to even propose that the governing boards of Michigan's public universities adopt the exact affirmative action plan that this Court held was the only way that significant numbers of black, Latina/o and other minority students could be admitted to the University of Michigan's Law School and other schools like it. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

On the other hand, in two profound and prescient decisions, this Court rightly found in the Fourteenth Amendment a mighty shield protecting the democratic rights of black, Latina/o and other minority citizens against attempts by a would-be dominant white majority to prevent minority citizens from obtaining protection against *de facto* segregation and inequality. *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982).

The Sixth Circuit Court of Appeals, in a well-reasoned decision, held that *Hunter* and *Seattle*

compelled the conclusion that Proposal 2 violated the Equal Protection Clause by creating an unequal and racially discriminatory political process. Every other group in the state—including the alumni, wealthy donors, game-day boosters, powerful politicians and all the rest—whose sons and daughters already have a host of unearned advantages in the universities' admissions systems—may still lobby for and win the consideration of special factors that will further increase their children's chances of being admitted. Black, Latina/o, Native American and other under-represented minorities, however, now have no such right. They and they alone may not lobby the elected governing boards of the University of Michigan, Michigan State University and Wayne State University to obtain those changes in the universities' admissions systems that *Grutter* held were the only way that a significant number of their children could actually attend those universities.

Under Proposal 2, black, Latina/o and other minority citizens may no longer ask the universities to consider the ways that Michigan's nationally-recognized pattern of intense segregation and inequality makes it almost impossible for the universities to admit many minority students under its other admissions criteria (see infra, at 55-59). Nor may they ask the universities to consider the cultural biases in the standardized tests that allow the poorest white students to score higher on those tests than the most privileged minority students (JA 173-176, 182-187). Under Proposal 2, minorities may not fight for their children's future, and the universities must pretend that race and racism do not exist.

Like many discriminatory laws before it, Proposal 2 uses seemingly neutral language, declaring that state universities "...shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin..." MI Const 1963, art 1, s. 26(1). The prohibition of discrimination, however, has no meaning because the Michigan's Constitution had long before banned discrimination on account of race or national origin. MI Const 1963, art. 1, sec. 2. Similarly, the prohibition on "preferential treatment" was completely one-sided because the University of Michigan had never adopted an explicit special program to admit white students. As Ward Connerly made clear in the 279 pages of his book, California's Proposition 209 from which Proposal 2 was copied aimed *only* at banning the affirmative action programs that had led to the admission of minority students. Ward Connerly, Creating Equal: My Fight Against Race Preferences, 1-279 (Encounter Books, San Francisco, 2000).

By so doing, Proposal 2 hopes to reverse some of the proudest and most far-reaching achievements of the Civil Rights Movement. During the 1960s, the University of Michigan Law School had nine black graduates and no known Latina/o graduates. After the Regents established the first affirmative action program in 1970 (JA, 91-101), the Law School graduated 262 black and 41 Latina/o students in the 1970s and comparable numbers every decade thereafter (JA, 102-103). Proposal 2 has reversed that progress and driven down the number of black law graduates to levels not seen since 1969. William C. Kidder, *Restructuring Higher Education Opportunity?*, 2 (The Civil Rights Project, 2013),

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At Michigan's Law School and at all the schools that are like it, Proposal 2 is destroying *Brown's* promise of an equal and integrated education which over time will destroy *Brown's* promise at all levels. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Proposal 2 makes the drops in minority enrollment both inevitable and permanent. Because Proposal 2 is part of Michigan's Constitution, it may only be removed by another referendum. MI Const. 1963, art. 12, sec. 2. The cost of such a referendum campaign is prohibitive (JA, 39-51). But even if by some miracle minority communities could obtain the needed resources, they would have zero chance of winning such a referendum. Michigan's electorate is 85 percent white. In the November 2006 general election, ninety percent of Michigan's black voters cast ballots against Proposal 2, but two out of three of Michigan's white voters cast ballots for that Proposal (R. 222-2, Dep. of Linski, Ex 3, Page ID No. 4606). There is no way for minority communities to close that racial gap, and they thus have no lawful way to regain the right even to present proposals that will end their exclusion from the University of Michigan.

Minorities' chances of being admitted and their chance of winning a referendum will continue to decrease due to the enormous increase in the competition for admission at all selective schools, including the University of Michigan. Forty thousand students applied for one of the 6,000 seats in the class that would enter in September 2011. Forty-two

thousand students applied for the same number of seats in the class that entered in September 2012. Statements by Ted Spencer, Dir. Of Admissions, available at http://www.vpcomm.umich.edu/admissions/archivedocs/spencer11.html and http://www.vpcomm.umich.edu/admissions/statements/spencer12.html. The increasing competition for admission to the University of Michigan, the contraction of Michigan's other public universities, the impossibly high price of private colleges, and the knowledge that a degree from the University of Michigan opens doors that are closed to others will only decrease minority admissions and increase the polarization in the electorate.

The proponents of Proposal 2 ask this Court to uphold Proposal 2, knowing that it has re-segregated the selective colleges in Michigan and California (see infra, at 47-51), knowing that it will deny minority communities equal access to the political process, and knowing that it will allow white majorities to take from black, Latina/o and other minority citizens the equality in the political process that the Fourteenth Amendment promised to protect.

But Proposal 2 does even more: it enshrines in the Michigan Constitution the false claim that any attempt to overcome racial inequality and exclusion is an attempt to win "preferential treatment," an attempt to maintain "discrimination." By its votes, the white majority has renamed the pursuit of equality as the pursuit of inequality.

The Court's decision in this case will tell the people of America what the Court's relationship is to America's transformation into a majority-minority

nation. Michigan established pervasive de facto segregation and inequality with the same scientific precision that it used to create the assembly line. Michigan must not become the model for how to create a new, constitutionally-ratified Jim Crow.

The proponents of Proposal 2 ask this Court to transform the Fourteenth Amendment from an Amendment that requires the states to protect equality into an Amendment that allows the states to pass laws that deny equality. Such a reversal could never legitimately claim to foster a "color-blind Constitution," but rather would create a Constitution that is blind to injustice, blind to inequality, and blind to the needs and aspirations of the communities that are quickly becoming America's new majority. If "color-blind Constitution" means nothing more than the protection of white privilege, then it will be a phrase held in derision, associated with cynicism and hypocrisy, and will serve as the new legal pseudonym for separate and unequal.

The Fourteenth Amendment was proposed and ratified after the Civil War to heal the breach in America. Those who drafted, proposed and ratified it understood that the only way to heal the breach was to protect and empower the ex-slaves and to defend their rights with the arms of Union soldiers. Every right extended to the slaves was attacked by Andrew Johnson and many others as a detriment to white people, as a special privilege or preference for black people. But the Fourteenth and later Fifteenth Amendments recognized that a united and diverse America could only be built by uplifting those who had so long been held down by force, by law, and by custom.

One hundred years later, in the wake of what until that time had been the most ferocious, bloody, and costly urban riots in American history, the bipartisan body charged with investigating why the riots had occurred and what could be done to prevent future uprisings concluded, "Our nation is moving toward two societies, one black, one white, separate and unequal." Report of the National Advisory Commission on Civil Disorders, 1 (U.S. Gov't. Printing Office 1968). Dr. Martin Luther King, Jr. called that Report "a physician's warning of approaching death, with a prescription for life." H.R. Rep. No. 95-1828, pt 2 at 277 (1979). The life-saving prescription to save America was affirmative action.

Most of America failed to recognize the approaching storms that led to the explosion of discontent in 1968. To most white Americans, America seemed to be making progress on issues of race. Dr. King had built a movement powerful enough to win landmark changes in federal law, and he had an unparalleled ability to speak to and for the oppressed. Dr. King never apologized for or sugar-coated the deep discontent of the black and Latina/o communities, and he always defended and stood by those determined to fight for freedom, even if he disagreed with the tactics some chose to achieve it. Through Dr. King's words and the seemingly unstoppable civil rights movement, a section of white Americans glimpsed how America's minority communities saw and experienced America's promises of equality, democracy and justice.

In the 1960s, some sections of America's top leaders, including this Court under Chief Justice Earl Warren, heard the voices of discontent. The Court worked to

restore the Fourteenth Amendment and used its guarantee of equal protection to combat segregation and discrimination in the North and the South. In *Hunter* and then *Seattle*, the Court assured that minority citizens would have an equal right to seek the aid of government in overcoming the enormous private discrimination and de facto segregation that remained.

The Court's authority was high, because its decisions were based on reality and truth and on the Court's great optimism that the American people could change for the better. The Court recognized that it is ultimately the real lives of the American people—not the legal terms and high-sounding phrases—that alone can give the Constitution true meaning for the great majority of Americans and that defines for them whether the nation's laws are just or unjust.

America today is a nation desperately in need of decisions that express a commitment to equality and justice. America will soon be a majority-minority nation. There is no way to build a united, inclusive new America if the core values, the core political *rights* that have bound us together, even in their imperfect application, do not apply to us all. We are in a new phase of struggle for human equality, dignity and equal rights in America. The millions of immigrants, mostly Latina/o, who started their great march in 2006, are just beginning their fight to make America everyone's nation.

As they do, however, California's Proposition 209, from which Proposal 2 was copied word-for-word, is widening the gulf between Latina/o and black communities on one side—and white communities on

the other. The gap in educational opportunities means widening gaps in employment, family income, home ownership, and everything else (see infra, at 55-59).

This trend, if unchecked, will take on a whole new meaning in our nation today than it did under the old Jim Crow. In the lifetime of many who are alive today, black, Latina/o, Asian and Native Americans will be the majority of our population. America will no longer be in any sense the "white man's republic." The transformation before us will be vast, and few would say that we are ready for it.

This case is essentially about this question: Can our nation avoid the traumatic convulsions that such changes have so often wrought in human history? Can the "principles of constitutional liberty" that Justice Harlan described, *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), be a bright beacon that provides a sufficiently broad, deep and realistic framework to ease and foster this great transformation, making it an organic process in the evolution of a great democratic people? Or will that constitutional framework itself be distorted into a perverse bulwark of a decadent rearguard defense of the dying privileges of those who believe that they should be the "dominant race" in this country?" *Id.*, at 560.

This Supreme Court should not repeat the mistake of *Plessy* by turning equality over to the states and thus becoming responsible for the new Jim Crow that these laws are now creating in California, Michigan and other states. We ask that the Court consider the words of a Texan raised in the *de jure* segregation of the South. Everything that President Lyndon Johnson

said in June of 1965 to the graduating students of Howard University, just weeks before he signed the 1965 Voting Rights Act, remain both true and painfully relevant today:

> Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family you live with, and the neighborhood you live in, by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man...
>
> For Negro poverty is not white poverty. Many of the causes and many of the cures are the same. But there are differences—deep, corrosive, obstinate differences—radiating painful roots into the community, and into the family and the nature of the individual...
>
> Freedom is the right to share, share fully and equally in American society—to vote, to hold a job, to enter a public place, to go to school. It is the right to be in every part of our national life as a person equal in dignity and promise to all others.
>
> But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

> You do not take a person, who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say 'you are free to compete with all others' and still justly believe that you have been completely fair.
>
> That is, it is not enough to open the gates of opportunity. All of our citizens must have the ability to walk through those gates.
>
> This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity, but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

Speech of Lyndon B. Johnson, June 4, 1965, available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp.

President Johnson could not make that speech to the Regents of the University of Michigan today. If he did make it, they would be required to ignore it. If they did not ignore it, they could be sued under the private right of action that Proposal 2 has created for any student who claims to have been aggrieved by alleged "preferential treatment" given to minority applicants. MI Const. 1963, art. 1, sec. 26(6)(7); MCL 37.2801.

This Court should strike down Proposal 2 to end these attacks upon democracy and upon equality and to assure that all of the citizens of Michigan and of the Nation can again use the normal democratic procedures for establishing the admissions standards

that will play such an enormous role in determining what kind of country we will be over the next half century and more.

B. The proceedings below and the Sixth Circuit's decision.

On November 8, 2006, the day after Proposal 2 passed, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and to Fight for Equality By Any Means Necessary (BAMN) and a number of black, Latina/o and white students, applicants and citizens (jointly referred to as the "Coalition plaintiffs") filed this action in the Eastern District of Michigan against the Governor of Michigan and the governing bodies and individual presidents of Michigan's three constitutionally-established universities. The Coalition plaintiffs alleged in relevant part that Proposal 2 violated the Equal Protection Clause by imposing unequal burdens on racial minorities who sought changes in admissions policies and by the selective and judicially-enforceable substantive limitation that it imposed upon the criteria for admitting women and minority applicants (Pet. App. 9a).[1]

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[1] The Coalition plaintiffs initially challenged Proposal 2's restrictions on women applicants under both the unequal political structure and the substantive counts of their Complaint. The Coalition plaintiffs have not pursued the political structure count as to women because it raises somewhat different issues. The Coalition plaintiffs have pursued their challenge to Proposal 2's substantive limitation and special legal remedy for challenging the admission of women students because it has and it will eliminate special programs which lessen the continuing exclusion of women from fields like many sciences and engineering.

About six weeks later, a different group of faculty and students ("the Cantrell plaintiffs") filed an action in the same court alleging that Proposal 2 had imposed unequal political burdens on racial minorities in violation of the Fourteenth Amendment (Pet. App. 10a).

The Attorney General intervened to defend Proposal 2, the Governor was later dismissed by stipulation, and the two actions were consolidated. The Attorney General filed a motion for summary judgment. The District Court rejected the Coalition plaintiffs' claim that factual disputes precluded summary judgment,[2] granted the Attorney General's motion for summary judgment, and denied the Cantrell plaintiffs' cross-motion for summary judgment (Pet. Supp. App. 270a). The Coalition plaintiffs appealed immediately, and the Cantrell plaintiffs appealed after the District Court had denied their motion to alter or amend the judgment (Pet. Supp. App. 184a-193a).

On July 1, 2011, a divided panel of the Sixth Circuit reversed the District Court (Pet. App., 101a-183a). The

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[2] The Coalition plaintiffs responded to the Attorney General's claim that *Hunter* and *Seattle* did not apply to "preferences" by asserting that if the District Court accepted that claim, it nevertheless could not grant the Attorney General's motion without determining whether departures from grade point averages and test scores were actually "preferential treatment" that should be excluded from the coverage of *Hunter* and *Seattle*. The Coalition plaintiffs asserted that disputes over whether those criteria were neutral means of determining what was and what was not a preference for purposes of the Fourteenth Amendment precluded granting the Attorney General's motion for summary judgment. R. 222, Coal. Resp. Atty. Gen. Mot. For Summ. Judg., pgs. 24-25, 41 of 48.

Attorney General petitioned for and obtained en banc review. On November 15, 2012, the Sixth Circuit, sitting en banc, reversed the District Court for reasons that are nearly identical to those that the panel had given for its decision (Pet. App. 1a-100a).

The en banc Sixth Circuit began its statement of those reasons by concluding that the Circuit was "neither required nor inclined to weigh in on the constitutional status or relative merits of race-conscious admissions policies as such" (Pet. App.. 13a). Rather, it held, the issue before the Sixth Circuit was:

> ...whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even *consider* using race as a factor in admissions decisions—something they are specifically allowed to do under *Grutter*.
>
> Pet. App. 13a (emphasis in original).

In deciding that issue, the Sixth Circuit followed this Court's decisions in *Hunter* and *Seattle*.

"Ensuring a fair political process is nowhere more important than in education," the en banc Court held, because "[e]ducation is the bedrock of equal opportunity and 'the very foundation of good citizenship.'" Pet. App. 15a, citing *Brown*, 347 U.S. at 493. Because *Grutter* had held that the nation had a vital interest in assuring that "...the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity," the en banc panel declared

that it had to "...apply the political-process doctrine with utmost rigor" (Pet. App., 15a).

The en banc Sixth Circuit then concluded that Proposal 2 had created separate and unequal political rights for minority citizens on the one hand and all others on the other hand. The minority citizen, the Circuit held, was required to "traverse [the] difficult and costly road" of winning a statewide vote to repeal Proposal 2 before "our now exhausted citizen" could reach the starting point of his neighbor who sought a legacy-related policy change simply by asking the Regents or their administrative officials to adopt it (Pet. App., 36a).

The en banc Sixth Circuit found that the determination of admissions standards was part of the political process of the State of Michigan (Pet. App., 27a-33a), and found that Proposal 2 had a racial focus because it excluded from that process only those proposals that were designed to increase the number of minority students (Pet. App., 33a-38a).

The Sixth Circuit rejected the Ninth Circuit's conclusion that this Court's decisions in *Hunter* and *Seattle* did not apply when racial minorities sought programs that the opponents had labeled as "preferences." Pet. App. at 38a-41a, citing *Coalition for Economic Equity v. Wilson*, 122 F. 3d 692 (9th Cir. 1997). Five judges had dissented in the Ninth Circuit from the denial of hearing en banc in *Wilson*, 122 F. 3d at 711-718. The Sixth Circuit echoed and expanded upon their reasons for rejecting the *Wilson* panel's decision.

The Sixth Circuit declared that "[t]his effort to drive a wedge between the political process rights afforded when seeking anti-discrimination legislation and so-called preferential treatment is fundamentally at odds with *Seattle*" (Pet. App., 39a). The *Hunter/Seattle* doctrine, the en banc Court held, "...worked to prevent the placement of special procedural obstacles on minority objectives, whatever those objectives may be" (Pet. App., 41a). The en banc Court rejected the proposed preferences limitation on *Hunter* and *Seattle* because it attempted to impose an "*outcome*-based limitation on a *process*-based right" (Pet. App., 41a)(emphasis in original).

Proposal 2, the Sixth Circuit concluded, was not a mere repeal of an existing affirmative action program, distinguishing *Crawford v. Bd. of Educ. of the City of Los Angeles*, 458 U.S. 527 (1982). If the proponents of Proposal 2 had won a decision by university officials to end affirmative action, "...there would be no equal protection concern" under the political process doctrine, but Proposal 2 not only repealed the policies but "...*took the additional step* of permanently removing the officials' power to reinstate them" by "lodging decisionmaking authority over the question at a new and remote level of government'" (Pet. App. 43a, citing *Seattle*, 453 U.S. at 483).

Finally, the en banc Sixth Circuit recognized that *Seattle* and *Hunter* might allow the state to establish a different political process for particular racial issues, if the state demonstrated a compelling state interest for doing so (Pet. App. 45a). Michigan's Attorney General, however, has never asserted such a compelling interest (Pet. App. 45a). Thus, the Circuit concluded, those

portions of Proposal 2 which affected Michigan's public institutions of higher education violated the Equal Protection Clause by imposing heavier burdens on racial minorities who seek changes in the universities' admissions policies than the minimal burdens that faced by all others who seek changes in those policies (Pet. App. 45a).

The Sixth Circuit found no need to address the Coalition plaintiffs' claim that Proposal 2's substantive standards also violated the Equal Protection Clause because it had already concluded that Proposal 2 violated the Fourteenth Amendment (Pet. App. 46a).

There were five separate opinions by the seven dissenting judges on the en banc panel. We will state and address their arguments in detail below in the course of responding to the Petitioner's restatement and elaboration of their arguments.

SUMMARY OF ARGUMENT

The Fourteenth Amendment promised the four million newly-freed slaves Equal Protection of Laws, including federal protection for equality in the processes by which the states may enact new laws and policies. That promise and almost all the promises of the Fourteenth Amendment were, however, soon forgotten as this Court and the nation ceded federal protection and allowed the southern states in particular to deny equality altogether.

Brown revived the promises of the Fourteenth Amendment and following from it, the Court began the process of restoring equality in government by its

historic one-person, one-vote decisions. Following from those decisions, the Court held in *Hunter* that a local majority could not reallocate governmental power in a way that imposed special burdens on racial minorities who are fighting for lawful measures to reduce racial discrimination in residential housing. Thirteen years later, *Seattle* reaffirmed *Hunter* by holding that a state constitutional amendment could not deprive a local school board that had power over student assignment decisions of the power to use districting and busing to lessen de facto segregation in the public schools. In *Seattle* as in *Hunter*, this Court held that the majority could not deprive a racial minority of political rights equal to those of all others because the majority objected to the substance of the minority's lawful proposals.

The Petitioner, however, here asserts that Michigan voters may deprive Michigan's nearly two million black, Latina/o and other minority citizens of the right to propose through the procedures available to all other citizens that Michigan's public universities adopt affirmative action programs that *Grutter* and now *Fisher* have held may be used in defined circumstances because they are necessary in order to admit a significant number of black, Latina/o and other minority students. *Fisher v. University of Texas at Austin*, ___ U.S. ___, 133 S. Ct. 2411 (2013). The Petitioner thus asserts that Michigan may deny racial minorities the right to fight on equal terms for the adoption of the only plans that will make it possible for meaningful numbers of qualified black, Latina/o and other minority students to actually attend the University of Michigan Law School and other schools like it.

The Petitioner says that the electoral majority may deprive racial minorities of that right because the majority objects to the substance of the minorities' proposals. As the Sixth Circuit held, Proposal 2 imposes an outcome limitation on a process-based democratic right, in direct violation of *Hunter* and *Seattle* and the democratic principles for which they stand.

Moreover, the Petitioner asserts that the validity of every affirmative action plan should be litigated twice: once to determine whether the University may adopt such a plan under *Grutter* and *Fisher* and once to determine whether racial minorities have the right even to propose that plan through the normal procedures. The same Fourteenth Amendment, however, governs what public universities may do in considering race *and* the proposals that minorities have a federally-guaranteed right to present through normal procedures under *Hunter* and *Seattle*. There is no basis for saying that black, Latina/o and other minority citizens may be deprived of the right to propose through the normal procedures the adoption of those lawful affirmative action plans that are the only practical way that significant numbers of black, Latina/o and other minority students may actually be admitted to public universities.

The Petitioner claims that the state may limit the scope of the political equality protected by *Hunter* and *Seattle* to proposals that comply with a state-proclaimed theory of the color-blind Constitution—a theory that this Court has held may not be used as a "universal" principle because it is "inconsistent...with

the history, meaning and reach of the Fourteenth Amendment," *Parents Involved*, 551 U.S. at 782, 788 (Kennedy, J., concurring).

The Petitioner's claim that Michigan may define political equality itself by that theory will destroy the Fourteenth Amendment's uniform, national definition of equality, as the states strikes will be free to set new balances that differ from those set by this Court in *Grutter* and in *Fisher*, by choking off the political procedures that may be used for proposing any plan that the state majority believes should not be considered.

Proposal 2's substantive standards for admissions also violate the Fourteenth Amendment. Not long ago, the states banned minority and women students from even applying to many public universities. Proposal 2 echoes those laws by declaring that those same two groups alone cannot receive any "preferential treatment" and by authorizing an independent cause of action that allows any person claiming to be aggrieved by "preferences" favoring either of those groups to ask a state court for damages and for injunctive relief. Proposal 2's substantive limits on the admissions of women and minority students and its special cause of action are not applicable and have never been applicable to any categories of applicants other than women and minorities.

Proposal 2 pretends to protect equality but actually imposes selective and draconian restrictions upon the political rights and educational futures of minority and women students. The Sixth Circuit's decision striking down Proposal 2 should be affirmed because Proposal

2 violates the most fundamental promises of the Fourteenth Amendment itself.

ARGUMENT

I. PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY PROHIBITING MINORITY CITIZENS FROM PROPOSING THROUGH THE PROCEDURES AVAILABLE TO ALL OTHERS THAT PUBLIC UNIVERSITIES ADOPT LAWFUL AFFIRMATIVE ACTION PROGRAMS THAT ARE THE ONLY PRACTICAL WAY THAT SIGNIFICANT NUMBERS OF QUALIFIED BLACK, LATINA/O AND OTHER MINORITY STUDENTS MAY ATTEND MANY SCHOOLS IN THOSE UNIVERSITIES.

A. The Fourteenth Amendment guarantees racial minorities an equal right to use the political procedures that are available to all other citizens when they seek action by the government in aid of their interests.

The Fourteenth Amendment's historic promise of Equal Protection of the Laws meant not only substantive equality in the laws that were enacted but also equality in the procedures by which state governments enacted new laws and policies. Senator Jacob Howard, an anti-slavery lawyer from Detroit, made the promise of equality in the "rights and remedies" that black citizens would have in a "republican government" explicit when he introduced

the Fourteenth Amendment to the United States Senate on behalf of the Joint Committee of Fifteen on Reconstruction:

> [Section 1 of the Amendment] will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government.

Congressional Globe, 39th Cong., 1st Sess., p. 2766.

The 39th Congress knew that those promises could not be carried out unless the federal government prevented the defeated but still ruling leaders of the South from robbing the four million new citizens of their freedom. In Senator Charles Sumner's words:

> Four million slaves have been declared to be freemen; and by whom, and by what power? By the national Government; and let me say that, as the national Government gave that freedom, it belongs to the national Government to secure it. The national Government cannot leave those men whom it has made free to the guardianship or custody or tender mercies of any other

> government. It is bound to take them into its own keeping, to surround them all by its own protecting power, and invest them with all the rights and conditions which in the exercise of its best judgment shall seem necessary to that end.

Congressional Globe, 39th Cong., 1st Sess., pp. 2335-2336

For Senators Howard and Sumner and all the others who framed the Fourteenth Amendment, the then-small University of Michigan was far from the center of their concerns. But the promise of equality in their new Amendment guaranteed to Michigan's then-small black population an equal right to attend that University *and* an equal right to propose changes in its admissions standards so that they could attend that university.

Those promises were soon rendered worthless in much of the country as the Fourteenth Amendment was "strangled in infancy by post-civil-war judicial reactionism." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 291 (1978)(Powell, J.). The betrayal of the Fourteenth Amendment culminated in decisions upholding state-mandated segregation, *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the exclusion of black citizens from the political process by state constitutions which established poll taxes, literacy tests and similar devices to prevent any challenge to the system of segregation. *Williams v. Mississippi*, 170 U.S. 213 (1898).

Brown struck down the segregation laws and reopened a process that soon led to the restoration of

the promise of equality in the political process. Thus, in *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court struck down the gerrymanders that the South had used to perpetuate segregation by holding that the states must assure one-person, one vote in their legislative districts. Equality in the process of government, it said, was "at the heart of Lincoln's vision of government of the people by the people [and] for the people." *Id.*, at 568.

Reynolds led to *Hunter*, and *Hunter* then led to *Seattle*. In his defense of Proposal 2, the Petitioner trains his fire on *Hunter* and, especially, on *Seattle*. As set forth below, those decisions, like *Brown*, provide their own defense. The Petitioner's real target, however, is not those great decisions, but the still greater Amendment that stands behind them.

The Petitioner asserts that the Fourteenth Amendment's guarantee of political equality should be sacrificed to assure that minority students are admitted in rigid compliance with *some* of the universities' existing admissions standards, no matter how much inequality those particular standards incorporate and no matter how many exceptions others have obtained from those standards in order to facilitate *their* admission to the university.

For all the pages that have been spent by the Petitioner and his supporters, there is a fundamental question that he cannot answer. How, under the "surrounding power" of the Fourteenth Amendment, can the state enact a law that allows the alumni and everyone else to seek exceptions from its admissions system while denying to black, Latina/o and other

minority citizens, whom the Fourteenth Amendment was enacted to protect, the right to use the same process to petition for the adoption of lawful programs that are the only practical way that meaningful numbers of minority students may gain access to the state's most selective universities? How can the Fourteenth Amendment allow a state law that absolutely deprives racial minorities alone of the equal right to seek lawful modifications, adjustments and considerations in the Universities' admissions criteria?

B. This Court has rightly held that the racial majority may not adopt state constitutional amendments that ban racial minorities from using the political procedures available to all others to seek relief from racial inequality and exclusion because the majority objects to the substance of minorities' lawful proposals.

Brown inspired black, Latina/o and other minorities to fight for equality in all spheres and, at the same time, was met with massive resistance across the South. The die had been cast and in *Reynolds v. Sims*, the Court began the process of reestablishing the right of minority citizens to participate on an equal basis in the political processes of the states.

In 1967, the Court struck down an amendment approved by a large majority of California's voters that guaranteed every property owner the right to sell or rent to "such person...as he, in his absolute discretion, chooses." *Reitman v. Mulkey*, 387 U.S. 369, 371 (1967).

The Court struck down the amendment because it provided state sanction for private discrimination and because it made it impossible for minority citizens to seek legislative action to stop that discrimination. *Id.*, at 377.

The crucial battle was then joined in Akron, Ohio. As described in *Hunter*, the Akron City Council had passed an ordinance that banned racial or religious discrimination in the sale or rental of property. Citizens opposed to that ordinance won a referendum vote that amended the City charter to repeal that ordinance and to prohibit any similar ordinance from going into effect without being approved by the citizens in a special referendum. The Court struck down the charter amendment because the "...State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than that of another of comparable size." *Hunter*, 393 U.S at 393.

Justice Harlan concurred, concluding that while a state was normally free to allocate political power according to any general principle that it saw fit to apply, when it reallocated power over racial subjects alone it bore a "far heavier burden of justification" than was normally required, because the selective reallocation necessarily made it far more difficult for racial and religious minorities to "achieve legislation that is in their interest." *Id.*, at 395 (Harlan, J., concurring).

In its critical holding, *Hunter* declared that however deeply the majority of Akron's citizens believed in the

rights of property owners, the majority could not assure that its views prevailed forever by adopting an amendment that "...disadvantage[d] [racial or religious minorities] by making it more difficult to enact legislation in [their] behalf..." *Hunter*, 393 U.S. at 393. More generally, *Hunter* held that the majority could not prevent racial and religious minorities from equal access to the normal democratic procedures *because the majority objected to the substance of the minority's lawful proposals.*

Thirteen years after *Hunter*, this Court reaffirmed in *Seattle* the same protection for the political rights of racial minorities. In that case, the local school board had adopted racial minorities' proposals to use redistricting and busing to assure that their children were able to attend better schools and to overcome some of the evils of *de facto* segregation that *Brown* had identified. Having lost the political battle in the City of Seattle, those opposed to the school board's plan won a majority in a statewide referendum that amended the state constitution to declare a binding state policy in favor of neighborhood schools and to provide that busing could only be used for specified purposes of which racial integration was not one. *Seattle*, 458 U.S. at 463.

The Court saw that the amendment's ostensibly neutral wording concealed the reality that it had removed school assignment and transportation powers from the local school boards only on racial matters. Following *Hunter*, the Court once again held that a state could not, without a compelling interest for doing so, use the "racial nature of a decision to determine the decisionmaking process" because that "...place[d]

special burdens on racial minorities within the governmental process...." *Seattle*, at 470, citing *Hunter*, at 391 (emphasis in *Seattle*). As in *Hunter*, the Court held that however deeply the majority believed in neighborhood schools, it could not deprive racial minorities of the right to propose school assignment policies that the minority believed would give its children a chance for an integrated and better education.

The Petitioner attempts to ignore *Hunter* and wrongly asserts that *Seattle*, a reiteration of *Hunter*, has been undercut by this Courts' decisions in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) and *Romer v. Evans*, 517 U.S. 620 (1996).

Parents Involved did *not*, however, affect the Seattle district's power to draw district lines, or its use of student transportation, which were the sum and substance of the amendment struck down in the first *Seattle* decision.[3] Moreover, the *Seattle* majority knew that *some* racially-conscious plans might be unlawful, but recognized that the state could not prohibit racial minorities from proposing *all* racially-conscious plans because *some* might not be lawful. *Seattle*, 458 U.S. at 474. *Parents Involved* may have adopted a new substantive standard for determining which racially-conscious policies were unlawful, but it did not affect *or claim to affect* a racial minority's right to political

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[3] Indeed, even in other areas, the Court left open the possibility of different result if the facts were different. *Id.*, at 797- 798 (Kennedy, J., concurring).

equality when it presented lawful proposals to lessen racial inequality and exclusion.

Similarly, *Romer* parallels, rather than undermines, *Hunter* or *Seattle*. While *Romer* did not adopt the Colorado Supreme Court's expansion of *Hunter* and *Seattle* to cover a non-suspect class, that hardly shows that *Romer* rejected *Hunter* or *Seattle*. In fact, in striking down a Colorado constitutional amendment that banned the subdivisions of the state from adopting any laws or policies that provided legal protection to lesbians and gay men, *Romer* started, as *Hunter* and *Seattle* did, from the premise that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection in the most literal sense." *Romer,* 517 U.S. at 633. Like *Hunter* and *Seattle*, *Romer* then examined whether the state had offered any legitimate purpose for the denial of equal political rights, but found none because Colorado's justifications were so "far removed" from the amendment's provisions that the Court concluded that the state had enacted the amendment "...not to further a proper legislative end but to make [lesbians and gay men] unequal to everyone else." *Id.*, at 635.

Romer differed from *Hunter* and *Seattle* in that it required only a "legitimate" state purpose, not a compelling one, but that is because the class at issue in *Romer* was not suspect while the classes at issue in *Hunter* and *Seattle* clearly were. *Romer* also differed from *Hunter* and *Seattle* in that the amendment at issue in that case denied the existing citizens of local subdivisions and students at state universities the right to seek protection against the discrimination that

they were suffering, while *Hunter* and *Seattle* denied minorities the right to seek protection against their outright exclusion from particular areas or schools. That, however, is a difference without a distinction.

Hunter, *Seattle* and *Romer* all protected the political rights of minorities to advance proposals that were, at the time, unpopular. All three decisions made it possible for the minority to win protection for some of its legitimate interests and, overtime, to win the majority's support for that protection. Not only minorities, but the nation as a whole, made enormous progress because of those decisions, and with the challenges facing us now, there is no reason that this Court should abandon those decisions.

In striking down Proposal 2, the Sixth Circuit rightly summarized the rights of the majority and of the minority under the Fourteenth Amendment. The majority, if it truly is a majority, may persuade Regents to reject an affirmative action plan, or may elect new Regents if the ones now serving do not follow its will. The majority may not, however, "[rig] the game to reproduce its success indefinitely" by ending the minority's rights to use the political process to win the adoption of such plans in the future (Pet. App., 16a).

The Petitioner's central argument directly contradicts the principles of *Hunter*, *Seattle*, and the Fourteenth Amendment. The Petitioner asserts that an electoral majority may burden and essentially eliminate the racial minorities' *right* to petition for the adoption of lawful proposals to lessen the exclusion of minority students from state universities because the

majority objects to the *substance* of the minority's proposals. Pet. Br., at 17-22, 30-36. As the Sixth Circuit rightly held, the Petitioner seeks to impose an outcome-based limitation on a process-based right—a result that converts the *right* of a minority to fight for lawful proposals that it sees as necessary to lessen inequality into a *privilege* that the majority may dole out based upon its views of the merits of the racial minority's proposals. Pet. App. 13a.

C. The State has shown no compelling reason for denying minority citizens the right to petition through equal procedures for the adoption of the affirmative action programs that this Court has held are in defined circumstances the only way that significant numbers of black, Latina/o and other minority students may be admitted to the most selective state universities.

1. The State may not limit the federal rights protected by *Hunter* and *Seattle* based upon a state constitutional amendment that proclaims the theory of the color-blind Constitution.

As the Sixth Circuit further rightly observed, the particular outcome-based limitation that the Petitioner offers to justify truncating the political rights of black, Latina/o and other minority citizens is an attempt to take a "second bite" at *Grutter* and, now, at *Fisher* (Pet. App. 13a). On the basis of the *same* arguments against

affirmative action that this Court rejected in *Grutter* and in *Fisher*, the Petitioner asserts that the validity of every affirmative action program in higher education must be litigated twice: once to determine whether the university has the right to adopt such a plan and once to determine whether the majority may prohibit the minority from ever proposing that the university adopt such a plan. As the Fourteenth Amendment aimed above all at prohibiting state attempts to deny the *right* of minority citizens to equality, there can be no argument that the right of minority citizens to propose affirmative action programs through normal procedures by which the universities adopt admissions standards is governed by a standard that is narrower than the one that governs the right of the university to adopt such a plan.

The Court's holdings in *Fisher* and *Grutter* make clear why the right of the university to adopt an affirmative action plan and the right of minority citizens to propose that plan must be judged by the same standards. In *Grutter* and in *Fisher*, this Court held a state university could consider race in admissions if it was "necessary" to do so in order to admit significant numbers of black, Latina/o and other minority students. *Fisher*, 133 S. Ct. at 2420. By definition, therefore, racial minorities have a surpassing interest in being able to propose through the normal procedures that the universities actually adopt such plans because that is the only way that significant numbers of black, Latina/o and other minority students can actually attend those schools.

In arguing that a different standard should govern the rights of minorities to propose and the right of the

university to adopt affirmative action plans, the Petitioner does *not* rely upon the normal right of a state university "...to determine of itself on academic grounds ...who may be admitted to study," or on the corollary right of the university to determine, within constitutional limits, whether it should adopt an affirmative action plan in particular circumstances. *Bakke*, 438 U.S. at 312 (Powell, J.).

On the contrary, he asserts that the state may bar state universities from considering such plans no matter what the circumstances may be. In so doing, the Petitioner asserts that the state can define by its own laws the scope of the political equality that is guaranteed to racial minorities by the Fourteenth Amendment. Just as Louisiana once claimed the right to define *equality* by the "usages, customs, traditions" of its people, *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896), the Petitioner now claims that Michigan has the right to define the scope of the *political equality* protected by *Hunter* and *Seattle* on the basis of a state-conducted referendum.

The Petitioner proposes that the rights of minority citizens be limited by a state-declared version of the theory of the color-blind Constitution. As this Court knows, however, the framers of the Fourteenth Amendment and this Court have repeatedly declared that that theory is inconsistent with the Fourteenth Amendment. The 39th Congress adopted the Freedmen's Bureau and many other racially-conscious measures because it recognized that special programs, including above all special educational programs, were the only way to assure equality in the conditions that slavery had left behind. Eric Schnapper, *Affirmative*

Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753 (1985).

Likewise, this Court held in *Grutter* and in *Fisher* that the theory of the color-blind Constitution does *not* govern admissions standards. More generally, this Court has held that the theory of the color-blind Constitution is "inconsistent...with the history, meaning and reach of the Fourteenth Amendment." See *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring). "In the real world"—that is in the world created by three centuries of denying equal rights—that theory cannot be used as a "universal constitutional principle." *Id.*, at 788.

Petitioner proposes that Michigan may adopt a state definition of the political equality that is inconsistent with the Fourteenth Amendment. No decision by this Court even suggests that a state has the power to circumscribe the equality protected by that Amendment by that state's own peculiar standards.

The Petitioner claims that the Sixth Circuit's decision to strike down Proposal 2 did "real damage to the democratic process" (Pet. Br., at 27). On the contrary, leaving Proposal 2 standing would convert racial minorities' right to political equality into a privilege that the majority may withdraw as it sees fit. Even more fundamentally, it would convert the *national* definition of equality that was at the heart of the Fourteenth Amendment into a local option.

Under the Petitioner's view, a state can reject or modify the balances that this Court struck in *Grutter*

and *Fisher* between the universities' and the nation's compelling need to assure diversity and what this Court saw as the harms arising from the consideration of race in admissions. One by one, the states may adopt new balances and new standards that restrict or eliminate the right of minority citizens to propose that the universities adopt programs that comply with this Court's decisions. This Court's decisions would become increasingly irrelevant, and the states would be free to define "preferential treatment" in any way they wanted.

The nation has gone down the state's-rights path before, and it must not do so again in the crucial area of higher education at the exact moment that the nation is becoming a majority minority nation and at the exact moment that the need for training new black, Latina/o and other minority leaders is assuming ever-greater urgency.

2. The State may not deny minority citizens the right to seek the lawful consideration of race in admissions through the same procedures that all other citizens may use for securing the consideration of numerous other factors.

The Petitioner asserts that Proposal 2 should be sustained because it "only" limits what he calls "preferences" or "special treatment" (Pet. Br., at 17-24). The Petitioner *assumes* that the University's admission criteria are neutral and wrongly *ignores* the *reality* that the universities have long recognized that they do not have, and probably never have had, a single, universal,

all-purpose, and purportedly neutral system for determining merit, promise, effort or any similar quality.

For that reason, numerous groups of citizens have proposed that the universities adopt special considerations and special factors that take account of various forms of inequality and that serve many other lawful purposes. Far from promoting fairness or equality, Proposal 2 prevents racial minorities from seeking the same sort of modifications, exceptions and considerations that every other group—including the alumni—has obtained and can continue to obtain under the structure that Proposal 2 has established.

Even a brief review of the University of Michigan's actual policies reveals the inequality that Proposal 2 has created. In one of its earliest admissions systems—the famous certificate system—the University admitted any graduate of a high school that the University had certified. However, in the small towns and rural areas where so many citizens then lived, there were no such high schools, and so the University maintained an examination system that allowed students from those areas to be admitted without a diploma. Harold S. Wechsler, *The Qualified Student: A History of Selective College Admission in America*, 19, 23-29 (John Wiley & Sons, Inc. NY, 1977).

Decades later, the universities granted an exception, a "preference," to veterans returning from the First and Second World Wars by relieving them of the need to have certain courses that they could not have taken because of their military service. *Proceedings of the Univ. Michigan Regents, 1917-1920,*

498 (Jan. 1919); *Proceedings*, 1945-1948, 192 (Jan. 1946). See also John Aubrey Douglass, *The Conditions for Admission: Access, Equity, and the Social Contract of Public Universities*, 41-42 (Stanford Univ. Press 2007).

Eventually, the massive growth in enrollment forced the universities to abandon the old certificate system by adding first grade-point averages and then, over many objections, standardized test scores to their admission criteria. Douglass, at 84-87, 90, 99-100. By all accounts, these criteria do not fully or accurately capture an applicant's promise or potential, and, as many have recognized, they confer a distinct advantage to wealthier students from the best suburban schools (see infra, at 55-59). Thus, the University of Michigan, like almost all major universities, now grants an exception, a "preference," to applicants from less privileged backgrounds by directing its admissions officials to consider an applicant's low income and his or her family's educational background in deciding whether to admit that applicant (JA, 299-306).

Indeed, if one reads the current undergraduate admissions policy of the University of Michigan, it is full of exceptions and "preferences" for the children of alumni and of donors, athletes, residents of particular areas, and many others (JA, 299-306).

In 1970, when black, Latina/o and other minority students asked the University to consider *their* circumstances, they broke no new ground in the form of their demands. They rightly asked the university to consider the pervasive racial discrimination, inequality and segregation that *they* faced, just as the university

had earlier considered the realities that the small farmers, the veterans, and the low-income students faced. Similarly, they asked the university to assure diversity by race just as it had assured diversity along many other axes.

Of course, the Fourteenth Amendment makes the consideration of race different. But that is the point. The standards, the balances for considering race are established by that Amendment and thus by this Court. In denying racial minorities the political right to seek the diversity and the opportunity that this Court has held lawful in *Grutter* and *Fisher*, Proposal 2 has established a state standard that denies to racial minorities the right to petition for the consideration of race in admissions, even though this Court has held that such consideration can in defined circumstances serve compelling purposes under the Fourteenth Amendment.

Depriving racial minorities of the right to seek the consideration of race in the university's admission system under *all* circumstances while allowing all others to seek any modification or departure or consideration under *any* circumstances is not the color-blind Constitution, nor still less, the Fourteenth Amendment. It is *inequality* that is prohibited by the Fourteenth Amendment.

3. The Ninth Circuit and the California Supreme Court have offered no valid reasons for depriving California's large black and enormous Latina/o communities of the right to fight for their children's ability to attend that state's leading universities.

The only precedents supporting the Petitioner's claims are the decisions of the Ninth Circuit and of the California Supreme Court sustaining Proposition 209. The Ninth Circuit, however, wrongly claims that Proposition 209 restates the requirements of the Fourteenth Amendment, while the California Supreme Court wrongly claims that the state has the right to revise the Fourteenth Amendment.

The Ninth Circuit rejected a challenge to all aspects of Proposition 209 on the stated grounds that "[t]he alleged 'equal protection' burden that Proposition 209 imposes on those who would seek race and gender preferences is a burden that the Constitution itself imposes." *Wilson*, at 708. The dissenting judges in the Sixth Circuit echoed the same claim by declaring that "...a state does not deny equal treatment by mandating it" or by declaring that the Sixth Circuit majority's decision is the "antithesis of the Equal Protection Clause." (Pet. App. 82a, 94a, Sutton, J., and Griffin, J., respectively, dissenting).

These statements are incorrect. The burdens imposed by Proposal 2 and Proposition 209 are *not* the same as those imposed by the Fourteenth Amendment. The Fourteenth Amendment requires a federal court to strictly scrutinize the consideration of race and to

approve it only when it was necessary to do so in order to further a compelling interest. *Fisher*, 133 S. Ct. at 2421. Proposal 2 and Proposition 209, however, declare that racial minorities may *never* ask the universities to consider race—no matter how compelling the need for it may be and no matter how absent the alternatives may be.

The dissenters and the Ninth Circuit panel also seek support for their claim that these proposals further the purposes of the Fourteenth Amendment in the strict scrutiny standard that this Court adopted. They claim that because "racially conscious admissions policies are subject to the most exacting judicial scrutiny," the states therefore have a license to essentially eliminate minority citizens' right even to propose that such plans be adopted. Pet. App. 63a (Gibbons, J, dissenting) and *Wilson*, 122 F. 3d at 708.

There is no basis for that assertion either. Strict scrutiny is a standard used by the federal courts to "smoke out" the illegitimate uses of race, *Grutter*, 539 U.S. at 326, not a license for state laws declaring that compelling interests do not exist and may not be addressed. The Ninth Circuit and the dissenters below have wrongly converted a standard used by the federal courts to supervise the use of race under a *Constitution that is not color-blind*, into a license for state action declaring that the Constitution is color-blind within that state's borders.

Unlike the Ninth Circuit, the Supreme Court of California explicitly stated that Proposition 209 intended to reverse this Court's decisions and to restore

what the California Court believed to be the proper interpretation of the Fourteenth Amendment:

> ...the voters [of California] intended to reinstitute the interpretation of the [federal] Civil Rights Act and equal protection that predated ...*Bakke*...viz., an interpretation reflecting the philosophy that 'however it is rationalized a preference to any group constitutes inherent inequality' [and that] preferences, for any purpose, are anathema to the very process of democracy.

Hi-Voltage Wire Works, Inc . v. City of San Jose, 24 Cal. 4th 537, 561 (2000)(Brown, J.).

If there is *any* power that the voters of California may not assert, however, it is the power to "reinstate" the interpretations of the Fourteenth Amendment that this Court has rejected. Similarly, if there is *any* power that the voters of California may not assert, it is the power to use *their* interpretation of the Constitution to limit the political rights that the Fourteenth Amendment *guarantees* to minority citizens.

The Fourteenth Amendment establishes a uniform *national definition of equality*, and it promises federal protection for the right to fight *through equal political procedures* for programs that are lawful *under that federal definition of equality*. If the theory of the color-blind Constitution is "inconsistent... with the history, meaning and reach of the Fourteenth Amendment," and if that theory may not serve as a "universal constitutional principle," then the state's-rights version of that theory cannot possibly serve as the universal

constitutional principle limiting the scope of the political equality protected by *Hunter* and *Seattle*. *Parents Involved*, 551 U.S. at 782, 788 (Kennedy, J., concurring).

D. The Petitioner has failed to show any other reason that this Court should overrule, limit or depart from *Hunter* and *Seattle* in order to sustain Proposal 2.

1. The determination of admissions standards is clearly part of the political process of the State of Michigan.

We respond briefly to three other arguments that the Petitioner has offered in support of his claim that Proposal 2 can limit the rights protected by *Hunter* and *Seattle*, and we then briefly outline the real effects that these proposals have had.

Like the dissenters below, the Petitioner claims that the Fourteenth Amendment does not apply to the process by which the University of Michigan adopts its admissions standards because three current or former admissions officers and one former Dean were unaware of the Regents' authority over admissions (Pet. Br., at 24-26; Pet. App. 72a-74a). Three successive constitutions of the State of Michigan, however, conferred *full* power over *all* of the operations on the Regents and on the other governing boards. Const 1850, art 13, secs. 6-8; MI Const 1908, art 11, sec. 3-5; MI Const 1963, art 8, sec. 5. The Michigan Supreme Court has held that the board of Regents is "the

highest form of juristic person known to the law...which, within the scope of its functions, is *coordinate with and equal to that of the legislature*." *Bd. of Regents of the Univ. of Michigan v. Attorney Gen.*, 167 Mich. 444, 450 (1911)(emphasis added). The testimony of four officials cannot take such authority away from the Regents or from the other governing boards.

Moreover, no party has produced any document demonstrating that the Regents or the other governing bodies have *ever* delegated final authority over admissions to any other body, including any faculty. Indeed, the Regents' current By-laws explicitly state: "The faculty of each school and college shall from time to time *recommend to the Board for approval*...requirements for admission and graduation." Bylaws of Univ. Of Michigan Regents, Sec. 5.03, *www.regents.umich.edu / bylaws / bylaws.pdf* (emphasis added). See also Bylaws of the MSU's Trustees, Arts. 7, 8, at http://trustees.msu.edu/bylaws/ http://trustees.msu.edu/bylaws/ index.html, and the Statutes of Wayne State's Board of Governors. WSU Statutes, 2.34.09, 2.34.12, at bog.wayne.edu/code.

Moreover, the Regents' have specifically asserted their plenary power over the admissions policies for minority students. The Regents first established affirmative action by a specific resolution applicable to all units (JA, 91-101). For decades thereafter, the Regents and the President modified the affirmative action programs (R. 222-16, R. 222-17, Rep. Dr. James Anderson, Page ID Nos. 4164-4197, 4420-4438). When those policies were challenged, the President and the Regents, not the faculties, were named as respondents

and defended those policies in this Court. See *Grutter* and *Gratz v. Bollinger,* 539 U.S. 244 (2003).

The Regents' power is so clear that there are no concerns here like the hypothetical ones that Justice Powell expressed in a footnote in his *Seattle* dissent. See *Seattle*, 458 U.S. at 498 n. 14 (Powell, J., dissenting). The Regents' constitutional authority, its By-laws and its practice make clear that no rogue faculty or admissions officers could implement an affirmative action plan and then claim that the Regents could not change it because that would involve a higher level of government.

The Regents have always had *full* power over admissions; Proposal 2 has stripped them of that power *only* in the areas of the admission of racial minorities. Only racial minorities must win a vote to amend the Constitution before they may even present their proposals to the Regents. The violation of *Hunter* and *Seattle* is presented here in an almost chemically-pure form.

2. The Court need not speculate on the intentions of the Michigan electorate because Proposal 2 employs an open racial classification.

The Petitioner asserts that this Court should sustain Proposal 2 unless the respondents can establish that "...racial discrimination was the only possible motivation behind the referendum results," which he says is not the case here because the electorate could have been motivated by the numerous purportedly beneficent motives that he lists. Pet. Br.,

at 14, citing *Arthur v. City of Toledo*, 782 F. 2d 565, 573 (6th Cir. 1986).

The claim that the Respondents must show the subjective motivations of the voters is simply a claim that *Hunter* and *Seattle* should be overruled because no one could ever show the subjective motivations of millions of citizens who cast secret ballots.

Alternatively, the Petitioner proposes that the courts determine after-the-fact whether a particular restriction on a racial minority's political rights was motivated by racial animus or by a good-faith belief in the nature of the restriction it enacted. But that opens the door to judicial second-guessing of motives and again converts a racial minority's *right* to propose lawful measures to lessen inequality into a privilege which the judiciary may withhold or confer based on *its* assessment of the voters' motives.

There is neither need nor justification for such standards here. Proposal 2 employs an open racial classification. As in *Hunter* and *Seattle*, the ostensibly neutral wording barely conceals the fact that in higher education, these proposals are solely aimed at proposals for racially-conscious admissions plans. In all their literature, the supporters of Proposition 209 and Proposal 2 have made that abundantly clear. As Justice Harlan said of the neutral wording of Louisiana's Jim Crow law, "no one [should] be so wanting in candor" as to assert that these proposals do "...not discriminate against either race, but prescribe a rule applicable alike to white and colored citizens," *Plessy*, at 556-557 (Harlan, J., dissenting).

In *Hunter* and in *Seattle*, this Court held that the burden on the political equality of racial minorities imposed by the amendments at issued carried a heavy presumption against them, a presumption that could only be overcome by showing a compelling reason for them. No such showing has been made or even attempted here. Proposal 2 violates the Fourteenth Amendment by denying core political rights to black, Latina/o and other minority citizens for no reason other than the racial majority's disagreement with the substance of the minority's lawful proposals.

3. The rapidly-changing demographic character of the nation requires the Court to follow not abandon the political equality guaranteed by *Hunter* and *Seattle*.

The Petitioner and others have suggested that the profound demographic change that is now occurring has rendered *Hunter* and *Seattle* obsolete. That assertion reveals a lack of knowledge about the history and the purpose of the Fourteenth Amendment.

In 1866, the 39th Congress's overriding concern was the ongoing legal and extra-legal attempts to deny equality in the eleven states of the Confederacy. According to the 1860 Census, however, slaves comprised nearly half the population in Alabama, Florida, Georgia, and Louisiana, and *more* than half of the population in Mississippi and South Carolina. *McDonald v. City of Chicago, Ill.*, ___ U.S. ___, 130 S.Ct. 3020, 3080 (2010)(Thomas, J., concurring). The 39th Congress thus understood that the need to protect

"minority" rights did not end when some arithmetic threshold was crossed.

For the same reasons, the need to protect the rights of racial "minorities" cannot be abandoned today. Many states, including Michigan, will probably never be "majority minority." In other states, where the population is or soon will be "majority minority," the electorate will be majority white for many years to come because of the age, citizenship and the economic status of Latina/os in particular. Finally, in every state, the wealthiest segments of the population, who exert such a disproportionate influence on the universities and on political life, will be majority white for far longer than that.

Especially in a period of great racial change, it is vital that the protections for minority rights contained in the Fourteenth Amendment and in *Hunter* and *Seattle* be maintained, not abandoned, especially in higher education which will exert such a profound influence on the nation and its leadership for many years to come.

4. The actual results of these proposals show that minority citizens have been deprived of the political right to prevent the re-segregation of higher education.

Grutter recognized that the nation's selective universities train a disproportionate share of the future leaders in all fields, and thus held that the nation had a vital interest in assuring that the path to those universities be kept "visibly open to talented and

qualified individuals of every race and ethnicity." *Id.*, 539 U.S. at 332.

According to all studies, however, that path is closing as those universities, which were first opened by affirmative action, are becoming *increasingly* re-segregated in the face of rising economic and racial inequality and the cutbacks on affirmative action:

> White students are increasingly concentrated, relative to population share, in the nation's 468 most well-funded, selective four year colleges and universities, while African American and Hispanic students are more and more concentrated in the 3,250 least well-funded, open-access, two-and four-year colleges."

Anthony P. Carnevale and Jeff Strohl, Separate and Unequal, at 7 (Georgetown Public Policy Institute: July 2013).

Proposal 2, Proposition 209, the four similar proposals in other states, and the similar proposals that would pass if this Court sustains Proposal 2 will close that path even further, thus vastly accelerating the re-segregation that is now occurring.

In Michigan, Proposal 2 has already shown the effects that such proposals will have. The number of black graduates from the state's public medical schools dropped from between 44 to 68 per year in 2004-2011 to only 27 in 2012. William C. Kidder, *Restructuring Higher Education Opportunity?*, at 2. By 2012, the percentage of black graduates at the University of Michigan Law School was the lowest it had been since

1969, while doctoral and master's degrees had declined to levels not seen in twenty years. *Id.*, at 1. There are similar effects in the undergraduate colleges, although precise data is not available in a form that is judicially noticeable because of the government-mandated change in 2009 in the way data on the racial nature of the student body had to be collected.

However, the University of California has collected data by a common system since the last affirmative action class in 1996. Its data shows the results of the forced experiment on a grand scale on what happens when selective schools cannot consider race in their admissions systems.

There are now almost no black students and only a few Latina/o students in the University of California's business and law schools. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, J.C. & U.L. 53 (2013). At the UC's world-famous colleges at Los Angeles and Berkeley, which serve as a gateway to the leading graduate and professional schools across the country, the admission of black students has fallen by one third to one half in the fifteen years from 1996 to 2011:

Percent of African Americans Among California Resident Admissions

Yr.	UC. Berkeley	UCLA
1996	6.0	7.1
2001	4.1	3.6
2006	3.6	2.1
2011	3.9	3.6

Source: www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf

There has effectively been a one-third fall in Latina/o admissions at UCLA and Berkeley, once the one third increase in the share of Latina/o students in that state's high-school graduating classes is taken into account:

Freshman Admissions of California Resident Chicano/Latina/o students

Yr.	UC Berkeley	UCLA	% Latina/os H.s. Grads.
1996	16.5	16.9	30.4
2001	12.5	12.7	32.9
2006	16.8	12.8	35.7
2011	17.2	17.3	40.1*

*2009 data. Actual percentage for 2011 is expected to be significantly higher but is not yet available.

Source: www.ucop.edu/news/factsheets/2012/flow-frosh-ca 12.pdf (admission data); http://www.cpec.ca.gov/StudentData/EthSnapshotGraph.asp (California high school graduate data).

The University of California has adopted many programs to counter these trends, but the limits of those programs are shown in the data above.

If anything, the data understates the effects. The dramatic drops in the admission of black and Latina/o students means dreams dashed not only for those rejected, but for their families and for the communities whose best and brightest have effectively been told that they need not even apply.

The question in this case is not what admission policies should be adopted, *but rather whether some citizens can be excluded from the process by which those standards are adopted.* In Michigan, two million black and Latina/o residents are now prevented from presenting those proposals that are essential if their children are to attend the state's best universities. In California, 2.5 million black residents and 14.5 million Latina/o residents are prevented from even presenting those same proposals.

The country is becoming majority minority at the same time that the selective universities are becoming increasingly segregated. Over time, those trends will create a new form of separate and unequal. As the history of the South shows, political systems that

exclude huge numbers of citizens from the political process are neither democratic nor stable. In the face of the greatest demographic change in our history, we cannot again make the mistake of allowing the wholesale exclusion of millions of citizens from the political process.

Hunter, *Seattle*, and the Fourteenth Amendment guarantee to minority citizens equal rights in the procedures by which the government establishes its own policies. Above all, that is crucial for those great avenues of opportunity named the University of Michigan and the University of California. Proposal 2 and Proposition 209 have deprived minority citizens of the political means through which they could present proposals to gain access to those universities for significant numbers of minority students. This Court should strike down Proposal 2 in higher education because denying minority citizens the right to fight for their future and for the future of this country violates the most fundamental principles of the Fourteenth Amendment.

II. PROPOSAL TWO VIOLATES THE EQUAL PROTECTION CLAUSE BY SELECTIVELY PROHIBITING THE UNIVERSITIES FROM ATTEMPTS TO ASSURE OPPORTUNITY AND TO ACHIEVE DIVERSITY ONLY IN THE AREAS OF RACE OR GENDER.

Just as the states once barred minority students and women from their public universities, *United States v. Virginia*, 518 U.S. 515 (1996), Proposal 2 has now enacted special substantive standards and judicial remedies to regulate the admissions of those two

categories of students. In reality, Proposal 2's ban on "preferential treatment" applies only to the admissions of those students, as does the special cause of action that it has enacted. MI Const 1963, art. 1, sec. 26. The Michigan Constitution does *not* prevent "preferences," however that term may be defined, and has never prohibited "preferences" for any other groups of applicants.

Similarly, for the first time in Michigan history, Proposal 2 has created a cause of action through which opponents of affirmative action may seek damages and injunctive relief if they believe that the universities have granted "preferential treatment" to minority applicants or to women. MI Const. 1963, art. 1, sec. 26(6), (7); MCL 37.2801. No constitutional provision or statute has ever before authorized private actions to challenge the admission of any other groups of students.

Proposal 2's substantive limit and the private right of action that it created are absolutely selective. Proposal 2 not only violates, but defies, Justice Jackson's declaration that there is "...no more effective practical guaranty against arbitrary and unreasonable government [action] than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-113 (1949)(Jackson, J., concurring).

Proposal 2's ban on "preferences" has already led the universities to abandon the explicit consideration of race and gender which has resulted in the sharp drop in the admissions of black and Latina/o students

described above. Moreover, far from decreasing stigma, as the supporters of these Proposals claimed they would do, Proposal 2 and Proposition 209 have provided legal sanction to the charges of inferiority by declaring that all minority applicants must be specially scrutinized to ensure that they merit admission and by declaring that the admissions officials cannot be trusted to make those decisions without the special supervision by the state courts. The charge of "preferences" has become the charge of "illegal preferences," the stigma continues, and the hunt for various allegedly disguised "preferences" proceeds.

Thus, after Proposition 209 resulted in an entering class of 4,000 at UCLA that had only 25 black men who were not scholarship athletes, the UCLA adopted "holistic" admissions—and the opponents threatened lawsuits for granting preferences in violation of Proposition 209. David Leonhardt, "The New Affirmative Action," New York Times, Sept. 30, 2007.

Similarly, when an opponent of affirmative action learned that admissions officials at UCLA had read an applicant's essay in which she referred to her Latina heritage, he leveled the charge of preferential treatment in violation of Proposition 209. Tim Groseclose, "Report on Suspected Malfeasance in UCLA Admissions and the Accompanying Coverup," available at mages.ocregister.com/newsimages/news/2008/08/CUARSGroseCloseResignationReport.pdf (last visited October 24, 2011).

Neither Proposal 2 nor Proposition 209 define what they mean by "preferential treatment," leaving that task to the state courts under state standards. As this

Court has held, however, the courts lack standards by which they can evaluate the substance of academic decisions, and judicial attempts to formulate such standards endanger the university's interest, recognized by the First Amendment, "...to determine for itself on academic grounds ...who may be admitted to study." *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n. 12 (1985), citing *Bakke*, 438 U.S. at 312 (Powell, J.). Even more importantly, because this particular law limits the admission of racial minorities and women, it endangers the students' and the nation's paramount interest under the Fourteenth Amendment in assuring that the path to leadership remains open to qualified students of all races and genders. *Grutter*, 539 U.S. at 331-332.

The proposed definition of "preference" offered by the proponents of Proposal 2 and Proposition 209 increases the dangers and makes clear the double standard that is at the heart of these proposals. Ward Connerly defined "preferential treatment" as the admission of black, Latina/o and other minority applicants with lower grades and test scores than rejected white applicants. Connerly, *Creating Equal*, at 121-124, 134. Barbara Grutter used the same definition before this Court, *Grutter*, at 320-321, and the main campaign statement in support of Proposal 2 used the same definition to proclaim that the University of Michigan had given "preferential treatment" to minority applicants. Althea K. Nagai, Racial and Ethnic Preferences in Undergraduate Admissions at the University of Michigan, 1 (Center for Equal Opportunity, 2006).

Even as admissions criteria, however, the grade-test score criteria have never been accepted as neutral measures of merit or fitness. The inventor of the SAT test later repudiated it because he recognized that the test measured many variables, "...including schooling, family background, familiarity with English, and everything else, relevant and irrelevant." Nicolas Lemann, *The Big Test*, 34 (Farrar, Straus and Giroux, NY, 1999). Similarly, from the 1930s forward college officials have engaged in an "endless debate over whether intelligence test scores, high school average, or some other indicator best predicted success in college." Wechsler, at 247-248.

The debate over whether and to what degree the tests reflect educational inequality or undervalue the educational achievements of minority students has not ended and will probably never end. See, e.g, William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 Cal. L. Rev. 1055, 1073-1081 (2001). For minority and women applicants alone, however, Proposal 2 has transferred that debate from the admissions offices and university governing bodies, where it belongs, to the courts, where it does not belong.

Finally, the proponents' proposed grade/test score definition of "preferential treatment" makes concrete the double standard that is inherent in Proposal 2's selective ban on "preferential treatment." Thus, the University of Michigan can and does take account of the fact that applicants from the highest income group scored about 100 points higher on the SAT test than those from the lowest income group and that applicants

whose parents had a college degree scored 130 points higher than those whose parents lacked a high school diploma (JA, 198-199). Without fear of a lawsuit, the University of Michigan requires its admissions officials to assess the applicants' grade point average and test scores in light of parental income, parental education and similar factors (JA, 301).

Proposal 2, however, flatly prohibits the University from doing the same for black, Latina/o and other minority students even if it acts in complete compliance with *Grutter* and *Fisher*. It requires the University to ignore racial inequality and to do nothing special to assure opportunity for minority students. The existing conditions make clear, however, that special programs are far more necessary to assure opportunity and diversity by race than they are by class.

Taking Michigan as an example, Dr. Gary Orfield described why that is so. Two-thirds of Michigan's black students attend schools where 90 percent or more of the students are black or Latina/o. Those schools are centers of concentrated poverty unlike that present in any school serving poor white students anywhere in the country. As vividly described by Dr. Orfield—and as can be seen by anyone who simply inspects segregated, inner-city schools—the education these schools provide is distinctly separate and unequal:

> ...There are many fewer teachers who choose to go work in schools of this sort. Most teachers who start in schools that are segregated leave faster. The curriculum that is offered is more limited. The probability that the teacher will be trained in their field is much more limited. The

> level of competition is less. The respect for the institution on the outside world is less. The connections to colleges are less. There are more children with health problems... The population is much more unstable. Many segregated schools have a vast turnover of students every year and there's tremendous instability as far as students go and faculty go. It's a different world in every respect.

JA, 116-117; 123-125.

But it is not only those schools where racial inequality prevails. One third of Michigan's black students has escaped from those schools and attends one of a few urban magnet schools or a suburban school that has some degree of integration. The magnet schools are the pride of the cities in which they exist, and they offer students a chance to gain admission to a school like the University of Michigan. The magnet schools do not, however, provide a range of courses and experiences that are equal to those of the better suburban districts (JA, 147-149).

Similarly, the suburban schools that black students attend provide many with a chance of going to a school like Michigan, but nowhere near an equal chance. Many of those suburban schools are in the process of being re-segregated, with the educational opportunities declining at the same time as the black students arrive (JA 126, 128-131, 149-150). Even in those few stable, integrated schools that the most fortunate black students attend, the black students face isolation and sometimes hostility as well as tracking and stereotypes

that can profoundly affect the education that they receive (JA, 128-129).

Nor is education the only arena in which black students face inequality. Even taking the middle classes, from which the Universities draw most of their students of all races, the black middle-class family has on average less educational history, less wealth, and less residential stability than a white family with similar income—and it is more likely to be headed by single parent and more likely to be affected by the tragedies that disproportionately arise in the urban centers (JA, 127).

Michigan's Latina/o students, who are fewer in number than black students, face *all* of those difficulties *plus*, in many cases, the inequalities caused by differences in language and in citizenship rights (JA, 140-141).

These inequalities necessarily translate into differences as measured by adjusted grade point averages and standardized test scores. Thus, on the SAT tests conducted the year that Proposal 2 went into effect, white test takers had about a 100 point advantage over black test takers on all three components of the SAT test and a 75 point advantage over Mexican Americans test-takers on those same components (JA, 185-186, 192, 194).

If those disparities appear comparable to those caused by income, the appearance is misleading because the Educational Testing Service does not provide data by race and income. Bob Laird, the former admissions director at the University of

California at Berkeley, and Ward Connerly agree, however, that the vast data compiled by the University of California show that white students from the lowest income brackets had mean test scores that were above those of black and Chicano students from the highest income brackets (JA, 174; R. 222-2, Dep. of Connerly, 101-102, Page ID 4224).

These facts reveal the double standard that is at the heart of Proposal 2. The University may consider income and numerous associated factors in order to assure opportunity for students whose parents had a lower income, but even if the University complies with every requirement of the Fourteenth Amendment, it cannot use the same means to assure opportunity for black or Latina/o students.

Far from being a law to promote equality, Proposal 2 is a special law that denies opportunity to black and Latina/o students. Where the Black Codes once made it unlawful for black citizens to "pursu[e] certain occupations or professions (e.g. skilled artisans, merchants, physicians...," *Goodman v. Lukens Steel*, 482 U.S. 656, 672-673 (1987), Proposal 2 makes it far more difficult for black citizens to enter law, medicine and other professions because they can no longer obtain the training that will enable them to enter those professions.

The State and its electorate may regulate the universities that they have established, but they must do so by constitutionally-valid means. If Michigan had adopted a law that required all admissions to be by "merit"—however elusive a definition of that term is—the selective aspect of Proposal 2 would at least be

gone. Michigan, however, could not do that because of the educational disaster and the political firestorm that would result. If, however, Michigan is not willing to ban all the special programs and considerations that it has adopted, it cannot impose a *selective*, judicially-enforceable and absolutely undefined ban on "preferential treatment" for black, Latina/o and other minority students and, as to particular programs, for women as well.

The universities may, or may not, adopt particular programs on educational grounds. This law, however, allows Michigan's public universities to take special steps to provide opportunities for everyone *except* racial minorities and to achieve diversity in every way *except* racial diversity. The *selective* nature of the substantive ban on "preferential treatment" and the private right of action to enforce that ban betray what the Fourteenth Amendment has stood for since the day it was ratified 145 years ago, and, for that reason, this Court should strike down Proposal 2 in higher education.

CONCLUSION

For the reasons stated, the Coalition plaintiffs ask this Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit striking down Article 1, Section 26 of the 1963 Constitution of the State of Michigan in higher education because it violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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RESPONDENT'S BRIEF

RECO
AND
BRIEF

Supreme Court, U.S.
FILED
AUG 21 2013
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No. 12-682

In The Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS THE REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, MARY SUE COLEMAN, AND LOU ANNA K. SIMON

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INTRODUCTION

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court upheld the constitutionality of the University of Michigan Law School's admissions policy, which took race into account as part of a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id.* at 337. The Court concluded that the educational benefits that flow from having a diverse student body are "real" and "substantial," *id.* at 330, and that the Law School had a compelling interest in achieving such diversity. *Id.* at 329. The Court further held that the Law School had sufficiently reviewed race-neutral alternatives before the school concluded that it was necessary to consider "race as one factor among many" to assemble a truly diverse class. *Id.* at 340.

Just a few years later, in November 2006, a majority of Michigan voters approved an amendment to Michigan's Constitution, *see* Mich. Const. 1963 art. I, § 26, that prohibited admissions policies like the one upheld in *Grutter*. Section 26 raised concerns about the challenges Michigan's public universities might face in admitting diverse student bodies if they were foreclosed from all consideration of an applicant's race.

Two groups of Plaintiffs ("Plaintiffs-Respondents") filed suit in the U.S. District Court for the Eastern District of Michigan, contending that § 26 violated

the Equal Protection Clause and, more specifically, the political-restructuring doctrine.[1] One of those groups, the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary ("BAMN"), included the Board of Regents of the University of Michigan and the Board of Trustees of Michigan State University ("the University Respondents"), as well as Wayne State University and the presidents of these institutions, among the named defendants.

From the beginning, the University Respondents have maintained that they are unnecessary defendants because their only involvement with § 26 has been to follow it, as they are compelled to do.[2] Moreover, they are poorly positioned to raise questions concerning the constitutionality of § 26; for example, they would lack standing to bring the Equal Protection claims advanced by Plaintiffs-Respondents. Accordingly, the University Respondents leave arguments regarding the constitutionality of § 26 to Plaintiffs-Respondents, who have standing to advance them. And they leave the defense of § 26 to

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[1] The District Court consolidated the two actions. R. 12.

[2] The University Respondents asked the District Court to dismiss them as improperly joined parties but that motion was denied. R. 179 and 246. The Sixth Circuit affirmed. Pet. App. 152a-153a. The University Respondents did not seek review of that ruling here and that issue is not before the Court.

Petitioner, who, they believe, is the only proper defendant in this case.

The University Respondents are, however, uniquely well-positioned to assist the Court in understanding the distinctive nature and breadth of the authority of their governing boards, as well as some of the oversimplifications embodied in Petitioner's discussion of race-neutral alternatives. This brief will accordingly focus on two respects in which Petitioner's brief errs in its presentation to the Court regarding matters that directly implicate the expertise of the University Respondents.

First, in arguing that petitioning for changes in admissions policy does not constitute a political process, Petitioner's brief neglects to recognize the partisan political process by which the citizens of Michigan elect the members of the University Respondents' governing boards. Petitioner also incorrectly asserts that the governing boards of the University Respondents have entirely and irrevocably delegated oversight of admissions policies to faculty committees that are insulated from outside influences, an assertion that is inconsistent with the record and with Michigan law.

Second, Petitioner's brief implies that the race-conscious options afforded to universities by *Grutter* are unnecessary because race-neutral alternatives suffice for the University Respondents to admit diverse student bodies. There is no evidence in the record to support the argument with respect to the

University Respondents, and the limited evidence that does exist contradicts it.

STATEMENT OF THE CASE

The University Respondents are satisfied with part B of Petitioner's Statement of the Case. They take exception, however, to certain discrete statements made by Petitioner in part A. Consistent with Supreme Court Rule 24(2), the University Respondents provide this limited Statement of the Case to address two specific issues.

Petitioner's Statement begins as follows:

> The genesis for the Article 1, § 26 ballot initiative was a recognition that the public-university admissions process was insulated from political accountability to the public—it could not be affected by those who wanted public universities to move away from race- and sex-conscious policies.

Pet'r's Br. 6. Petitioner's brief provides no record citation in support of this statement, *see* Sup. Ct. R. 24(1)(g), and the University Respondents are unaware of record evidence indicating that the initiators of § 26 were motivated by a belief that "the public-university admissions process was insulated from political accountability." In fact, it would be peculiar if this were their motivation, because, as is discussed within, the members of the governing boards of these institutions are elected to office, have plenary

authority over admissions, and are routinely lobbied by members of the public on matters of policy. Pet. App. 32a-33a.

Petitioner's Statement of the Case continues:

> For example, at the University of Michigan, the tenured faculty are the primary architects of all the admissions criteria and protocols. J.A. 35. There is no process by which members of the public, prospective students, or others who are not faculty or part of the college can comment or even submit suggestions for admissions criteria. J.A. 35. The same practices are followed at the University of Michigan's Law School and Medical School; faculty members develop and adopt the admissions criteria, and there is no formal process by which the public "petitions" or submits suggestions for consideration. J.A. 11-13, 27-29.

Pet'r's Br. 6. This paragraph creates an inaccurate impression in three important respects.

First, it ignores the University of Michigan's Board of Regents, which oversees admissions policy, conducts open meetings at which it receives public input, and is elected by popular vote. Pet. App. 30a-31a. Through the board, a formal process is therefore available to any citizen who wishes to lobby for changes to the institution's admissions policies. *Id.*

Second, it implies that admissions practices are uniform across all academic units at the University

of Michigan. The record does not support such a generalization. Thus, the largest admissions office at the University of Michigan—the Office of Undergraduate Admissions—is managed by the Associate Vice Provost and Executive Director of Undergraduate Admissions, who is directly appointed by the elected Regents themselves. R. 222-5 at 14; Pet. App. 29a. In contrast, at the University of Michigan Law School a faculty admissions committee appointed by the dean plays a significant role in the design and development of admissions policy. R. 205-5 at 14-15; J.A. 11-12. The one characteristic that all these academic units do share is omitted from Petitioner's description: they are all subject to the plenary authority of the popularly elected Board of Regents. Pet. App. 28a-31a.

Just as policies and procedures may vary among the academic units within an institution, so may they vary between institutions. Petitioner generalizes as though all of Michigan's public universities—which number more than a dozen and differ in numerous material respects—have policies and procedures identical to those of the University of Michigan Law School.[2] But the record is silent as to

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[2] The State of Michigan has a collection of separately administered public universities rather than a centrally managed system. Its public universities include the University of Michigan (http://www.umich.edu), Michigan State University (http://www.msu.edu), Wayne State University (http://wayne.edu), Central Michigan University (http://www.cmich.edu), Eastern Michigan University (http://www.emich.edu), Ferris State University (http://www.ferris.edu), Grand Valley State University

(Continued on following page)

the vast majority of those schools, let alone the hundreds of distinct academic units within them.[4] This much, however, is clear as a matter of law: plenary authority in all of those institutions is vested in a governing board that is directly elected or that is appointed by the state's elected governor. *See* Mich. Const. 1963 art. VIII, §§ 5, 6.

Third, this paragraph in Petitioner's brief creates the impression that no mechanisms exist for providing input regarding admissions policy to the administrators and faculty committees at the University of Michigan that have a role in developing those policies. Again, this is inaccurate. Concerned parties can avail themselves of the formal methods discussed above for raising admissions-related issues with the governing board, which has final authority over such matters. Or they can approach administrators or committees using any of the countless informal

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(http://www.gvsu.edu), Lake Superior State University (http://www.lssu.edu), Michigan Technological University (http://mtu.edu), Northern Michigan University (http://www.nmu.edu), Oakland University (http://www.oakland.edu), Saginaw Valley State University (http://www.svsu.edu), and Western Michigan University (http://www.wmich.edu).

[4] This includes Michigan State University, one of the University Respondents.

methods of communication that characterize the university environment. J.A. 12-14, 28-29.[5]

SUMMARY OF ARGUMENT

The University Respondents advance two arguments:

First, the process of petitioning elected public officials like the Regents of the University of Michigan and the Trustees of Michigan State University is, by definition, a political process.

The Constitution of the State of Michigan vests plenary authority over University Respondents in governing boards whose members are directly elected by the citizens. Pet. App. 28a. Given the vast and complex nature of these institutions, those boards choose to delegate an array of day-to-day functions to university officers and administrators. Nevertheless, the boards retain comprehensive authority over

[5] The two passages from Petitioner's Statement of the Case discussed above are incorrect for the reasons stated. The University Respondents are unaware of any record evidence that supports a third assertion made by Petitioner in part A of the Statement of the Case. Petitioner declares that, after *Grutter*, "reliance on race apparently increased. Statistical analyses of admissions patterns show an even heavier weight for race and a reduced weight for socioeconomic factors." Pet'r's Br. 7. Petitioner does not support this statement with a reference to the Joint Appendix or to the record. *See* Sup. Ct. R. 24(1)(g).

university policy—including admissions policies. *Id.* at 30a.

The boards take that authority seriously and remain engaged in the oversight of admissions. The record shows that these boards consider, discuss, and receive reports regarding admissions issues—including the question of how to respond to the challenges posed by the passage of § 26. *Id.* at 30a. The public meetings of those boards include an open forum, during which citizens can—and do—petition the board to take certain positions on matters of university policy. R. 12/21/2011 Supp. Br. 22.

Authority over the admissions policies of the University Respondents is therefore vested in popularly elected governing boards whose members can be petitioned by citizens and that are politically answerable to the people of the State of Michigan. The Sixth Circuit sitting en banc accordingly recognized that petitioning such boards regarding university admissions policies constitutes a political process. Pet. App. 33a.

Second, the record does not support Petitioner's suggestion that the University Respondents could achieve the benefits of a diverse student body solely by adopting race-neutral plans imported from other states. Indeed, to the extent the record addresses this issue at all, it suggests the contrary.

As this Court reiterated in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), the attainment of a diverse student body is a compelling

governmental interest. A diverse learning environment "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" *Grutter*, 539 U.S. at 330 (citations omitted). It is a critical pedagogical tool by which universities impart skills essential in an increasingly global and multi-cultural marketplace. *Id.* Those skills have become no less essential in the decade following *Grutter*.

Because Plaintiffs-Respondents commenced this litigation hard on the heels of the passage of § 26, the record evidence as to the impact of this provision on the ability of the University Respondents to achieve that compelling governmental interest—and as to the effectiveness of the University Respondents' use of race-neutral alternatives—is limited. The record on this issue largely consists of deposition testimony from the admissions officers of two academic units at the University of Michigan, who, based on their experience and their study of race-neutral alternatives, predicted that § 26 would result in declines in minority enrollment within their respective schools. Nothing in the record contradicts their testimony. And Petitioner's effort to do so by going outside of the record—indeed, by going outside of Michigan to Texas and California—is unpersuasive.

Prior to the adoption of § 26, concerned individuals had the opportunity to petition the governing boards of Michigan's state universities to approve admissions policies that considered race in a constitutionally permissible manner. In deciding whether the

change in that structure violated the political-restructuring doctrine, this Court should not be distracted by claims that such policies do not matter to the goal of achieving a diverse student body and the benefits that flow from it. Nothing in the record of this case suggests that the options *Grutter* made available to public universities are less important in 2013 than they were in 2003.

ARGUMENT

I. Petitioning the elected public officials who constitute the governing boards of the University Respondents is a political process.

The Michigan Constitution vests authority over the University Respondents in governing boards whose members are popularly elected. Pet. App. 38a.[6] This structure has persisted through Michigan's Constitutions of 1850 (art. XIII, § 8), 1908 (art. XI, §§ 7, 8), and 1963 (art. VIII, §§ 5, 6). It is a central and distinctive feature of Michigan's approach to higher education.

Each governing board of the University Respondents consists of eight members who hold office for

[6] The governing boards of the University Respondents are elected. The boards of some of Michigan's public universities are appointed by the governor. *See* Mich. Const. 1963 art. VIII, §§ 5, 6.

terms of eight years. *See* Mich. Const. 1963 art. VIII, § 5. Each political party, at its fall convention, nominates two candidates for membership on the board. Mich. Comp. Laws § 168.282 (2013). Nominees to the boards are elected as part of the general state-wide election. Mich. Comp. Laws § 168.286 (2013). The governing boards are thus elected through the same kind of partisan political process as are Michigan's governor, attorney general, and secretary of state.

The constitutional structure established by article VIII affords substantial independence to Michigan's public universities. Indeed, Michigan courts have described these governing boards as a fourth arm of state government, placing them on a par with the legislative, executive, and political branches. *See Bd. of Regents of Univ. of Mich. v. Auditor Gen'l*, 167 Mich. 444, 450, 132 N.W. 1037, 1040 (1961).

At the same time, these governing boards remain politically accountable. This structure places those "institution[s] in the direct and exclusive control of the people themselves," through the "constitutional bodies" that they elect. *Sterling v. Bd. of Regents of Univ. of Mich.*, 110 Mich. 369, 383, 68 N.W. 253, 258 (1896). The Michigan Supreme Court has explained the benefits of this structure:

> Obviously, it was not the intention of the framers of the Constitution to take away from the people the government of this institution. On the contrary, they designed to, and did, provide for its management and

> control by a body of eight [individuals] elected by the people at large. They recognized that [each institution] should be in [the] charge of [officers] elected for long terms, and whose sole official duty it should be to look after its interests, and who should have the opportunity to investigate its needs, and carefully deliberate and determine what things would best promote its usefulness for the benefit of the people.

Id. at 379, 68 N.W. at 256.

Like other elected officials, candidates who aspire to positions on these governing boards typically run on policy platforms—their own and their party's—for example, promoting lower tuition or higher academic standards. Over the years, some candidates for these boards have run on platforms that included a plank on admissions policy, and, specifically, on race-conscious admissions policies. Pet. App. 33a. Citizens who wish to advocate for or against such policies have historically been able to support, campaign on behalf of, and vote for candidates whose views in this respect align with their own. *Id.* at 32a.

Under the Michigan Constitution, these governing boards have plenary authority to manage their respective institutions. Mich. Const. 1963 art. VIII, §§ 5, 6; *Bd. of Regents of Univ. of Mich. v. Auditor Gen'l*, 167 Mich. 444, 450-51; 132 N.W. 1037, 1040 (1911); *Federated Pubs. v. Bd. of Trustees of Mich. State Univ.*, 460 Mich. 75, 87, 594 N.W.2d 491, 497 (1999). The boards enact bylaws, which make clear

that all university operations remain subject to their control. *See* Univ. of Mich. Bd. of Regents Bylaws, Preface, http://www.regents.umich.edu/bylaws (last visited Aug. 15, 2013); Mich. State Univ. Bd. of Trustees Bylaws, Preamble, http://trustees.msu.edu/bylaws (last visited Aug. 15, 2013).

This plenary authority includes the oversight of admissions policy. Thus, the Board of Regents of the University of Michigan directly appoints the Associate Vice Provost and Executive Director of Undergraduate Admissions. Univ. of Mich. Bd. of Regents Bylaws § 8.01. And the Board of Trustees of Michigan State University has expressly declared that it retains the authority to "determine and establish the qualifications of students for admission at any level" upon the recommendation of the President, whom the Board elects and who serves at the pleasure of the Board. Mich. State Univ. Bd. of Trustees Bylaws, art. 8.

To perform their supervisory function, the governing boards meet regularly. *See* Univ. of Mich. Bd. of Regents Bylaws § 1.01; Mich. State Univ. Bd. of Trustees Bylaws, art. 2. These meetings provide a vehicle for the boards to receive reports from the President and others and to discuss, opine on, and implement university policy. As the record shows, this has included board deliberation over the specific issue of race-conscious admissions policies. Pet. App. 30a.

Those meetings also allow the governing boards of the University Respondents to hear the thoughts, concerns, and requests of members of the public. To

this end, time is reserved at open board meetings for public comment. *See* Univ. of Mich. Bd. of Regents Public Comments Policy, http://www.regents.umich.edu/meetings/addressing.html (last visited Aug. 15, 2013); Mich. State Univ. Bd. of Trustees Policy for Addressing Bd., http://trustees.msu.edu/meetings/public-participation.html (last visited Aug. 15, 2013). Public comment has historically influenced board decisions with respect to matters of policy and continues to do so.[7]

Despite these settled principles of law and undisputed facts, Petitioner's brief marginalizes the authority and involvement of these governing boards with respect to admissions policies. *See* Pet'r's Br. 6, 13, 24-25. Petitioner argues that (1) the governing boards have fully and irrevocably delegated admissions issues to faculty committees and (2) members of the public have no mechanism for providing input to those committees. From these premises, Petitioner

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[7] For example, at its July, 2013 meeting, the Board of Regents of the University of Michigan approved changes in the guidelines that address how students can qualify for in-state tuition. Members of the public spoke in support of the changes, and members of the governing board specifically acknowledged the role that public input played in the policy change. *See* Rick Fitzgerald, *Regents approve clearer, simpler guidelines for granting in-state tuition*, Univ. Record Online (July 22, 2013), http://ur.umich.edu/1213/Jul22_13/4747-regents-approve-clearer.

concludes that decision-making about admissions policy is not part of a political process.[5]

The law and the record show that Petitioner's premises and conclusion are wrong. Indeed, as the Sixth Circuit sitting en banc concluded, Petitioner's argument can only be advanced if one "look[s] the other way," Pet. App. 27a, and pays no attention to "the Michigan Constitution, state statutes, and the universities' bylaws and current practices," *id.* at 31a.

As the Sixth Circuit correctly recognized, "power in a large university, a vast and highly complex institution, must be delegated." *Id.* at 30a. But the record is clear that this delegation is neither complete nor irrevocable. As noted above, the boards retain plenary authority over all matters of university governance—including admissions. They consider, discuss, and pass upon questions of admissions policy at the highest levels. *Id.* And, to the extent that, through their bylaws, the governing boards delegate particular responsibilities to administrators or others, it is important to remember that board bylaws can be—and routinely are—changed. Pet. App. 29a-31a.

The record further establishes that formal mechanisms exist for the public to try to influence policies regarding admissions or any other university business. They can do so through the formal processes of

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[5] Petitioner's argument closely tracks the argument set forth by Judge Gibbons in her dissent from the en banc decision of the Sixth Circuit. Pet. App. 68a-69a.

electoral politics, campaigning and voting for governing board candidates with whom they agree. And they can do so by personally and directly addressing the governing board, which holds plenary power over such policies.[9]

Granted, there is no *formal* process for providing input to every administrator or faculty committee that helps shape admissions policy—just as there is no *formal* process for providing input to every subaltern or committee that is given a task by the legislature or the governor. But the record is clear that individuals have *informal* ways of providing input to those university administrators and faculty committees. J.A. 12-14, 28-29.[10]

For all of these reasons, petitioning the governing boards of the University Respondents constitutes a political process.

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[9] Of course, as with any elected official, less formal opportunities for lobbying (correspondence, e-mail and the like) exist as well.

[10] Petitioner's argument also wrongly assumes that delegation and political accountability are mutually exclusive. As the Sixth Circuit observed, elected officials in the executive branch remain politically accountable even where, as in the administrative law context, they delegate expansive rule-making powers. *See* Pet. App. 32a.

II. The record does not support Petitioner's suggestion that the University Respondents can achieve the benefits of a diverse student body solely by adopting race-neutral plans imported from other states.

This case does not raise questions as to whether the University Respondents have a compelling interest in achieving the educational benefits that flow from student body diversity. This Court has recognized that a diverse learning environment fosters cross-racial understanding, breaks down stereotypes, and imparts skills that are essential in today's global and multi-cultural marketplace. *Grutter*, 539 U.S. at 330. As institutions that send their graduates to every corner of the world, the University Respondents have a compelling interest in ensuring that their students have the opportunity to learn in such an environment.

Nor does this case directly implicate questions about the academic merit, practical workability, or empirical success of various race-neutral alternatives to race-conscious admissions policies. Those questions are properly considered and addressed in a case in which this Court must determine whether the specific admissions policy of a specific institution passes muster under the narrow-tailoring prong of strict scrutiny. As the Court observed in *Grutter*, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.* at 327. Thus, in *Bakke*, *Grutter*, and *Fisher* the Court focused

on the program and institution before it and engaged in a particularized and nuanced analysis.

Nevertheless, Petitioner's brief touches repeatedly and emphatically on the issue of race-neutral alternatives. Petitioner focuses on the Texas Top Ten Percent Plan as a method for achieving a diverse student body.[11] Pet'r's Br. 17, 32-33. Petitioner also cites statistics regarding the experience of the University of California system under Proposal 209 to suggest that diversity can be achieved without considering race. Pet'r's Br. 31-32. The flaws in Petitioner's broad-brush analysis are sufficiently significant that the University Respondents cannot leave them unaddressed. Still, mindful of the limited relevance of these issues to the question before the Court, the University Respondents will respond only to those aspects of Petitioner's argument that are most inapt to them and to higher education in Michigan generally.

The overarching problem with Petitioner's arguments as to race-neutral alternatives and statistics is that they address in a simplistic and generalized way issues that are complex and institution-specific—and often academic-unit-specific. Petitioner addresses

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[11] "[T]he Top Ten Percent Law grants automatic admission to any public state college [in Texas,] including the University [of Texas, Austin], to all students in the top 10% of their class at high schools in Texas that comply with certain standards." *Fisher*, 133 S. Ct. at 2416.

both of these issues as though the University of Michigan Law School, the Michigan State University College of Human Medicine, the Department of Music at the University of Texas at Arlington, and the School of Business Administration at the University of California-Irvine were identical academic units within identical institutions recruiting from identical applicant pools in order to serve identical visions of diversity in furtherance of identical educational missions. If context is restored to the conversation, and attention is directed back to the University Respondents, then the flaws in both of Petitioner's arguments become glaringly evident.

*

Petitioner's arguments in favor of percentage plans apply poorly to the University Respondents for a number of reasons.[12] At best, such plans are a workable alternative only for academic units that admit students directly from high school. *Grutter*, 539 U.S. at 340 (a percentage plan would not "work for graduate and professional schools"). Some of the most highly competitive academic units within the University Respondents, however, are professional schools, graduate schools, and undergraduate programs that admit students in their junior year. With respect to the University Respondents, percentage plans therefore do not help the goal of admitting a diverse

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[12] For a catalog of the difficulties with such plans, *see* Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 Tul. L. Rev. 1767, 1817-24 (2004).

student body precisely where that goal faces some of its greatest challenges.

Nor are such plans workable for undergraduate academic units that place a heavy emphasis on a particular talent that may not correspond to a percentage ranking. The University Respondents have programs in art, architecture, design, music, theater, and dance that are internationally acclaimed.[13] Those programs obviously could not admit students based exclusively on high school class standing.

Percentage plans also create incentives that fit poorly with the pedagogical goals of the University Respondents. Such plans encourage students to take a pass on anything—a leadership opportunity, a challenging course or teacher, or a chance to do meaningful volunteer work—that might compromise their class rank. Percentage plans thus reward

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[13] For example, the Michigan State University College of Music attracts students from 35 states and 23 countries and is "nationally and internationally acknowledged to be among the best in several areas of performance and music education." *See* Michigan State University College of Music, http://music.msu.edu/about/ (last visited Aug. 15, 2013). The University of Michigan School of Music, Theatre, and Dance is a "highly selective" school with demanding audition requirements and a host of distinguished alumni. *See* University of Michigan School of Music, Theatre, and Dance, Prospective Undergraduate Students, http://www.music.umich.edu/prospective_students/admissions/ug/ugadmissions.htm (last visited Aug. 15, 2013) and UM Musical Theatre Department News of Graduates, http://www.music.umich.edu/departments/mustheatre/alumni.htm (last visited Aug. 15, 2013).

students for limiting their experiences and for taking a one-dimensional view of their life and education. In contrast, many of the academic units within the University Respondents seek students with a wide array of interests, experiences, and perspectives, because, in their informed judgment, those are the "students who will contribute the most to the robust exchange of ideas."[14] *Grutter*, 539 U.S. at 324 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).

Finally, as the Court noted in *Grutter*, percentage plans preclude a university "from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340. The University Respondents believe that, for a multitude of educational reasons, it is important for them to retain, in deciding whom to admit, the flexibility necessary to consider a wide array of factors, such as test scores, awards, enrollment in advanced placement courses, the competitiveness of the high school environment, socioeconomic status, and a demonstrated capacity to overcome hardships.

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[14] For example, the Michigan State University College of Human Medicine considers numerous "non-academic" factors as part of its "mission-based, holistic assessment" of applicants. *See* Michigan State University College of Human Medicine, Office of Admissions, http://mdadmissions.msu.edu/applicants/competitive.php (last visited Aug. 15, 2013).

In sum, nothing in the record of this case suggests that percentage plans are a workable alternative for the University Respondents. In fact, the limited record that does exist on this point is to the contrary. For example, Theodore Spencer, Associate Vice Provost and Executive Director of Undergraduate Admissions at the University of Michigan, testified that a ten percent plan would result in the admission of some students who were not adequately prepared for the demands of such an academically demanding environment. *See* R. 222-5 at 156.

*

Petitioner's recitation of statistics from the University of California system with respect to the purported effects of Proposal 209 is similarly inapposite.[15] Granted, statistics regarding the effects of § 26 on the University Respondents are not part of the record. As noted above, this litigation was filed shortly after the passage of § 26, so the impact of this provision—and the viability of the use of race-neutral alternatives —could not be known with certainty.

There is, however, some record evidence on this issue. For example, University of Michigan undergraduate admissions director Spencer, a nationally prominent figure in the field of higher education

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[15] The University Respondents leave to the Plaintiffs-Respondents and amici the task of analyzing Petitioner's claims about how the California public university system has fared with respect to diversity.

admissions, testified that he anticipated undergraduate minority enrollment would decline at his institution in light of § 26 and that he was unaware of any race-neutral strategy that would remedy that decline. J.A. 230, 233; R. 222-5 at 119.[16]

Petitioner's brief ignores this testimony. Instead, Petitioner imports statistics from outside the record—and outside the State of Michigan—about the University of California system. Pet'r's Br. 31-32. Petitioner could have just as easily cited non-record but publicly available data about the University Respondents. This, however, would have told a story different and more complicated than Petitioner represents. To take just one example, between 2004 and 2006, the numbers of entering African American freshmen at the University of Michigan ranged from a low of 330 to a high of 443; in contrast, from 2007 to 2009, after the passage of § 26, entering African American freshmen ranged from a low of 289 to a high of 374. *See* Univ. of Mich., Office of Budget and Planning, Common Data Set, http://sitemaker.umich.edu/obpinfo/common_data_set (last visited Aug. 15, 2013).

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[16] Similarly, Sarah Zearfoss, Assistant Dean for Admissions at the University of Michigan Law School, testified that she thought it would be "extremely likely" that there would be "fewer minorities in the entering class" at the Law School because of § 26. R. 222-4 at 113. No depositions were taken of admissions officers from Michigan State University.

In sum, nothing in the record supports Petitioner's suggestion that the University Respondents can achieve the benefits of a diverse student body solely by importing race-neutral plans from other states. And Petitioner's departure from the record to try to prove the point is wholly unpersuasive.

CONCLUSION

For the reasons stated above, the University Respondents respectfully request that this Court (a) recognize that petitioning the governing boards of the University Respondents constitutes a political process and (b) disregard, as outside the record, Petitioner's arguments with respect to the alleged viability of race-neutral methods for achieving a diverse student body at the University Respondents' institutions.

Respectfully submitted,

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In the
Supreme Court of the United States

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT ERIC RUSSELL IN SUPPORT OF PETITIONER

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STATEMENT

Respondent Eric Russell concurs in Petitioner's statement of the case. He provides this additional statement setting forth his involvement and interest as a defendant-intervenor in this litigation.

Eric Russell moved to intervene in this case on December 18, 2006, five days before Proposal 2 was to take effect, in order to vindicate his right to equal protection under this constitutional amendment.[1] At that time, Russell had been granted admission to Wayne State University Law School and was an applicant to the University of Michigan School of Law. During the course of this litigation, Russell attended and graduated from Wayne State University Law School. Beginning in his last semester of law school and continuing to the present time, Russell has been continuously employed as an adjunct faculty member at Oakland Community College, a lecturer at Oakland University, or both. In addition, Russell returned to Wayne State University as a student in 2011, where he is currently pursuing a Master of Science degree in accounting. The University of Michigan, Wayne State University, Oakland University, and Oakland Community College are all public institutions subject to Proposal 2. Accordingly, Russell has had a direct and substantial interest in the validity of Proposal 2 throughout this litigation.

In addition, Russell has played a leading role in this litigation from the outset. He alone sought and received from the Sixth Circuit an emergency stay of the district court's preliminary injunction delaying implementation of Proposal 2—an injunction

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[1] Intervention was granted on December 27.

that had been entered with the consent of all of the other parties to the litigation, including Michigan's Attorney General. *See* Pet. App. 224a-254a. He alone took factual discovery and presented expert opinion evidence rebutting the factual evidence and expert opinions offered by the plaintiffs. He alone advanced numerous arguments and points relied on by the district court in upholding the constitutionality of Proposal 2. And he alone argued that even if Proposal 2 were subject to strict scrutiny, it would meet that standard. In addition, Russell submitted briefs supporting Proposal 2 to the Sixth Circuit both at the panel and en banc stages, and his counsel presented oral argument supporting Proposal 2 before the en banc court.[2]

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[2] Because he was a party in the court below, Russell believes that he is entitled to file a brief as a respondent supporting petitioner in this Court. Furthermore, this Court has treated Russell as a party, directing that he respond (or waive his right to respond) to the petition for a writ of certiorari and serving him with notices of its orders in this case. Nevertheless, the district court did ultimately dismiss Russell from this case on the theory that he no longer satisfied the requirements for intervention, and the Sixth Circuit affirmed that dismissal. *See* Pet. App. 48a-50a. While Russell believes his dismissal was erroneous, he did not seek this Court's review of that issue.

In any event, Russell notes that this brief satisfies the filing deadline and word count limitations that would apply to an amicus brief. And he certifies that letters from all parties (including Russell) consenting to amicus briefs are on file with this Court, that no counsel for any party other than Russell authored this brief in whole or in part, and that no person or entity other than Russell, his counsel, and their firms made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Under the political process doctrine set forth in this Court's decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), States are prohibited from reallocating decisionmaking authority in a manner that places a comparative structural burden on the achievement of minority interests. This doctrine should be overruled.

1. The political process doctrine invites absurd results, as well illustrated by the decision below, which held that Proposal 2, a state constitutional provision prohibiting discrimination or preferential treatment based on race, violates the Equal Protection Clause of the Fourteenth Amendment. Not only does the decision below suggest that any governmental policy relating to the treatment of racial minorities is off-limits to higher levels of government, it would appear to protect even patently unconstitutional policies. While it may be possible to read this Court's political process decisions more narrowly than did the Sixth Circuit, the political process doctrine plainly lends itself to such anomalous results.

2. The political process doctrine is inconsistent with fundamental equal protection principles.

a.) The political process doctrine applies strict scrutiny to facially neutral laws even in the absence of any proof of discriminatory intent. It thus conflicts with "the basic equal protection principle that the invidious quality of a [facially neutral] law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory pur-

pose." *Washington v. Davis*, 426 U.S. 229, 240 (1976).

b.) The political process doctrine focuses on protecting the interests and goals of particular groups. It thus conflicts with "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), as well as "the cardinal rule that our Constitution protects each citizen as an individual, not as a member of a group," *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting), *overruled by Adarand Constructors*, 515 U.S. at 227.

c.) The political process doctrine ascribes to the groups it seeks to protect collective interests and goals that it presumes individuals share simply by virtue of their race. It thus reflects "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens, the precise use of race as a proxy the Constitution prohibits." *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (citation and internal quotation marks omitted).

d.) The political process doctrine protects only *minority* groups and assumes that the majority needs no protection against discrimination. But "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, it is not equal." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.); *accord City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989).

e.) The political process doctrine rests on "the conception of a Nation divided into racial blocs," *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting), in which the "majority" and the "minority" are engaged in a zero-sum competition to protect their conflicting "interests" and achieve their divergent "goals." Such a conception of the Nation "may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Miller*, 515 U.S. at 912.

3. The restrictions imposed by the political process doctrine on reallocations of state decision-making authority cannot be reconciled with the "wide leeway" afforded States "when experimenting with the appropriate allocation of state legislative power." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). As this Court has explained, "[t]he principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion. Whether and how to use that discretion is a question central to state self-government." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002) (citation and internal quotation marks omitted).

4. The political process doctrine is malleable and unpredictable in practice, as demonstrated by the numerous opinions from the en banc proceedings in this case, the previous opinion from the Sixth Circuit vacating a preliminary injunction of Proposal 2, and the opinions from the Ninth Circuit and Cali-

fornia Supreme Court rejecting closely analogous political process claims. *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997); *Coral Constr., Inc. v. City & County of San Francisco*, 235 P.3d 947 (Cal. 2010). Indeed, the open-ended formulations used to determine whether reallocations of decisionmaking authority have a "racial focus" and are thus subject to the political process doctrine may simply license—or even require—judges to determine, by their own lights, whether policies burdened by state reallocations of decisionmaking authority are or are not "racially beneficial." *Seattle Sch. Dist.*, 458 U.S. at 474, 483.

5. Finally, the political process doctrine is unnecessary to vindicate the Equal Protection Clause, as underscored by the fact that this Court has expressly relied on the political process doctrine to invalidate a law only twice in the forty-four years since the doctrine was invented. In one of those instances, moreover, this Court likely would have reached the same result applying conventional equal protection analysis. To be sure, this Court's decision in *Seattle School District* likely would have come out differently but for application of the political process doctrine. But that decision was not a necessary—or even faithful—application of the Fourteenth Amendment, and it should be overruled.

ARGUMENT

In 2006, the People of Michigan adopted Proposal 2, an initiative that amended their Constitution to provide that the State "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, eth-

nicity, or national origin in the operation of public employment, public education, or public contracting." MICH. CONST. art. I, § 26(2). Sitting en banc, the Sixth Circuit concluded, paradoxically, that this guarantee of equal treatment violates the Fourteenth Amendment's mandate that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. In reaching this startling conclusion, the Sixth Circuit relied on the "political process doctrine" (also known as the "political structure doctrine") set forth in this Court's decisions in *Hunter* and *Seattle School District*. These cases held that the Fourteenth Amendment prohibits States from reallocating "decisionmaking authority" in a manner that places a "comparative structural burden . . . on the political achievement of minority interests." *Seattle Sch. Dist.*, 458 U.S. at 474 n.17.

However well-intentioned the cases establishing the political process doctrine may have been, that doctrine invites absurd results, as well illustrated by the decision below. Further, that doctrine can be reconciled neither with fundamental equal protection principles nor with the constitutional prerogative of the States to allocate their decisionmaking authority as they see fit. Finally, the political process doctrine has proved malleable and unprincipled in practice and is unnecessary to vindicate the Equal Protection Clause. For all of these reasons, it should be overruled. *See* Pet. App. 92a-99a (Griffin, J., dissenting); *Coral Constr.*, 235 P.3d at 966-67 (Corrigan, J., concurring).

I. The Political Process Doctrine Invites Absurd Results.

In the case below, the Sixth Circuit held that by prohibiting public universities in Michigan from employing admissions policies that discriminate against or grant preferential treatment to any individual based on race, the People of that State denied Plaintiffs the equal protection of the laws. It did so, moreover, "in the face of the core equal protection principle of nondiscrimination—a principle consistent with the choice of the People of Michigan," "despite the absence of any precedent suggesting that states must employ racial preferences in university admissions," and even though such preferences themselves are "presumptively invalid" under the Equal Protection Clause. Pet. App. 56a (Gibbons, J., dissenting).

As well expressed by Judge O'Scannlain in rejecting an analogous constitutional claim, "[i]f merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence." *Coalition for Econ. Equity*, 122 F.3d at 702; *see also id.* at 709 ("The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits."). Indeed, it should be axiomatic "that a State does not deny equal treatment by mandating it." Pet. App. 82a (Sutton, J., dissenting).

Invoking the political process doctrine, the Sixth Circuit nevertheless held that Proposal 2's ban on racial preferences is unconstitutional because it "removed the authority to institute any such policy from Michigan's universities and lodged it at the most remote level of Michigan's government, the

state constitution," and thus made it more difficult for racial minorities (which it presumed supported such policies) to obtain racial preferences through the political process. *Id.* at 36a-37a. But the proposition that any governmental policy relating to the treatment of racial minorities is off-limits to higher levels of government is completely unsustainable as a generally applicable rule of law. Under this view, the State Legislature is subordinate to the agency and the municipality, the Governor is subordinate to the bureaucrat, and the University Board of Trustees is subordinate to the admissions committee. And the People themselves are subordinate to all government bodies and officials. More important, racial preferences become a one-way ratchet. No intermediate government body or official may ever ban them in the first place because that would make it more difficult for minorities to lobby for such benefits from lower level government entities. And once some governmental body had adopted racial preferences, the decision may never be rescinded by a higher level of government.

Further, precisely the same reasoning could be applied to a state court decision invalidating racial preferences in admissions under a state constitution's general equal protection guarantee. *Cf. Louisiana Associated Gen. Contractors, Inc. v. State*, 669 So.2d 1185, 1196-98 (La. 1996) (interpreting state equal protection guarantee to prohibit all race-based distinctions). For as Judge Sutton explained, such a decision

> would have precisely the same effect as Proposal 2, establishing that the Constitution bars racial preferences and placing the onus on proponents of racial

> preferences to alter the Constitution. . . . If Proposal 2 violates the political-process doctrine, so too would a decision by the Michigan Supreme Court that comes to the same end through . . . interpretation of [Michigan's general] equal-protection guarantee.

Pet. App. 89a.

Indeed, given the Sixth Circuit's emphasis on the fact that Proposal 2 imposes a greater hurdle to those championing racial preferences than on those "advocating consideration of nonracial factors in admissions decisions," *id.* at 37a, the decision below might well prohibit a State's courts from interpreting that State's equal protection guarantee to mirror its federal analog in requiring strict scrutiny for preferences based on race, but not for preferences based on other considerations. After all, such an interpretation would "impose special burdens on some policies that might benefit racial minorities in the admissions process without imposing the same burdens on policies that benefit groups categorized along nonsuspect lines." *Id.* at 90a (Sutton, J., dissenting). It goes without saying, however, that "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Crawford v. Board of Educ.*, 458 U.S. 527, 535 (1982).[3]

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[3] Indeed, were the Equal Protection Clause of the Fourteenth Amendment not the source of the political process doctrine, that Amendment might itself violate the political process doctrine, for as Judge O'Scannlain has observed, "[t]he Equal Protection Clause, parked at our most 'distant and remote' level

(Continued on following page)

Despite its protestations to the contrary, *see* Pet. App. 44a n.9, the Sixth Circuit's rationale would require invalidation of Proposal 2 even as applied to patently *unconstitutional* race-based admissions policies—a rigid racial quota, for example—that a court would be duty-bound to strike down under the Equal Protection Clause, *see, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Bakke*, 438 U.S. 265. Indeed, the Sixth Circuit expressly rejected any sort of "*outcome*-based limitation on a *process*-based right." Pet. App. 41a. Instead, the court below held that

> the *Hunter/Seattle* doctrine works to prevent the placement of special procedural obstacles on minority objectives, *whatever those objectives may be*. . . . What matters is whether racial minorities are forced to surmount procedural hurdles in reaching their objectives over which other groups do not have to leap. If they are, the disparate procedural treatment violates the Equal Protection Clause, *regardless of the objective sought*.

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of government, singles out racial preferences for severe political burdens—it prohibits them in all but the most compelling circumstances." *Coalition for Econ. Equity*, 122 F.3d at 708; *see also Seattle Sch. Dist.*, 458 U.S. at 483 (faulting the People of Washington for "lodging decisionmaking authority over [race-conscious busing] at a new and remote level of government"); Pet. App. 36a (faulting the People of Michigan for banning racial discrimination and preferences "at the highest level"); *id.* at 83a (Sutton, J., dissenting) ("There is nothing unusual about placing an equal-protection guarantee in a constitution. That is where individual-liberty guarantees often go, and that after all is where the national framers placed the federal counterpart.").

Id. (emphases added); *see also, e.g.*, *id.* at 40a ("the language of *Hunter* and *Seattle* encompasses any legislation in the interest of racial minorities . . . ."); *id.* at 21a n.2 ("This holds true for enactments that make it more difficult for minorities to use the political process to obtain *any* sort of legislation that is in their interest . . . ."). According to the Sixth Circuit, then, the political process doctrine would protect even racial preferences that are themselves unconstitutional. This proposition obviously cannot be right.

While it may be possible to read *Seattle School District* and *Hunter* more narrowly than did the Sixth Circuit and thus to avoid some of these anomalies, there can be no question that those cases, and the political process doctrine they enunciate, "lend themselves to arguments distinctly at odds with the high court's own approach to racial classifications in . . . later cases." *Coral Constr.*, 235 P.3d at 967 (Corrigan, J., concurring). Indeed, in *Seattle School District*, this Court itself declined to consider the constitutional "propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation," *Seattle Sch. Dist.*, 458 U.S. at 472 n.15, even while holding that the political process doctrine barred the People of Washington from amending their constitution to prohibit such assignments, *see id.* at 462-63. Significantly, this Court later held that a subsequent iteration of the very desegregation plan that it had protected under the political process doctrine in *Seattle School District* itself violated the Equal Protection Clause. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *see also id.* at 856 (Breyer, J., dissenting) (stating that *Seattle School District* "involve[d] the original Seattle Plan,

a *more heavily race-conscious predecessor* of the very plan now before us").

The Equal Protection Clause is assuredly not at war with itself, and any doctrine that suggests that the States may not prohibit race-based policies that themselves violate the Fourteenth Amendment (either outright or at least presumptively) cannot be sound. And, as demonstrated next, the doctrinal difficulties posed by the political process doctrine are no less serious than the practical absurdities, such as the decision below, that it is prone to engender.

II. The Political Process Doctrine Is Inconsistent with Fundamental Equal Protection Principles.

Under the political process doctrine, state laws are subject to strict scrutiny if they reallocate decisionmaking authority in a way that makes it "more difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Seattle Sch. Dist.*, 458 U.S. at 470 (internal quotation marks omitted; alterations in *Seattle Sch. Dist.*); *see also id.* at 467 (doctrine applies to "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation" (citation and internal quotation marks omitted)); *Hunter*, 393 U.S. at 393 (State may not "disadvantage any particular group by making it more difficult to enact legislation in its behalf"); Pet. App. 22a (doctrine applies to laws that "reallocat[e] political power or reorders the decisionmaking process in a way that places special bur-

dens on a minority group's ability to achieve its goals through that process"). As demonstrated below, this doctrinal framework is fundamentally inconsistent with core equal protection principles repeatedly reaffirmed in this Court's cases.[4]

A. The Political Process Doctrine Imposes Liability Absent Discriminatory Treatment or Intent.

As an initial matter, the political process doctrine applies strict scrutiny to facially neutral laws even in the absence of any proof of discriminatory intent. *See, e.g.*, *Seattle Sch. Dist.*, 458 U.S. at 485 (holding that "legislation of the kind challenged in *Hunter* . . . falls into an inherently suspect category"); Pet. App. 23a n.3 (similar); *id.* at 96a (Griffin, J., dissenting) ("The laws at issue in *Hunter* and *Seattle* were both facially neutral.").

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[4] *See also* Pet. App. 95a (Griffin, J., dissenting) ("the 'political structure' doctrine is an anomaly incompatible with the Equal Protection Clause"); *Coral Constr.*, 235 P.3d at 966 (Corrigan, J., concurring) (noting "the difficulty of squaring the 'political structure doctrine' with modern equal protection jurisprudence" and expressing "perplex[ity] by the persistence of this anachronistic feature of federal constitutional law") (internal quotation mark omitted); David J. Barron, *The Promise of Cooley's Cities: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 561 (1999) (describing cases establishing the political process doctrine as "jurisprudential enigmas that seem to lack any coherent relationship to constitutional doctrine as a whole"); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2476 (2003) ("It is therefore easy to view these cases as constitutional oddballs, difficult or impossible to explain in light of accepted equal protection principles.").

In effect, then, under the political process doctrine a law may violate the Equal Protection Clause based solely upon a presumed disparate effect on racial minorities. In this case, for example, it cannot be disputed that Proposal 2 is facially neutral—far from drawing a race-based classification, it prohibits *all* race-based discrimination or preferences—and the Sixth Circuit did not disturb the District Court's finding that Plaintiffs had failed to establish a discriminatory purpose. *See id.* at 78a (Gibbons, J., dissenting). The political process doctrine thus conflicts with the bedrock "equal protection principle that the invidious quality of a [facially neutral] law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington*, 426 U.S. at 240; *see also Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979) ("even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose"). In short, as aptly stated by Judge Griffin in his dissent from the decision below, the political process doctrine "replaces actual evidence of racial motivation with a judicial presumption and, hence, is an aberration inconsistent with the Fourteenth Amendment." Pet. App. 96a.

B. The Political Process Doctrine Protects Groups Rather than Individuals.

More important still, the political process doctrine—with its focus on the "interest" and "goals" of "particular groups," *supra* at 13-14—"seems to perceive the right to equal protection as a group right

rather than an individual right," *Coalition for Econ. Equity*, 122 F.3d at 705 n.12. It thus conflicts with "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*," *Adarand Constructors*, 515 U.S. at 227, as well as "the cardinal rule that our Constitution protects each citizen as an individual, not as a member of a group," *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting). In the words of Justice Powell in *Bakke*, "it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group . . . ." 438 U.S. at 299 (*quoted in Adarand Constructors*, 515 U.S. at 224).

As this Court has explained, the "fundamental principle of equal protection as a personal right," *Adarand Constructors*, 515 U.S. at 235, follows directly from the plain text of the Fourteenth Amendment:

> The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." (Emphasis added.) As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

J.A. Croson Co., 488 U.S. at 493 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). The political process doctrine's conception of equal protection as a

group right simply cannot be reconciled with "the long line of cases understanding equal protection as a personal right." *Adarand Constructors*, 515 U.S. at 230; *see also Coalition for Econ. Equity*, 122 F.3d at 705 & n.13 (noting "the tension between the protection that the 'political structure' cases afford to the 'ability of minority groups to achieve beneficial legislation' and the 'fundamental principle of equal protection as a personal right' " (citation omitted)).

C. The Political Process Doctrine Presumes that Individuals' Interests and Goals Are Determined by Their Race.

Not only does the political process doctrine impermissibly seek to protect groups rather than individuals, it ascribes to each group collective "interests" and "goals" that it presumes are shared by individuals simply by virtue of their race. *Supra* at 13-14. The doctrine thus "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, [and] share the same political interests." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). But this Court, of course, has roundly "rejected such perceptions elsewhere as impermissible racial stereotypes." *Id.*; *see also, e.g.*, *Miller*, 515 U.S. at 912, 920 (rejecting this "offensive and demeaning assumption" as "racial stereotyping at odds with equal protection mandates"); *Metro Broad.*, 497 U.S. at 615 (O'Connor, J., dissenting) (rejecting "generalizations impermissibly equating race with thoughts and behavior"); *id.* at 618 (rejecting notion "that a particular and distinct viewpoint inheres in certain racial groups").

For as this Court has explained, although they may share a common ancestry,

> it does not follow from this that individuals of the same race share a single political interest. The view that they do is "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens," the precise use of race as a proxy the Constitution prohibits.

Miller, 515 U.S. at 914 (quoting *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting)); *see also Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities").

At bottom, then, the political process doctrine rests on "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred . . . by history and the Constitution." *Miller*, 515 U.S. at 912. It thus conflicts with "one of our most cherished constitutional and societal principles . . . that an individual's tastes, beliefs, and abilities should be assessed on their own merits rather than by categorizing that individual as a member of a racial group presumed to think and behave in a particular way." *Metro Broad.*, 497 U.S. at 618 (O'Connor, J., dissenting). In short, both by focusing its protection on groups, rather than individuals, and by ascribing to individuals goals and interests based solely on their race, the political process doctrine falls afoul of the "simple command" "[a]t the heart of the Constitution's guarantee of equal

protection . . . that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911 (internal quotation marks omitted).

D. The Political Process Doctrine Does Not Apply Equally to All Races.

Not only does the political process doctrine protect groups rather than individuals (who are protected only as members of groups whose collective "interest" and "goals" they are presumed to share), it protects only "*minority* groups." *Supra* at 13-14 (emphasis added). Indeed the doctrine's focus on protecting minorities from changes in the political process reflects the explicit assumption that "[t]he majority needs no protection against discrimination." *Hunter*, 393 U.S. at 391.

Sounder, more recent cases, however, have rejected "a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process." *J.A. Croson*, 488 U.S. at 495. This Court has thus embraced Justice Powell's statement that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, it is not equal." *Bakke*, 438 U.S. at 289-90; *accord J.A. Croson*, 488 U.S. at 494. Accordingly, this Court has repeatedly held that the requirements of equal protection "obtai[n] with equal force regardless of 'the race of those burdened or benefitted.' " *Miller*, 515 U.S. at 904 (quoting *J.A. Croson*, 488 U.S. at 494); *see also, e.g., Adarand Con-*

structors, 515 U.S. at 223, 227 (emphasizing, among the "general propositions" established by this Court's cases, the requirement of "consistency of treatment irrespective of the race of the burdened or benefited group").

In short, as Justice O'Connor put it in dissent from this Court's short-lived decision in *Metro Broadcasting*,

> We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens.

497 U.S. at 610. The sharp distinction drawn by the political process doctrine between protected "minority groups" and the majority—which "needs no protection"—could not be more at odds with this understanding.

E. The Political Process Doctrine Is at Cross-Purposes with the Ultimate Goal of the Fourteenth Amendment.

Far from viewing this Nation as one built from "divergent communities knitted together by various traditions and carried forth, above all, by individuals," the political process doctrine rests on "the conception of a Nation divided into racial blocs," *Metro Broad.*, 497 U.S. at 603, 610 (O'Connor, J., dissenting), in which the "majority" and the "minority" are

engaged in a zero-sum competition to protect their conflicting "interests" and achieve their divergent "goals." *Cf.* Pet. App. 15a ("In effect, the political-process doctrine hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course."); *id.* at 16a ("*Hunter* and *Seattle* . . . set the benchmark for when the majority has not only won, but has rigged the game to reproduce its success indefinitely.").

This Court should no longer countenance this tribal conception of our Nation, which lies at the heart of the political process doctrine, for such a conception can "contribut[e] to an escalation of racial hostility and conflict," *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting); it "may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Miller*, 515 U.S. at 912 (quoting *Shaw*, 509 U.S. at 657); *cf. Shaw*, 509 U.S. at 648-49 ("When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here."); *Miller*, 515 U.S. at 927 ("If our society is to continue to progress as a multi-racial democracy, it must recognize that the automatic invocation of race stereotypes retards

that progress and causes continued hurt and injury.").

III. The Political Process Doctrine Is Inconsistent with Principles of Federalism and the Separate Sovereignty of the States.

Under the political process doctrine, the Federal Constitution is violated when a State's "political mechanisms are modified to place effective decision-making authority over a racial issue at a different level of government." *Seattle Sch. Dist.*, 458 U.S. at 474. This doctrine cannot be reconciled with the States' traditional authority as separate sovereigns to structure their governments and allocate (or reallocate) their lawmaking authority as they see fit.

"The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion. Whether and how to use that discretion is a question central to state self-government." *City of Columbus*, 536 U.S. at 437 (citations and internal quotation marks omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government . . . a State defines itself as a sovereign."). Thus, as this Court explained in *Hunter v. City of Pittsburgh*,

> The number, nature, and duration of the powers conferred upon [its "political subdivisions"] rests in the absolute discretion of the state. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers . . . . In all these respects the state is supreme, and

> its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

207 U.S. 161, 178-79 (1907).

To be sure, subsequent decisions have recognized certain limitations on these general principles. But *City of Pittsburgh* and the principles it enunciates "continu[e] to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club*, 439 U.S. at 71; *accord City of Columbus*, 536 U.S. at 437. Thus, "while the Equal Protection Clause provides a check on such state authority," this Court's "scrutiny will not be so demanding where [it] deal[s] with matters resting firmly within a State's constitutional prerogatives. This rule is no more than . . . a recognition of a State's constitutional responsibility for the establishment and operation of its own government . . . ." *Gregory*, 501 U.S. at 462 (citation and internal quotation marks omitted).

The strict scrutiny applied by the political process doctrine to reallocations of state decision-making authority simply cannot be squared with the "extraordinarily wide latitude" and "wide leeway" afforded States "when experimenting with the appropriate allocation of state legislative power." *Holt Civic Club*, 439 U.S. at 71. Indeed, as explained by Justice Powell in dissenting from the holding in *Seattle School District*, the decisions setting forth the political process doctrine

> offe[r] no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a State to act with respect to racial matters by subordinate bodies. It is a strange notion—alien to our system—that local governmental bodies can forever preempt the ability of a State—the sovereign power—to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result.

458 U.S. at 495; *see also id.* at 496 ("The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system."); Pet. App. 85a-86a (Sutton, J., dissenting) ("Odder still, the United States Constitution generally does not meddle in the way the States structure their governments. . . . [I]t is surely the case that the Fourteenth Amendment does not dictate the level of government at which a State must enact a statewide ban on race discrimination.").

IV. The Political Process Doctrine Is Malleable and Unprincipled.

In addition to the significant constitutional problems it poses, the political process doctrine is unpredictable in practice, as well illustrated by the numerous opinions from the en banc proceedings in

this case, *see* Pet. App. 6a, 51a, 56a, 79a, 80a, 94a, the previous opinion from the Sixth Circuit vacating a preliminary injunction of Proposal 2, *see id.* at 224a-254a, and the opinions from the Ninth Circuit and California Supreme Court rejecting closely analogous political process claims, *see Coalition for Econ. Equity*, 122 F.3d 692; *Coral Constr.*, 235 P.3d 947. These conflicting results reflect the malleable and unprincipled nature of the test established by the political process cases.

As *Seattle School District* makes clear, the political process doctrine does not apply to "laws structuring political institutions or allocating political power according to 'neutral principles,' " but only those that use "the *racial* nature of an issue to define the governmental decisionmaking structure." 458 U.S. at 470. The doctrine is not limited, however, to laws explicitly addressing race, *id.*, but applies more broadly to laws that have a "racial focus," *id.* at 474, or that alter "the political process or the decisionmaking mechanism used to *address* racially conscious legislation," *id.* at 485.

These open-ended formulations are very difficult to apply with any degree of consistency, as can be seen simply by comparing the decision in *Seattle School District* with *Crawford*, a similar case decided the very same day. On the one hand, the Court in *Seattle School District* held that a popularly enacted constitutional amendment prohibiting school busing (except as a remedy for a constitutional violation or for a variety of enumerated reasons unrelated to race) had a "racial focus" and thus was subject to the political process doctrine. *See* 458 U.S. at 462-63, 474; *see also id.* at 471 ("despite its facial neutrality there is little doubt that the initiative was effectively

drawn for racial purposes"). On the other hand, in *Crawford*, the Court rejected an equal protection challenge to a popularly enacted constitutional amendment forbidding state courts from ordering "pupil school assignment or transportation in the absence of a Fourteenth Amendment violation," even though it was "clear that court-ordered busing in *excess* of that required by the Fourteenth Amendment, as one means of desegregating schools, prompted the initiation and probably the adoption of [the amendment]." 458 U.S. at 537, 538 n.18; *see also id.* at 538 (distinguishing "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters"). These conflicting results, reached by shifting majorities of the same Court, well illustrate the unpredictability the political process doctrine introduces into equal protection analysis.

Further, *Seattle School District* held that the amendment at issue had "a racial focus," despite its "facial neutrality," because it made "busing for integration" impossible to adopt locally and because, "[f]or present purposes, it is enough that minorities may consider busing for integration to be legislation that is in their interest." 458 U.S. at 471, 474 (internal quotation marks omitted). Taken at face value, this breathtakingly broad formulation would seemingly extend the reach of the political process doctrine to laws making it more difficult to enact *any* policy that minorities might consider to be in their interest, however facially neutral such laws may be. As such, it is difficult to reconcile with *James v. Valtierra*, 402 U.S. 137 (1971), which declined to apply the political process doctrine to a state constitutional amendment imposing unique procedural hurdles to the public development, construction, or ac-

quisition of "low-rent housing project[s]," *id.* at 139, on the ground that the amendment applied to "any low-rent public housing project, not only for projects which will be occupied by a racial minority" and thus was "seemingly neutral on its face," *id.* at 141; *but cf. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 269 (1977) (acknowledging that a challenged restriction on low income housing "d[id] arguably bear more heavily on racial minorities").

Elsewhere, the *Seattle School District* Court offered a number of alternative formulations, asserting that the initiative amendment challenged there had a racial focus because the practice it restricted "at bottom inures primarily to the benefit of the minority, and is designed for that purpose," 458 U.S. at 472, and because "the initiative makes the enactment of racially beneficial legislation difficult . . . ," *id.* at 483; *see also id.* at 467 (political process doctrine applies to laws that "place special burdens on the ability of minority groups to achieve beneficial legislation"); *id.* at 470 (doctrine applies to laws that "make it *more* difficult for certain racial and religious minorities . . . to achieve legislation that is in their interest").

Similarly, in applying the political process doctrine in this case, the Sixth Circuit stated, alternatively, that that doctrine applies to laws that place comparative burdens on "issues of importance to [minority groups]," Pet. App. 15a, on "minority objectives, whatever those objectives may be," *id.* at 41a, or on "any legislation in the interest of racial minorities," *id.* at 40a, and thus make it more difficult for minority groups "to achieve their political objectives," *id.* 37a, or "to enact policies that are in their favor,"

id. at 39a; *see also id.* 140a (doctrine applies to burdens on "a political program of particular importance to racial minorities"); *id.* 114a ("issues of importance to racial minorities").

It is far from clear that these varying formulations in any way limit the reach of the political process doctrine. They do, however, add to its malleability and unpredictable application. How, for example, is one to determine whether a policy made more difficult to adopt by a reallocation of decisionmaking authority to a higher level of government "inures primarily to the benefit of the minority," furthers "minority objectives," or is "in the interest of racial minorities," "racially beneficial," or "of particular importance to racial minorities"? Does one look simply to the racial make-up of those who support the policy in question? *See id.* at 24a (quoting *Seattle Sch. Dist.*, 458 U.S. at 474) ("given that racial minorities lobbied for the implementation of the very policies that Proposal 2 permanently eliminates, it is beyond question that Proposal 2 targets policies that 'minorities may consider . . . [to be] in their interest' "). But as the Court acknowledged in *Seattle School District*—which, as explained above, held that "busing for integration" was such a policy—"[i]t undoubtedly is true . . . that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350 [the constitutional amendment invalidated in that case]." 458 U.S. at 472. And the Court acknowledged that the same was true of the burdened policy in *Hunter*, as well: "we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance." *Id.*

Alternatively, does one attempt to determine who benefits from the policy? *See* Pet. App. 24a ("There is no material difference between the enactment in *Seattle* and Proposal 2, as both targeted policies that benefit minorities by enhancing their educational opportunities and promoting classroom diversity."); *Seattle Sch. Dist.*, 458 U.S. at 472 (busing for integration "at bottom inures primarily to the benefit of the minority, and is designed for that purpose"). But again, as the Court in *Seattle School District* recognized, "it should be equally clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom.'" *Id.*; *see also id.* (acknowledging that the same was true of policy at issue in *Hunter*).

More important still, the issue of who benefits from a particular policy such as the racial admissions preferences at issue here or the mandatory busing in *Seattle School District* is often sharply disputed. Thus, as Justice Powell explained in *Seattle School District*, "[i]t is far from clear that in the absence of a constitutional violation, mandatory busing necessarily benefits racial minorities or that it is even viewed with favor by racial minorities." *Id.* at 497 n.12; *cf. Crawford*, 458 U.S. at 537 (amendment barring court-ordered busing absent Fourteenth Amendment violation "seeks to confer [a benefit]—neighborhood schooling—[that] is made available regardless of race"). Nor is it undisputed that racial minorities as a whole have benefitted from racially preferential college admissions policies. *See, e.g.*, RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO

HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012).[5]

At bottom, then, the political process doctrine may simply license—or even require—judges to determine, by their own lights, whether policies burdened by state reallocations of decisionmaking authority are or are not "racially beneficial." *Seattle Sch. Dist.*, 458 U.S. at 483. If that is so, the inconsistent and diverging applications of the political process doctrine should come as no surprise. In all events, this amorphous and malleable doctrine has little to recommend it as a principled rule of constitutional law.

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[5] Wholly apart from their (disputed) effect on members of racial minorities afforded preferential treatment, racial preferences plainly operate to the disadvantage of many individuals of other racial minorities, such as Asian Americans, who are denied such preferences. *See, e.g.*, Brief for Richard Sander & Stuart Taylor, Jr. as Amici Curiae in Support of Neither Party at 4 n.4, 16, *Fisher v. University of Tex.*, No.11-345 (U.S. May 29, 2012); Brief for the Louis D. Brandeis Center for Human Rights Under Law, the 80-20 National Asian-American Educational Foundation, *et al.* as Amicus Curiae in Support of Petitioner at 5-9, 13-20, *Fisher v. University of Tex.*, No.11-345 (U.S. May 29, 2012). The harm suffered by Asian Americans under programs employing racial preferences illustrates that one of the political process doctrine's most basic premises—that our national community is divided neatly into a "majority" group and a "minority" group, each of which share collective interests and goals—is both simplistic and counterproductive.

V. The Political Process Doctrine Is Unnecessary To Vindicate the Equal Protection Clause.

Finally, conventional equal protection doctrine—which applies strict scrutiny to laws drawing race-based classifications as well as to facially neutral laws that have a discriminatory purpose—suffices to ferret out "the racial discrimination which it was the object of the Fourteenth Amendment to eliminate" and thus to vindicate "the principle of equality at the heart" of that Amendment. *Loving v. Virginia*, 388 U.S. 1, 11, 12 (1967). Indeed, to the best of our knowledge, this Court has expressly relied on the political process doctrine to invalidate a law only twice in the forty-four years since the doctrine was invented.[6] The rareness with which it has been invoked strongly suggests that the doctrine is dispensable. *Cf.* Pet. App. 96a (Griffin, J., dissenting) ("The infrequent use of the doctrine is not surprising given its lack of a constitutional basis.").

To be sure, this Court's decision in *Seattle School District* likely would have come out differently but for application of the political process doctrine. But we respectfully submit that that decision—which invalidated a popularly enacted consti-

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[6] In addition to the two times this Court has expressly relied on the political process doctrine to invalidate a law, the Court also affirmed without opinion a three-judge district court decision applying the political process doctrine to invalidate a New York law limiting the ability of appointed school boards to employ busing or mandatory school assignments to eliminate *de facto* school segregation. *See Nyquist v. Lee*, 402 U.S. 935 (1971), affirming *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970). This case thus was much like *Seattle School District*. *See* 458 U.S. at 469 (relying on *Lee v. Nyquist*).

tutional amendment that prohibited busing "for racially-balancing purposes" in the absence of a constitutional violation, 458 U.S. at 463, and thus insulated from state control a local busing plan, a subsequent iteration of which was ultimately determined to itself violate the Constitution, *see Parents Involved*, 551 U.S. 701—was not a necessary, or even faithful, application of the Fourteenth Amendment. The decision, accordingly, should be overruled.

By contrast, this Court's decision in *Hunter* likely would have come out the same way even in the absence of the political process doctrine. In that case, after the city council of Akron, Ohio, enacted an ordinance prohibiting housing discrimination based on "race, color, religion, ancestry or national origin," the voters of that city amended the city charter retroactively "to prevent the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters of Akron." *Hunter*, 393 U.S. at 386.

On the facts of *Hunter*, it is difficult to conceive of any reasonable, nondiscriminatory basis for this amendment of the city charter. Accordingly, even assuming this amendment could properly be characterized as facially neutral, it very likely reflected a racially discriminatory purpose. Indeed, *Hunter* may well have presented one of the " 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.' " *Shaw*, 509 U.S. at 643 (quoting *Arlington Heights*, 429 U.S. at 266). For while the city characterized the amendment "simply as a public decision to move slowly in the delicate area of race relations," *Hunter*, 393 U.S. at 392, this Court has made clear that

avoiding "private [racial] biases and the possible injury they might inflict" is not a permissible basis for government action, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.*; *cf. Loving*, 388 U.S. at 11 (law must reflect a "permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate"). Accordingly, the challenged law in *Hunter* almost certainly would have been subject to, and failed, strict scrutiny even under conventional equal protection principles.

* * *

This Court should overrule the political process doctrine. This malleable and unprincipled doctrine invites absurd results, as well illustrated by the decision below. Furthermore, the doctrine is not only unnecessary to redress genuine violations of the Fourteenth Amendment, it is irreconcilable with fundamental principles of equal protection and infringes on the separate sovereignty of the States with respect to matters "central to state self-government." *City of Columbus*, 536 U.S. at 437.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Sixth Circuit invalidating Proposal 2.

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REPLY BRIEF

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In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

AND

CHASE CANTRELL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

> "[A]ny State . . . is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program."

This commonsense conclusion—that states can constitutionally reject the use of race-based preference policies in admissions—comes not from *Grutter*, *Gratz*, or *Fisher*, but from the joint plurality opinion of Justices Brennan, White, Marshall, and Blackmun in *Regents of University of California* v. *Bakke*, 438 U.S. 265, 379 (1978). In other words, even the Justices in *Bakke* who would have upheld a racial *quota* system in university admissions saw no problem with a state's decision to ban racial preferences as a means to achieve a diverse student body. Against this backdrop, Respondents and their *amici* fail to explain how Michigan citizens violated equal protection when they enacted Article 1, § 26, which requires that all applicants to the State's universities be treated equally, without regard to race or sex.

There are three flaws in Respondents' approach. First, Respondents fail to acknowledge that for purposes of an equal-protection analysis, there is a fundamental difference between enacting a new law that creates an *obstacle* to special treatment (e.g., *Hunter* v. *Erickson*, 393 U.S. 385 (1969)), and a new law that *requires* equal treatment (e.g., § 26). A law that eschews the use of race and requires equal treatment cannot be said to "discriminate" on the basis of race. And any contrary conclusion would render every equal-treatment law invalid, including the federal Fair Housing Act.

Second, even Respondents admit that "[r]ace-conscious action that does 'not lead to different treatment based on a classification that tells each [person] he or she is to be defined by race' ordinarily need not satisfy 'strict scrutiny to be found permissible.'" Cantrell Br. 29 (quoting *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring)). The logical corollary is that a law *barring* racial classifications is not itself a racial classification and need not satisfy "strict scrutiny to be found permissible."

Section 26 does not authorize some racial groups to lobby admissions officials while prohibiting others from doing so. Nor does § 26 use a race classification to advantage or disadvantage any race in the admissions process. It prohibits making a racial classification in the first place. Accordingly, there is no basis to subject § 26 to strict scrutiny, or even to apply the political-restructuring doctrine to it at all, unless Respondents can prove discriminatory purpose. And the district court granted summary judgment to the State in part because "plaintiffs cannot show that the measure was enacted with a discriminatory intent," Pet. Supp. App. 319a, a ruling Respondents have never challenged.

Third, a state constitutional amendment is an easier way to change public-university admissions practices than pursuing such changes university by university. And by arguing that Michigan's citizens can eliminate through constitutional amendment the use of alumni preferences or athletic ability but not racial preferences, it is Respondents and their *amici* who single out race for differing treatment.

As its foundation, Respondents' argument contends that 58% of Michigan voters acted with racially discriminatory animus when enacting § 26. But § 26 does not discriminate against race; it discriminates against discrimination. The Sixth Circuit should be reversed.

ARGUMENT

I. Article 1, § 26 does not violate the political-restructuring doctrine because the provision does not create political obstructions to equal treatment. Section 26 is an impediment to *special* treatment.

A distinguishing feature of *Hunter* and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), is that both cases involved new political obstructions to equal treatment. In *Hunter*, it was the repeal of an anti-discrimination law and the new requirement that a proponent amend the city charter to enact a future anti-discrimination law. In *Seattle*, it was the repeal of a busing program adopted to provide "*equal* educational opportunity." 458 U.S. at 479 (emphasis added, quotation omitted).

In stark contrast, § 26 does not create political obstructions to *equal* treatment; § 26 is an impediment to *preferential* treatment. Section 26 does not allocate benefits based on race. Instead, § 26 bans university use of racial preferences altogether. The provision requires equal treatment rather than denying it. Put another way, § 26 does not discriminate based on race; it discriminates against discrimination—the same way strict scrutiny does.

As Michigan explained in its initial brief, Michigan Br. 23, the dizzying logic of Respondents' theory invalidates all manner of laws requiring equal treatment, including the federal Fair Housing Act. That is because any federal law requiring equal treatment (i.e., non-discrimination) would invalidate any state law that attempts to provide racial preferences within the same subject area. The same would be true of any state law as it related to a local law. See *Seattle*, 458 U.S. at 498 n.14 (Powell, J., dissenting) ("Indeed, under the Court's theory one must wonder whether—under the equal protection component of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas").

Respondents argue that federal fair-housing legislation "does not effect an unconstitutional restructuring because federal law already preempts state law." Cantrell Br. 44. But that response only highlights the illogic of Respondents' position. Supremacy Clause preemption comes into play only *after* a court has determined that a federal law is valid. And if Respondents' political-restructuring argument is correct, the federal Fair Housing Act (or any analogous state law) would violate the Equal Protection Clause, meaning the state law allowing preferences would reverse-preempt the federal law requiring equal treatment. The Supremacy Clause would not save federal law that had just been declared unconstitutional. And it cannot possibly be correct that federal laws requiring equal treatment must fall—due to the Equal Protection Clause, of all things—to state or local laws mandating *unequal* treatment, i.e., preferences.

Respondents try to avoid this problem by invoking an irrelevant line of redistricting cases. Respondents assert that when race is "the predominant factor" motivating manipulation of the political process, strict scrutiny applies even when the governmental action does not allocate benefits or burdens. E.g., Cantrell Br. 3 (citing *Bush* v. *Vera*, 517 U.S. 952, 959 (1996), and *Shaw* v. *Reno*, 509 U.S. 630, 641–43 (1993)). Those cases are inapposite.

Bush was a racial gerrymandering case where the Court applied strict scrutiny to congressional redistricting legislation that was so irregular on its face that it could only rationally be viewed as an "effort to segregate races for purposes of voting." 517 U.S. at 958 (per Justice O'Connor, with the Chief Justice and one Justice concurring, and two Justices concurring in the judgment).

Contrary to the position Respondents take here, the *Bush* Court emphasized that strict scrutiny does *not* apply merely because redistricting is performed with consciousness of race. 517 U.S. at 958. Instead, a plaintiff must demonstrate that racial considerations predominated over race-neutral considerations. *Id.* at 964. And there is no evidence that such was the case with § 26, which requires race neutrality.

Similarly, *Shaw* v. *Reno* involved redistricting legislation so extremely irregular that it could be viewed rationally only as an effort to segregate race for purposes of voting. 509 U.S. at 642. Nothing in the opinion suggests the Court was abandoning the requirement that a plaintiff pursuing an equal-protection claim must prove a racial classification or discriminatory intent.

Indeed, the problem in *Shaw* was that the law at issue did exactly the opposite of what § 26 does here—it classified citizens based on race. The plaintiffs in *Shaw* alleged that "the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process." 509 U.S. at 641–42. This Court agreed: "Classification of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their membership in a racial group and incite racial hostility." *Id.* at 643 (citations omitted). Such classification "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes." *Id.* at 647.

This language makes clear that this Court in *Shaw* rejected racial gerrymandering because it classified individuals based on their race, which is abhorrent to the Constitution. Article I, § 26 does not do that; § 26 is a provision that requires race neutrality. And under this Court's well-established equal-protection precedent, there is no basis to invalidate a law that forbids racial preferences and instead requires equal treatment on the basis of race.

II. Article 1, § 26 does not violate the political-restructuring doctrine because Michigan voters did not enact § 26 with a discriminatory purpose, and § 26 does not embody a racial classification.

In *Seattle*, this Court applied the political-restructuring doctrine to strike down a provision of the State of Washington's constitution that allowed cross-district busing of school students for virtually any purpose except racial desegregation. In so holding, the Court explained that "purposeful discrimination is 'the condition that offends the Constitution,'" *id.* at 484 (citations omitted), and the Court articulated two prerequisites for identifying purposeful discrimination:

1. "A *racial classification*, regardless of purported motivation, is presumptively invalid . . . ." *Id.* at 485 (emphasis added, quotation omitted).

2. "[W]hen facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was *designed to accord disparate treatment on the basis of racial considerations*." *Id.* at 484–85 (emphasis added).

Accord *Crawford* v. *Bd. Of Educ.*, 458 U.S. 527, 537–38 (1982) ("even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated *only* if a discriminatory purpose can be shown") (emphasis added).

Here, Respondents cannot prevail on the second standard, because they cannot prove a discriminatory purpose. In granting the State's motion for summary judgment, the district court held that there was no material dispute of fact: "plaintiffs cannot show that the measure was enacted with a discriminatory intent." Pet. Supp. App. 319a. And Respondents have not appealed that ruling. Accordingly, the political-restructuring doctrine's applicability in this case comes down to the first standard: whether § 26 embodies a "racial classification."[1] It does not.

This Court explained what it means for a law to embody a racial classification in *Crawford*. There, California state courts interpreted the California Constitution's equal-protection clause as requiring school desegregation whether *de facto* or *de jure* in origin. 458 U.S. at 530–31. That holding resulted in a state-court order that included a busing plan based "on a racial and ethnic basis." *Id.* at 531. One year later, California voters ratified Proposition I, which limited state-court power to order busing to those instances where a federal court would order busing to remedy a violation of the U.S. Constitution's Equal Protection Clause of the Fourteenth Amendment. *Id.* at 531–32.

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[1] The Cantrell Respondents say that the district court made a "factual finding" that § 26 "is 'unexplainable on grounds other than race.'" Cantrell Br. 47–48 (quoting *Shaw* v. *Reno*, 509 U.S. 630, 643 (1993)). But the Cantrell Respondents provide no citation for the district court's purported "factual finding," which is unsurprising given the summary-judgment context of the district court's ruling. There was no such finding.

Like Respondents in the present case, the *Crawford* plaintiffs argued that Proposition I embodied a "racial classification" and imposed a "'race-specific' burden on minorities." 458 U.S. at 536. And analogous to Respondents' argument here—that individuals may still lobby for non-race-based preferences, such as those based on alumni status—the *Crawford* plaintiffs emphasized that "other state-created rights may be vindicated by the state courts without limitation on remedies." *Id.*

Nonetheless, this Court rejected the suggestion that Proposition I imposed a "racial classification." 458 U.S. at 537. That was because Proposition I "neither says nor implies that persons are to be treated *differently* on account of their race. It simply forbids state courts to order pupil assignment or transportation in the absence of a Fourteenth Amendment violation." *Id.* (emphasis added). "Nor can it be said that Proposition I distorts the political process for racial reasons or that it allocates governmental or judicial power on the basis of a discriminatory principle." *Id.* at 541.

Likewise here. Respondents argue that the "political restructuring doctrine . . . ensur[es] that the political process for making that decision is not itself skewed on the basis of race," and that Michigan voters have attempted to "selectively change the rules of the political process along racial lines." Cantrell Br. 31. But Michigan voters did not skew the political process on the basis of race or change the rules along racial lines. That suggests the law was enacted by a racially discriminatory process or has a racially discriminatory impact. Neither is true.

Section 26 does not embody a racial classification. Section 26 neither says nor implies that university applicants are to be treated *differently* on account of race; to the contrary, § 26 expressly forbids public universities to use race-based preferences in the absence of a Fourteenth Amendment violation. The law makes no racial classification that provides benefit to one class and detriment to another. *No* student can be advantaged (or disadvantaged) based on race, sex, or ethnicity.

Moreover, § 26 does not distort the political process for racial reasons, and it does not allocate government or judicial power on the basis of a discriminatory principle. Quite the opposite, § 26 bars Michigan public universities from using race for any purpose at all. Because § 26 neither embodies a racial classification nor stems from a discriminatory purpose, it cannot violate the political-process doctrine or any other equal-protection theory.

This point is driven home by Respondents' contention that § 26 "needlessly heightens the salience of race in the political process and, by doing so, 'contributes to an escalation of racial hostility and conflict.'" Cantrell Br. 32 (quotation omitted). That is surely wrong. Choosing to create a color-blind system furthers the goals of the Equal Protection Clause, even if the Clause allows some form of affirmative action. To say that a statewide law regarding affirmative action (either forbidding it or approving it) should be barred because it "contribut[es] to an escalation of racial hostility and conflict" is to say that the democratic process should not be allowed to operate on controversial issues relating to race.

Respondents' suggestions also cannot be reconciled with *Crawford*, which makes clear that § 26 is facially neutral and does not embody a racial classification. Consider *Hunter* and *Seattle*, both of which similarly involved facially neutral laws. This Court did not strike those laws down because they embodied a racial classification; rather, the opinions in both cases relied on discriminatory intent. *Hunter* thwarted Akron's attempts to stop private racial discrimination in housing; discriminatory intent is the only logical explanation for why voters would repeal a law requiring equal treatment. *Seattle* involved an initiative that sought to facilitate private discrimination and deny equal treatment. *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196–97 (2003) (noting "evidence of discriminatory intent" in *Seattle*).

In other words, proof "'of racially discriminatory intent or purpose is required' to show a violation of the Equal Protection Clause," *Cuyahoga*, 538 U.S. at 194, even when a neutral law has a disproportionately adverse effect on a racial minority. *Washington* v. *Davis*, 426 U.S. 229, 238–48 (1976); *Crawford*, 458 U.S. at 537–38 ("even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown").

And as explained at length in Michigan's opening brief, there are a multitude of non-discriminatory reasons justifying § 26: a belief that granting a preferential treatment to someone because of that person's race is a type of discrimination; a belief that

race-neutral admissions alternatives can be used successfully to achieve a diverse community, Schuette Br. 31; that such race-neutral alternatives result in higher minority grade-point averages and graduation rates, *id.* at 31, 33; that race-based preferences can result in mismatch that results in minority-student failure, *id.* at 32; that moving away from race-based preferences could increase socioeconomic diversity on college campuses, *id.* at 34; and that admitting more students from economically disadvantaged high schools may raise the aspirations and performance of many students at such schools, *id.* at 35.

The question is not who is right and who is wrong about whether preferences ultimately help or hurt minorities. Rather, the question is whether Michigan's citizens were motivated by discriminatory intent and no other factor when they cast their vote for § 26. And the answer to that question is an unequivocal no, as the district court concluded. Pet. Supp. App. 319a ("plaintiffs cannot show that the measure was enacted with a discriminatory intent"). And in the absence of such intent or a facial racial classification, there is no equal-protection violation.

As noted in Michigan's initial brief, there is an additional reason why *Seattle* is easily distinguishable from this case: all nine Justices in *Seattle* agreed, in a footnoted discussion, that the Court's holding would not apply to the situation where a higher authority attempted to override an admission committee's decision to develop an affirmative action plan. Schuette Br. 19 (citing *Seattle*, 458 U.S. at 498 n.14 (Powell, J., dissenting), and *id.* at 480 n.23 (majority opinion)).

The Cantrell Respondents interpret these two competing footnotes differently, suggesting that the *Seattle* majority was only responding to Justice Powell's argument "that the majority's holding would prevent any other entity *within a university* from overruling an admission committee's decision to adopt race-conscious admission programs." Cantrell Br. 43. In Respondents' view, Justice Powell provided "no discussion of whether state law changed the locus of plenary decisionmaking authority for this racial issue." *Id.*

But that position is impossible to reconcile with what Justice Powell actually said in footnote 14 of his *Seattle* dissent. The footnote is *entirely* about changing the locus of political authority:

> The Court's decision intrudes deeply into normal state decisionmaking. Under its holding *the people of the State* of Washington apparently are forever barred from developing a different policy on mandatory busing where *a school district* previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. Thus, if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional *for any higher authority* to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the dean of the law school, the faculty of the university as a whole, the university president, the chancellor of the university system, and the

> board of regents might be powerless to intervene despite their greater authority under state law.
>
> After today's decision, it is unclear whether *the State* may set policy in any area of race relations where a *local governmental body* arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, *the State* apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder whether—under the equal protection component of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas. [*Seattle*, 458 U.S. at 498 n.14 (Powell, J., dissenting) (emphasis added).]

What Justice Powell describes is exactly what is at issue here. So when the majority dismisses Justice Powell's parade of horribles as having "nothing to do with the ability of minorities to participate in the process of self-government," the *Seattle* majority is rejecting *Seattle*'s application to the facts of this case.

When pressed, even Respondents are forced to acknowledge that "[r]ace-conscious action that does 'not lead to different treatment based on a classification that tells each [person] he or she is to be defined by race' ordinarily need not satisfy 'strict scrutiny to be found permissible.'" Cantrell Br. 29 (quoting *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring)). The logical corollary is that a law *barring* racial classifications is not itself a racial

classification and need not satisfy "strict scrutiny to be found permissible." Accordingly, there is no basis to subject § 26 to strict scrutiny, or even to apply the political-restructuring doctrine to it at all.

Any lingering doubt about the validity of Respondents' theory is dispelled when they try to distinguish § 26 from analogous situations. For example, Respondents say that Congress or the President could ban affirmative action at West Point and other military academies without being subject to strict scrutiny. This is so, say Respondents, because "Congress has plenary authority over the military academies and any delegated authority remains subject to ultimate congressional control. . . . The political restructuring doctrine is implicated only when the locus of plenary decisionmaking authority is changed. Modifying or withdrawing a lawful delegation of authority to a subsidiary governmental decisionmaker does not alter the locus of ultimate decisionmaking authority." Cantrell Br. 45 (citation omitted). But why should Congress' plenary authority over the military academies matter? Congress is doing in the hypothetical just what Respondents complain Michigan voters did, which is remove the issue from individual school control to centralized government control. Neither a West Point cadet nor a UM student can lobby a school official after the policy change.

In sum, Respondents' misunderstand *Seattle* to the extent they believe *Seattle* does not require proof of a racial classification or discriminatory intent. And if Respondents have properly interpreted *Seattle*, then *Seattle* should be limited or overruled.

III. Article 1, § 26 does not create a political process for changing university admissions policies that is any more difficult than the pre-§ 26 political process.

As Michigan explained in its initial brief, the reality of the university-admissions policy-setting environment bears little resemblance to a true political process, one where the polity has both access to and a meaningful ability to change public policy. For example, only the Wayne State Law School faculty has the authority to approve the admissions policy; it is not subject to approval by the Wayne State University Board of Governors. J.A. 21. And as the Law School's Dean testified, if the Board of Governors sought to change the policy, that action "would precipitate a constitutional crisis." J.A. 22.

Respondents look past this record evidence and instead try to make the case that university boards of trustees are legally empowered with overseeing all day-to-day operations at Michigan's public universities, including admissions. E.g., Bd. of Governors of Wayne State Univ. Br. 1–25; Regents of the Univ. of Mich. Br. 4–17. This proposition may be true as a theoretical matter, but it certainly is not reflected in the actual university practice.

In any event, even if one accepts Respondents' proposition, that does not alter the reality that § 26 actually had the effect of making it *easier* for interest groups to change university admissions policies. Consider the political-process hoops that an advocate had to jump through before § 26 and compare them with the process that applies now:

Before	After
• Elect at least 5 of 8 University of Michigan Trustees, no more than two at a time in statewide elections held only every other year.	• Obtain petition signatures equal to 10% of the total vote cast for all candidates for governor in the preceding general election.
• Elect at least 5 of 8 Michigan State University Trustees, no more than two at a time in statewide elections held only every other year.	• Obtain a majority vote in a single statewide election.
• Elect at least 5 of 8 Wayne State University Trustees, no more than two at a time in statewide elections held only every other year.	
• Elect a Governor in a statewide election to appoint favorable Trustees at Michigan's dozen other public universities.	
• Hope, after this eight-year process, that each Board of Trustee member lives up to campaign promises and is willing to battle university faculty members for control of the admissions process.	

So while there is a modest barrier to entry—a 10% signature requirement (a prerequisite that was satisfied by six different initiative efforts in Michigan's 2012 election cycle alone), the political process post-§ 26 requires only a single statewide vote on a single issue. In contrast, the political process pre-§ 26 was much more elaborate, requiring many statewide elections of multiple individuals over a period of many years, followed by the hope that the successfully elected officials will in fact take action.

Respondents provide examples of how Michigan can amend its Constitution without running afoul of Respondents' rule, e.g., by restructuring the admissions process so that only GPA and SAT scores matter, or transferring all authority over admissions to the state legislature or some other political body. Cantrell Br. 58–59. These proposals are so radical (and therefore unlikely to be adopted) that, as a practical matter, Respondents' position is that Michigan's citizens may not eliminate affirmative action in their state universities. That position *does* single out race, and the conclusion cannot be reconciled with *Grutter*, which recognized that affirmative-action policies are in serious tension with the Fourteenth Amendment.

In light of the above facts, it is not possible to say that Respondents have carried their burden of demonstrating that § 26 increased the political burden on any individual or group seeking to lobby for different admission standards. This reality provides a separate and independent reason for upholding § 26.

IV. Response to Respondents' and *amici*'s remaining arguments

Once it is clear that § 26 (1) does not embody a racial classification, (2) is not a result of a discriminatory purpose, (3) does not create a bar to equal treatment (but rather requires it), and (4) makes the political process for amending university-admission policies easier, not harder, there is very little over which to argue. That said, a few additional points advanced by Respondents are worth addressing.

First, the Sixth Circuit *en banc* majority correctly held that a political-restructuring claim requires proof that an enactment like § 26 that targets a "policy or program that 'inures primarily to the benefit of the minority, *and is designed for that purpose*.'" Pet. App. 22a (citing *Seattle*, 458 U.S. at 467, 472) (emphasis added). As Michigan explained in its initial brief, that is a prerequisite Respondents cannot satisfy here, because the type of admissions policy for which Respondents would like to lobby—a *Grutter* plan—cannot be designed to benefit primarily a minority individual or group; it must be a policy that advances the educational benefit of the entire student body. *Grutter* v. *Bollinger*, 539 U.S. 306, 330–33 (2003).

Respondents have no answer to that problem, so they abandon the Sixth Circuit's approach and argue that the political-restructuring doctrine is not limited to programs that inure primarily to the benefit of the minority: "The Court's observations in *Hunter* and *Seattle* that the program affected by the restructuring of the political process 'inure[d] to the benefit of the minority,' and that the restructuring

thus 'place[d] special burden on racial minorities,' were empirically accurate based on the record in each case and *do not limit the political restructuring doctrine's application*." Cantrell Br. 34 (emphasis added, quotations omitted).

Respondents' argument is a striking departure from this Court's political-restructuring precedent. E.g., *Seattle*, 458 U.S. at 471–72 ("It is beyond dispute, then, that the initiative was enacted because of, not merely in spite of, its adverse effects upon busing for integration [because] . . . desegregation of the public schools, like the Akron open housing ordinance, at bottom insures primarily to the benefit of the minority, and is designed for that purpose.") (citations omitted). And the fact that Respondents feel it necessary to disavow this Court's core language in *Seattle* demonstrates that Respondents cannot prevail in this case unless the Court is willing to expand the political-restructuring doctrine well beyond its present form.

Second, Respondents distinguish *Crawford* as a case involving "the simple repeal or modification of desegregation or antidiscrimination laws." Cantrell Br. 42. But *Crawford* was much more than that. As explained above, the California constitutional amendment changed the political process by prohibiting state courts from ordering busing to desegregate the schools except in the circumstance where the Fourteenth Amendment required it. Yet this Court upheld the amendment because it did not classify based on race, did not exhibit discriminatory intent, and did not eliminate equal treatment.

Third, the Coalition Respondents make the separate argument that § 26 violates equal-protection principles by prohibiting public universities from assuring opportunity and achieving diversity. Coalition Br. 52–61. But the Coalition Respondents cite no authority for this proposition, and no court (including the Sixth Circuit *en banc* majority) has ever endorsed it. This Court should not be the first.

Finally, the University of Michigan asserts—with no record or statistical support other than the self-serving testimony of its own officials—that it cannot possibly achieve the benefits of a diverse student body solely by adopting a race-neutral admission plan. (Regents of the Univ. of Mich. Br. 18–25.) This point is irrelevant to the legal question of whether § 26 violates the political-restructuring doctrine. But it is also difficult to understand in light of the University's own published admissions statistics, numbers which are noticeably absent from the University's brief.

In a press release recounting the makeup of the University's first freshman class post § 26 (the freshman class entering in 2008), the University noted that the percentage of underrepresented minorities ("African Americans," "Hispanic Americans," and "Native Americans") in the class was "relatively unchanged" at 10.47%, versus 10.85% for the class entering in 2007.[2]

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[2] http://ns.umich.edu/new/releases/6609.

Then a strange thing happened. Beginning with the class of 2010 freshmen, the University allowed incoming students to check multiple boxes representing each student's applicable race category.[3] And for reasons that are unclear, the *amici* use the enrollment percentages for only those students who identified *single* races/ethnicities (e.g. "African American," "Hispanic American")—as though a student's decision to check the multi-racial box brings no diversity to campus.

For example, the *amici* brief of the Society of American Law Teachers in Support of Respondents reports that in the 2012 entering class, only 8.1% of enrolling freshmen were "African American" or "Hispanic American," a number the Teachers say is 15 to 22% below pre-§ 26 figures. (Society *Amici* Br. 16 & Appendix.) But when the students who checked "Two or More" racial boxes are included, that number jumps to 11.07%,[4] a figure which is actually *higher* than the pre-§ 26 percentage (10.85%) for underrepresented minority students. And the 11.07% figure does not even include (1) categories of other traditionally underrepresented students, e.g., "Native Americans," (2) students whose race or ethnicity is "Unknown," or (3) students who are "Non-Resident Aliens." So the figure touted by Respondents' *amici* excludes students from Mexico, who apparently cannot bring racial or ethnic diversity to campus like students who live in the United States and identify themselves as "Hispanic Americans."

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[3] http://sitemaker.umich.edu/obpinfo/files/umaa_freshprofmaxfa12update.pdf.

[4] http://ro.umich.edu/report/12fa844.xlsx ([271+228+184]/6171).

But just sticking with the check-box categories "African American," "Hispanic American," and "Two or More," the percentage of enrolling freshmen selecting these boxes exceeded the pre-§ 26 underrepresented-minority-student enrollment percentage (10.85%) every single year since the University started this new way of tracking student racial identity: 2010—11.83%,[5] 2011—11.81%,[6] and 2012—11.07%. So the publicly available statistics, muddled as they are, do not appear to support the precipitous drop in minority enrollment § 26 opponents claim.

It is also difficult to know how the University would fare under a plan that placed greater emphasis on finishing near the top of a high school class or on a disadvantaged socioeconomic status. Many high schools located in the City of Detroit are both poor and predominantly African American. Yet the record reflects that in the 2005 admission year, the University did not offer a single admission to any student in 14 poor and highly segregated (African American majority) Detroit high schools. Coalition Resp. Br., Ex. J., Miller Decl. at 9. Is it really the case that there wasn't a single qualified student at any of these 14 high schools to whom the University could make an admission offer? The State has no way to know, but it is difficult to take the University's assertion seriously when such practices come to light.

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[5] http://ro.umich.edu/report/10fa844.xls ([283+275+211]/6496).

[6] http://ro.umich.edu/report/11fa844.xlsx ([276+267+195]/6251).

The larger point is that Michigan citizens have chosen to get out of the sordid business of categorizing individuals by race and sex. The people of Michigan do not want their public-university officials debating whether a multi-racial student adds ethnic or racial diversity, whether a "Hispanic American" lessens racial isolation and stereotypes on campus to a greater degree than a foreign-born Latino student, or whether Cubans should be discounted entirely as adding any underrepresented diversity because "Cubans are Republicans." Schuette Br. 27 (quoting *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting)). Michigan's citizens have pursued a "race-neutral alternative[ ]." *Grutter*, 539 U.S. at 342.

* * *

Respondents agree that "[t]o make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome." Cantrell Br. 4–5 (quoting *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring)). That is why the only "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748. Section 26 tries to embrace that principle as well as this Court's invitation in *Grutter* to experiment with race-neutral alternatives to the historic practice of checkbox diversity. 539 U.S. at 342.

Michigan appreciates that there are many differing views about the benefits and detriments of race-conscious admissions programs. But its citizens resolved the debate as a matter of policy when they adopted § 26. There is nothing unconstitutional about making that legitimate choice.

CONCLUSION

The court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE AMERICAN CIVIL RIGHTS UNION AND THE AMERICAN CIVIL RIGHTS INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Rights Union (ACRU) is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by the long-time policy advisor to President Reagan and architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and he originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the ACRU's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for all parties have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell; and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because the ACRU is concerned to protect the equal rights of all citizens, regardless of what may socially be considered the "politically correct" views on any issue.

The American Civil Rights Institute (ACRI) is a nonprofit research and educational organization headquartered in Sacramento, California. ACRI monitors and researches laws that ban the government's use of race, sex, or ethnicity in public contracting, public education, or public employment. ACRI devotes significant time and resources to the study of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. Ward Connerly, chairman of the ballot initiative for California's Proposition 209, is a member of the Board of Directors for ACRI. ACRI has participated as *amicus curiae* in numerous cases relevant to the issue of race and racial classification, including but not limited to *Fisher v. University of Texas at Austin*, No. 11-345, 570 U.S. ___ (June 24, 2013); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF THE ARGUMENT

For the reasons stated by Petitioner Bill Schuette and Respondent Eric Russell, this Court's political-restructuring doctrine is not applicable in this case, and in any event should be overruled. Moreover, even if Section 26 of Article I of the Michigan Constitution ("Proposal 2") were subject to heightened scrutiny under this Court's political-restructuring cases, it would pass muster. Proposal 2 is narrowly tailored to advance the compelling state interest in guaranteeing equal treatment on the basis of race in merit-based competitions for limited state benefits.

I. Guaranteeing equal treatment by the State on the basis of race is unquestionably a compelling government interest.

This Court's cases have identified at least eight distinct harms inherent in the State's imposition of racial classifications.

First, the abolition of all state-imposed racial classifications is the central purpose and ultimate aspiration of the Fourteenth Amendment. Accordingly, the use of such classifications by the State inflicts an injury upon fundamental constitutional values.

Second, this Court's cases have frequently observed that state-imposed racial classifications pose a basic affront to the dignity of the persons classified. The Fifth and Fourteenth Amendments protect individuals, not groups, and the race-based

grouping of individuals by the State demeans individual dignity.

Third, even when used for purportedly benign purposes, racial classifications frequently mask invidious stereotypes and unconscious prejudices. This Court's cases universally call for close scrutiny of racial classifications to "ferret out" such lurking malignity.

Fourth, the imposition of racial classifications in the award of government benefits involves an inherent injustice to members of disfavored groups. Racial-preference schemes unjustly impose the costs of remedying past discrimination on individuals who have no personal responsibility for the prior wrongs.

Fifth, racial classifications inevitably stigmatize both favored and disfavored groups. Members of preferred groups suffer from the unjust stigma that they are inherently incapable of competing on an even footing. Members of disfavored groups are branded with the charge that they share responsibility for previous wrongs. These stigmatic harms threaten to entrench racial prejudices, rather than alleviate them.

Sixth, as this Court has often observed, racial classifications promote hostility among members of the various affected groups by sowing seeds of division along racial lines.

Seventh, racial classifications threaten to undermine confidence in government by injecting racialism into state and local politics, and by causing

interest groups to organize on racial lines to jockey for preferred status in racial-preference programs.

Eighth, in the specific context of selective educational programs, a burgeoning body of empirical evidence indicates that racial preferences actually harm their intended beneficiaries by systematically mismatching minority students with programs where their risk of underperformance is heightened.

The numerous harms of racial preferences are aggravated when the State injects racial considerations into competitive schemes for awarding limited benefits on the basis of merit, such as government jobs, government contracts, and admission to selective state-run universities.

Proposal 2 thus advances an unquestionably compelling government interest in guaranteeing equal treatment by the State on the basis of race in such competitive, merit-based award schemes.

II. Proposal 2 is precisely tailored to achieve its compelling interest in eliminating racial classifications in the award of government jobs, government contracts, and admission to state-run educational programs.

Proposal 2 is not overinclusive. It is precisely tailored to eliminate the State's use of racial classifications in the covered areas, because it simply bans the State's use of racial classifications in these areas. The fact that Proposal 2 also guarantees equal treatment on the bases of sex, color, ethnicity,

and national origin does not render it overinclusive. The State has similarly compelling reasons to guarantee equal treatment on those parallel grounds.

Proposal 2 is not underinclusive. This Court's cases permit the State to focus on areas of particularly grave concern without running afoul of strict scrutiny. By guaranteeing equal treatment by the State in the operation of public employment, public education, and public contracting, Proposal 2 addresses the three key areas in which state governments have most often used race along with merit as a criterion in competitive award schemes. The harms of racial classifications are greatly heightened when used in such merit-based award schemes.

There is no viable "race-neutral alternative" that would advance the State's compelling interest. Indeed, as a guarantee of race-neutrality, Proposal 2 is itself race-neutral. Moreover, there is no alternative method of prohibiting state-imposed racial classifications without mentioning race.

Finally, Proposal 2 is the least restrictive means of advancing the State's interest in eliminating state-imposed racial classifications. A state constitutional amendment is necessary to limit state officials' power to employ racial classifications and to insulate state officials from the considerable political pressures calling for the use of racial classifications in competitive contexts.

III. Though Petitioner did not raise the argument that Proposal 2 advances a compelling state interest in the court below, this Court may prudently rule on this ground. From time to time, this Court has exercised its discretion to rule upon grounds raised only by *amici curiae*. Moreover, the argument that Proposal 2 withstands strict scrutiny was raised by an intervenor both in the district court and on appeal.

For the foregoing reasons, even if strict scrutiny were to apply, Proposal 2 would pass muster because it is precisely tailored to advance the compelling government interest in guaranteeing equal treatment by the State on the basis of race in the merit-based competitions for limited government benefits.

ARGUMENT

I. Proposal 2 Advances the State's Compelling Interest in Guaranteeing Equal Treatment on the Basis of Race in the Merit-Based Award of Limited Government Benefits.

For the reasons stated by Petitioner Bill Schuette, this Court's political-restructuring cases, *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), are not applicable in this case. Brief for Petitioner, at 17-37 (June 24, 2013). Moreover, for the reasons stated by Respondent Eric Russell, the political-restructuring doctrine should be overruled. Brief for Respondent Eric Russell in Support of Petitioner, at 6-34 (June 24, 2013).

Moreover, even if Proposal 2 were subject to "the strict scrutiny applied to explicit racial classifications," *Seattle Sch. Dist. No. 1*, 458 U.S. at 485 n.28, it would pass muster. Guaranteeing equal treatment by the government on the basis of race is a compelling state interest. Proposal 2 advances this compelling interest by mandating equal treatment on the basis of race in three critical areas in which state governments allocate limited benefits to their citizens on the basis of merit: public employment, public education, and public contracting.

A. Eight grave harms, all recognized in this Court's cases, inhere in the government's use of explicit racial classifications.

"Over the years, this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "Racial classifications of any sort pose the risk of lasting harm to our society." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). This Court's cases have identified at least eight distinct "lasting harm[s]," *id.*, inherent in the government's use of racial classifications. Singly and in combination, these grave harms establish that guaranteeing equal treatment by the government on the basis of race is a compelling state interest.

1. Guaranteeing equal treatment by the States on the basis of race is the central purpose of the Fourteenth Amendment.

First, this Court's cases emphasize that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), *quoted in Grutter v. Bollinger*, 539 U.S. 306, 341 (2003). "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388

U.S. at 10; *see also Shaw*, 509 U.S. at 642. "The most avid proponents of the post-war Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.'" *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954). "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

Accordingly, any imposition of racial classifications by the State does violence to the fundamental constitutional principle of racial equality. This Court's cases universally recognize that the ultimate aspiration of the Fourteenth Amendment is the complete elimination of state-imposed racial classifications. "[A]s an aspiration, Justice Harlan's axiom" of a color-blind Constitution "must command our assent." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Given this ultimate purpose, this Court's cases that permit limited race-conscious programs stress that the Fourteenth Amendment includes a "requirement that all governmental use of race must have a logical end point." *Grutter*, 539 U.S. at 342.

Eliminating the "governmental use of race," *id.*, is therefore a compelling state interest. Indeed, because of its fundamental nexus to the Fourteenth Amendment, this interest occupies a uniquely privileged position in the pantheon of our constitutional values. In 1880, this Court instructed that the Fourteenth Amendment "declar[es] that the law in the States shall be the same for the black as for the white," and that "all persons, whether colored or white, shall stand equal before the laws of the States." *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880), *quoted in Brown*, 347 U.S. at 490 n.5. This Court continues to assert this principle today. "Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment).

2. State-imposed racial classifications pose an affront to the dignity of individuals.

This Court's cases have frequently recognized that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment). "[E]very time

the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part); *see also Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) (observing that race-based classifications have been used by governments to "destroy the dignity of the individual").

Thus, racial classifications are at odds with the Constitution's fundamental aspiration to treat each human being as an individual with unique dignity, rather than as a member of a racial category. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.); *see also Adarand*, 515 U.S. at 227 (recognizing "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups").

Due to this affront to individual dignity, opinions of this Court have expressed deep discomfort with the government's adoption of criteria for defining membership in racial groups as necessary incidents of racial-classification programs. For example, in *Parents Involved*, the controlling opinion observed that a school district conducting a race-based pupil assignment program had failed to explain why "it has employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions," and reasoned that "[c]rude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand." 551 U.S. at 786, 798 (Kennedy, J., concurring in part and concurring in

the judgment). Likewise, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), considering the validity of the FCC's set-aside program for minority broadcasters, one dissenting opinion criticized the majority for "fail[ing] to address the difficulties, both practical and constitutional, with the task of defining members of racial groups," *id.* at 633 n.1 (Kennedy, J., dissenting), and noted that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting)). Another opinion, in *Fullilove*, noted that "[l]aws that operate on the basis of race require definitions of race," and predicted that, under race-conscious remedial programs, "our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white." *Fullilove*, 448 U.S. at 531 (Stewart, J., dissenting). The inherent indignity of such state-imposed racial definitions necessarily accompanies virtually any system of state-imposed racial classifications.

3. Even purportedly benign racial classifications frequently mask invidious purposes or subconscious prejudices.

Third, there is general agreement in this Court that even purportedly benign racial classifications often mask invidious prejudices or subconscious stereotypes, and must therefore be viewed with corresponding skepticism. "Racial classifications raise special fears that they are motivated by an

invidious purpose," and thus "searching judicial inquiry" is required to determine "what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Johnson v. California*, 543 U.S. 499, 505-06 (2005) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)); *see also id.* at 519 (Stevens, J., dissenting) (commenting that the prison's purportedly benign policy of race-based segregation of inmates "is based on racial stereotypes and outmoded fears" to which "[t]his Court should give no credence").

This Court's skeptical scrutiny of racial classifications arises in part from "a legitimate fear that racial distinctions will again be used as a means to persecute individuals, while couched in benign phraseology." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 310 (1986) (Marshall, J., dissenting). After all, "[p]olicies of racial separation and preference are almost always justified as benign." *Metro Broad.*, 497 U.S. at 635 (Kennedy, J., dissenting). "It is therefore irrelevant that a system of racial preferences ... may seem benign." *Fisher v. Univ. of Tex. at Austin*, No. 11-345, 570 U.S. ___, slip op. at 6 (June 24, 2013). Due to the omnipresent risk that putatively benign classifications may rest on invidious or unconscious prejudices, "[c]lose review is needed to 'ferret out classifications in reality malign, but masquerading as benign.'" *Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting)) (quoting *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting)).

4. Racial classifications inflict an inherent injustice upon individuals disfavored on the irrelevant basis of race.

Fourth, "there are serious problems of justice connected with the idea of [racial] preference itself." *Bakke*, 438 U.S. at 298 (opinion of Powell, J.), *quoted in Grutter*, 539 U.S. at 341. The allocation of benefits and burdens by the government on the basis of race, even for remedial purposes, is inherently unjust because it imposes the costs of remediation on individuals who are not personally responsible for prior discrimination. Unavoidably, "there is a measure of inequity in forcing innocent persons ... to bear the burdens of redressing grievances not of their making." *Bakke*, 438 U.S. at 298 (opinion of Powell, J.).

Needless to say, consideration of race is "in most circumstances irrelevant" to government decisions, "and therefore prohibited." *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). "The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government." *Fullilove*, 448 U.S. at 519 (Stewart, J., dissenting). Reliance on such an "irrelevant" characteristic is inherently unjust to those who lack that characteristic.

To be sure, this Court has occasionally held that imposing such injustices may be permissible in

limited circumstances to achieve certain compelling ends. But this Court's opinions have remained cognizant of the inherent injustice of racial classifications. *See, e.g.*, *Adarand*, 515 U.S. at 270 (Souter, J., dissenting) (observing that the result of remedial racial preferences "may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct"); *id.* at 276 (Ginsburg, J., dissenting) (similar); *Wygant*, 476 U.S. at 281 (plurality opinion).

Accordingly, "it is important not to lose sight of the fact that even 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race." *Croson*, 488 U.S. at 527 (Scalia, J., concurring in the judgment); *see also id.* at 516 (Stevens, J., concurring in part and concurring in the judgment) ("Imposing a common burden on such a disparate class [of white contractors] merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason.").

Moreover, the inherent injustice of racial classifications falls on members of other minority groups as well. *See, e.g.*, *Fisher*, No. 11-345, 570 U.S. ___, slip op. at 17 (Thomas, J., concurring) ("There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race."); *Metro Broad.*, 497 U.S. at 633 (Kennedy, J., dissenting) ("[T]he discriminatory policies upheld

today operate to exclude the many racial and ethnic *minorities* that have not made the Commission's list.").

5. Racial classifications stigmatize both favored and disfavored races and thus entrench racial prejudices.

Fifth, state-imposed racial classifications impose stigma on individuals of both favored and disfavored races, and thus such classifications tend to entrench racial prejudices.

This Court has often recognized that racial classifications inflict stigma upon members of the favored race by implying that they are incapable of competing for selective benefits on an even footing. "Special preferences ... can foster the view that members of the favored groups are inherently less able to compete on their own." *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting). Any state scheme involving racial preferences will "inevitably [be] perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." *Adarand*, 515 U.S. at 229 (quoting *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting)). Racial classifications thus threaten to "stamp minorities with a badge of inferiority." *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting) (quoting *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment)). Again, even those of this Court's opinions that would uphold the use of racial classifications for remedial purposes have acknowledged the gravity of these

stigmatic harms. *See, e.g.*, *Adarand*, 515 U.S. at 249 n.5 (Stevens, J., dissenting) (agreeing that such stigmatic harms "may be more significant than many people realize").

This stigma is especially noxious to those minority individuals who are fully qualified to receive competitive awards without the assistance of preferences. "When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma...." *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting); *see also Fisher*, No. 11-345, 570 U.S. ___, slip op. at 19-20 (Thomas, J., concurring).

Moreover, such racial classifications impose a different, but equally unfair, stigma on members of the disfavored group. Classifying by race, even for preferential purposes, unjustly "stigmatizes the disadvantaged class with the unproven charge of past racial discrimination." *Croson*, 488 U.S. at 516 (Stevens, J., concurring in part and concurring in the judgment).

Thus, "[c]lassifications based on race carry a danger of stigmatic harm" and "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U.S. at 493 (plurality opinion). For these reasons, this Court has often cautioned that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship

to individual worth." *Bakke*, 438 U.S. at 298 (opinion of Powell, J.). "To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome." *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment).

6. Racial classifications promote hostility and divisiveness between the affected groups.

Sixth, racial classifications promote hostility and divisiveness, rather than unity, between individuals in the affected groups. In *Parents Involved*, for example, the race-based assignment programs were invalidated in part because "[g]overnmental classifications that command people to march in different directions based on racial typologies cause new divisiveness" and "lead to corrosive discourse." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment). In *Johnson v. California*, this Court noted that the segregation of inmates on racial lines threatened to "breed further hostility among prisoners and reinforce racial and ethnic divisions" by "perpetuating the notion that race matters most." 543 U.S. at 507.

"In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). "The dangers of such [racial] classifications are clear. They endorse race-based reasoning and the conception of a Nation divided

into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting); *see also id.* at 636 (Kennedy, J., dissenting) (noting that racial preferences "foster intolerance and antagonism against the entire membership of the favored classes") (quoting *Fullilove*, 448 U.S. at 547 (Stevens, J., dissenting)).

7. Racial classifications undermine confidence in government by fostering racialism in politics.

Seventh, any state-imposed system of racial classifications risks undermining confidence in government by injecting unseemly racialism into the political process. "Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting); *see also Miller v. Johnson*, 515 U.S. 900, 912 (1995) (observing that "[r]acial classifications with respect to voting ... may balkanize us into competing racial factions" and "carry us further from the goal of a political system in which race no longer matters") (quoting *Shaw*, 509 U.S. at 657).

"[R]ightly or wrongly, special preference programs often are perceived as targets for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of minority inclusion." *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting).

This Court's cases contain specific examples of instances in which state-imposed racial classifications have injected racialism into the political process. For example, the racial assignment schemes invalidated in *Parents Involved* risked making racial classifications into "a bargaining chip in the political process," which "threaten[ed] to reduce children to racial chits valued and traded according to one school's supply and another's demand." 551 U.S. at 797-98 (Kennedy, J., concurring in part and concurring in the judgment). Similarly, the minority set-aside at issue in *Fullilove* raised concerns that the racial preferences had become an occasion for voting blocs of legislators, organized on racial lines, to seek "a piece of the action" for their members. *Fullilove*, 448 U.S. at 539 (Stevens, J., dissenting), *quoted in Croson*, 488 U.S. at 511 (plurality opinion); *see also id.* at 536, 542. These cases illustrate the danger that "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement" could become "lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Croson*, 488 U.S. at 505-06 (plurality opinion).

When politics become racialized in this manner, public confidence in government and in the constitutional ideals on which government is based inevitably suffers. Thus, in *Rice v. Cayetano*, this Court stated that "the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons

whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions." 528 U.S. 495, 517 (2000).

8. Empirical evidence indicates that racial preferences in education harm their putative beneficiaries.

Finally, a burgeoning body of empirical evidence indicates that, in the specific context of university admissions, racial-preference schemes ultimately injure their intended beneficiaries by "mismatching" them with selective programs in which they are at greater risk of underperformance. *See Fisher*, No. 11-345, 570 U.S. ___, slip op. at 17-18 (Thomas, J., concurring) (citing, *inter alia*, Brief of Richard Sander & Stuart Taylor, Jr. as *Amici Curiae* in Support of Neither Party, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. May 29, 2012)); *see generally* RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH (2012). These empirical studies indicate that "racial engineering does in fact have insidious consequences" for its putative beneficiaries. *Fisher*, No. 11-345, 570 U.S. ___, slip op. at 17 (Thomas, J., concurring). The "substantial gap" in merit-based admissions criteria leads to a "pervasive shifting effect" in the mismatch of minority students across institutions of higher education, and the overall effect is systematic underperformance by minority students. *Id.* at 17-18. Such evidence provides further support for the compelling nature of the State's interest in eliminating racial preferences.

For all eight of the foregoing reasons, the elimination of state-imposed racial classifications is

unquestionably a compelling state interest. It is squarely within the power of the State of Michigan, and its voters, to assert that "we are just one race here. It is American." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

B. The harms caused by racial classifications are aggravated when the State uses race in merit-based competitions for limited benefits.

Furthermore, the harms and risks caused by state-imposed racial classifications are particularly acute when the State uses racial classifications in merit-based, competitive schemes for the award of limited government benefits. Even in the rare circumstances where it is constitutionally permissible, "governmental classification on the immutable characteristic of race runs counter to the deep national belief that state-sanctioned benefits and burdens should bear some relationship to individual merit and responsibility." *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in the judgment). This "deep national belief" in favor of awards on the basis of "individual merit and responsibility," *id.*, is particularly entrenched with respect to government benefits in limited supply that are typically awarded on the basis of merit—such as government contracts, government jobs, and admission to selective state universities.

For these reasons, in contending that certain race-based pupil assignment programs should be upheld, the principal dissent in *Parents Involved*

took pains to emphasize that "[t]his context is *not* a context that involves the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply." 551 U.S. at 834 (Breyer, J., dissenting). The opinion thus acknowledged racial classifications become more harmful when the government relies on race as it "seek[s] to award a scarce commodity on the basis of merit." *Id.* at 835.

Indeed, most, if not all, of the eight harms associated with racial classifications identified in this Court's opinions, discussed above, are aggravated when race is used instead of merit in awarding competitive benefits. For example, the stigma imposed on members of preferred minorities is most acute when applied to merit-based selections, because such programs most strongly imply that the members of the preferred groups "are inherently less able to compete on their own." *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting); *see supra* Part I.A.5. For very similar reasons, injecting racial criteria into merit-based selection schemes bears a heightened risk of masking unconscious prejudices that the preferred minorities do in fact require such preferences to compete. *See supra* Part I.A.3. Particularly when substituted for merit, then, racial classifications threaten to produce a vicious cycle in which the stigma imposed on preferred minorities both arises from and reinforces unconscious and paternalistic racial stereotypes.

Furthermore, such a cycle of stigma renders the affront to personal dignity imposed by racial classifications even more acute. *See supra* Part I.A.2.

Likewise, the inherent injustice of making awards based on the irrelevant characteristic of race is heightened when race is used in merit-based selection schemes, because those denied benefits have a stronger claim that they actually deserved what was granted to another because of race. *See supra* Part I.A.4. And because it involves greater stigma and more profound injustice, the risk of increased resentment, hostility, and divisiveness on racial grounds is all the greater when competitive benefits are granted and denied on the basis of race. *See supra* Part I.A.6. Again, the injection of racial preferences into competitive award schemes is most likely to promote racialization of state and local politics, as such preferences encourage groups to balkanize along racial lines and jockey for the preferred status. *See supra* Part I.A.7. Finally, the empirical evidence of harm due to mismatch of putative beneficiaries has specific application in the context of admission to selective educational programs. *See supra* Part I.A.8.

In other words, the State's interest in eliminating racial classifications is uniquely compelling in the areas in which state government allocates competitive benefits based on merit—most notably, government jobs, government contracts, and admission to state-run educational institutions.

For the foregoing reasons, Proposal 2 advances the compelling state interest of guaranteeing equal treatment on the basis of race by the State in the award of "goods or services that are normally distributed on the basis of merit and which are in

short supply." *Parents Involved*, 551 U.S. at 834 (Breyer, J., dissenting).

II. Proposal 2 Is Precisely Tailored To Guarantee Equal Treatment by the State on the Basis of Race in the Key Areas Where Racial Classifications Are Most Harmful.

Proposal 2 provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." MICH. CONST. art. I, § 26(2). This provision passes muster, even under heightened scrutiny, because it is precisely tailored to advance the compelling state interest in guaranteeing equal treatment on the basis of race in the key areas of merit-based competition for limited government benefits.

This Court has repeatedly reaffirmed that strict scrutiny is not "strict in theory, but fatal in fact." *Fisher*, No. 11-345, 570 U.S. ___, slip op. at 13 (quoting *Adarand*, 515 U.S. at 237); *Grutter*, 539 U.S. at 326. Strict scrutiny requires that the provision under scrutiny be "specifically and narrowly framed to accomplish" the compelling state interest. *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)). "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" ... the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Id.* (quoting *Croson*, 488 U.S. at 493

(plurality opinion)) (ellipsis inserted by the *Grutter* Court). An "ill fit of means to ends" occurs when the policy is either "overinclusive" or "underinclusive." *Metro Broad.*, 497 U.S. at 621 (O'Connor, J., dissenting). The "fit" is also evaluated by considering whether there are "workable race-neutral alternatives that will achieve" the State's compelling interest. *Grutter*, 539 U.S. at 339; *see also Parents Involved*, 551 U.S. at 783-84 (Kennedy, J., concurring in part and concurring in the judgment) (noting that an "inquiry into less restrictive alternatives" is "demanded by the narrow tailoring analysis").

Proposal 2 satisfies all these criteria of narrow tailoring. It is neither overinclusive nor underinclusive with respect to the interest it advances, and there are no race-neutral or less restrictive alternative methods to achieve the State's interest.

A. Proposal 2 is not overinclusive, because it forbids only the precise evil it is intended to prevent.

Proposal 2 advances the compelling interest in guaranteeing equal treatment by the State on the basis of race precisely by guaranteeing equal treatment by the State on the basis of race. *See* MICH. CONST. art. I, § 26. Thus, Proposal 2 is not overinclusive with respect to the State's interest in eliminating state-imposed racial classifications.

To be sure, Proposal 2 prohibits governmental discrimination and preferential treatment on the

basis of "sex, color, ethnicity, or national origin," as well as "race." *Id.* art. I, § 26(2). But the inclusion of these related prohibitions does not render Proposal 2 "overinclusive" in any relevant sense. In equal protection cases, overinclusiveness is problematic when it betokens the "reflexive or unthinking use of a suspect classification," *Metro Broad.*, 497 U.S. at 621 (O'Connor, J., dissenting), or when it raises the "possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Grutter*, 539 U.S. at 333 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)). Proposal 2's symmetric prohibitions against discrimination on the basis of sex, color, ethnicity, and national origin raise no such concerns. Quite the contrary, the Proposal's guarantee of equal treatment on the basis of factors other than race belies any notion that citizens were motivated by "illegitimate racial prejudice or stereotype" in passing the constitutional amendment. *See id.*

Moreover, most or all of the compelling reasons to prohibit governmental discrimination on the basis of race detailed above, *see supra* Part I.A, apply equally to these other protected categories. Thus, far from being "overinclusive" for banning these other forms of state-sponsored discrimination, Proposal 2 is precisely drawn to advance the State's compelling interest of guaranteeing equal treatment by the government on the basis of race, and it is equally precisely drawn to advance the compelling state interests in guaranteeing equal treatment on the other specified grounds as well.

In addition, Proposal 2 does not place state law at odds with federal law by prohibiting any race-conscious remedial programs mandated by the Fourteenth Amendment. In a dwindling category of cases, race-conscious remedies are mandatory under the Equal Protection Clause to dismantle recalcitrant regimes of *de jure* segregation. *See generally Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 19-20 (1971). But Proposal 2 specifically exempts any such existing court-ordered remedial programs. MICH. CONST. art. I, § 26(9). In this case, there is no allegation that other programs in the State of Michigan may reasonably be expected to become the subject of future mandatory race-conscious desegregation orders, so Proposal 2 presents no plausible risk of becoming overinclusive on such grounds.

B. Proposal 2 is not underinclusive, because it addresses the key areas in which state governments inject racial classifications into merit-based award programs.

Likewise, the fact that Proposal 2 does not prohibit *all* use of racial classifications by the State does not render it fatally underinclusive. By targeting "the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply," *Parents Involved*, 551 U.S. at 834 (Breyer, J., dissenting), Proposal 2 enshrines its guarantee of equal treatment in the key areas where racial classifications are both commonly used by state governments and uniquely harmful.

As discussed above, racial classifications are particularly noxious when used in areas where the State "seek[s] to award a scarce commodity on the basis of merit." *Id.* at 835. And this Court's cases establish that, in advancing a compelling government interest, the State may focus on a particularly urgent or problematic subset of the targeted harm, without running afoul of strict scrutiny.

There was broad agreement on this principle in *R. A. V. v. St. Paul*, 505 U.S. 377 (1992), which invalidated a municipal ordinance that banned race- and religion-based fighting words as an impermissible content-based regulation of speech. *Id.* at 380. The Court's opinion stated that content discrimination within categories of unprotected speech is permissible "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Id.* at 388; *see also id.* ("[T]he Federal Government can criminalize only those threats of violence that are directed against the President ... since the reasons why threats of violence are outside the First Amendment ... *have special force* when applied to the person of the President." (emphasis added)). The concurring opinion of Justice Stevens, though disagreeing with the Court on the point of application, asserted the same principle: "Conduct that creates special risks or causes special harms may be prohibited by special rules." *Id.* at 416 (Stevens, J., concurring in the judgment); *see also id.* at 433-34.

Similarly, in *Burson v. Freeman*, this Court upheld a state statute prohibiting political canvassing within 100 feet of a polling place on election day. 504 U.S. 191 (1992). Concluding that the provision withstood strict scrutiny, the plurality opinion rejected the argument that the statute was underinclusive because it failed to prohibit non-political speech in the same area: "We do not, however, agree that the failure to regulate all speech renders the statute fatally underinclusive.... States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Id.* at 207 (plurality opinion) (Blackmun, J.), *quoted in part in R. A. V.*, 505 U.S. at 434 (Stevens, J., concurring in the judgment).

So also here, for the reasons stated above, *see supra* Part I.B, the people of Michigan were entitled to conclude that government-imposed racial discrimination "creates special risks or causes special harms," *R. A. V.*, 505 U.S. at 416 (Stevens, J., concurring in the judgment), in the specific context of "decid[ing] who will receive goods or services that are normally distributed on the basis of merit and which are in short supply," *Parents Involved*, 551 U.S. at 834 (Breyer, J., dissenting). By banning discrimination and preferential treatment "in the operation of public employment, public education, or public contracting," MICH. CONST. art. I, § 26(2), Proposal 2 correctly identifies three key areas in which its interest in prohibiting racial preferences in the award of competitive benefits "ha[s] special force." *R. A. V.*, 505 U.S. at 388. Simple review of this Court's cases confirms that public employment,

public education, and public contracting are the key areas in which state governments have frequently sought to superimpose racial preferences upon the merit-based allocation of benefits in limited supply. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244 (2003) (public education); *Grutter*, 539 U.S. 306 (public education); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993) (public contracting); *Croson*, 488 U.S. 469 (public contracting); *Wygant*, 476 U.S. 267 (public employment); *Bakke*, 438 U.S. 265 (public education). No other area of state-awarded competitive benefits poses repeat dangers of similar nature and scope.

To be sure, at the enactment of Proposal 2, the threat of governmental racial preferences was most acute in the area of public education, since this Court had recently affirmed the use of race in the University of Michigan Law School's admission programs. *Grutter*, 539 U.S. 306. But the State's voters were not required to wait for comparable racial-preference schemes to be enacted in public employment or public contracting before addressing those areas as well. Any such requirement "would necessitate that a State's political system sustain some level of damage before" the Michigan electorate "could take corrective action." *Burson*, 504 U.S. at 209 (plurality opinion). Rather, the people of Michigan were "permitted to respond ... with foresight rather than reactively." *Id.* (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)).

C. No "race-neutral alternative" is available because any such alternative would, by definition, fail to address the compelling interest advanced by Proposal 2.

As noted above, in the equal protection context, narrow tailoring typically requires "consideration of the use of race-neutral means." *Croson*, 488 U.S. at 507. "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative," but it does require "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339; *see also Fisher*, No. 11-345, 570 U.S. ___, slip op. at 11.

As an initial matter, it makes little sense to speak of "race-neutral alternatives" to Proposal 2, *id.*, because Proposal 2 is itself a provision that guarantees race neutrality. *See* MICH. CONST. art. I, § 26. In a fundamental sense, Proposal 2 is the most race-neutral of alternatives for the State.

To the extent that Proposal 2 might nevertheless be considered "race-conscious" because it bans racial discrimination and preferences, there are no race-neutral (or, more properly, race-silent) alternative means to advance the State's interest. In fact, the task of envisioning a provision of state law that would prohibit the State's use of race without mentioning the State's use of race confounds the imagination of *amici* and their counsel.

D. Amending the state constitution was the least restrictive means of advancing Proposal 2's compelling interest, because enacting such a policy at any lower level of government would gravely undermine its effectiveness.

For similar reasons, Proposal 2 is also the least restrictive means of achieving the State's goal of committing state officials to race neutrality in the areas of public employment, public education, and public contracting. It is clear that no less restrictive means exists that "could promote the substantial interest about as well." *Fisher*, 570 U.S. ___, slip op. at 11 (quoting *Wygant*, 476 U.S. at 280 n.6). In particular, there is no method of effecting Proposal 2's goal that is less burdensome on minority participation in the political process, which is the putative burden that this Brief assumes (strictly *arguendo*) triggers strict scrutiny in this case. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485 & n.28 (1982).

As a state constitutional amendment, Proposal 2 ties the hands of state officials and eliminates any prospect of enacting racial classifications through the State's political processes. Accordingly, it both binds state actors and insulates them from the often-powerful political forces that call for the use of racial classifications in public employment, education, and contracting. The only way to effectuate Proposal 2's policy in a manner less burdensome on minority political interests would be to require that the policy be adopted at some lower level of state government, through the actions of elected or appointed state

officials. But Proposal 2 reflects the judgment of the State's electorate that state officials and political processes cannot be trusted to remain race-neutral on their own. Consequently, any policy enacted at a lower level of state government would not constitute a "less restrictive alternative" to achieve the same compelling state interest of Proposal 2. *Parents Involved*, 551 U.S. at 784 (Kennedy, J., concurring in part and concurring in the judgment). Such alternatives would not "promote" the compelling interest "about as well," *Fisher*, No. 11-345, 570 U.S. ___, slip op. at 11. Rather, they would largely defeat the purpose of Proposal 2.

The decision below erred, therefore, when it treated as a constitutional evil the fact that Proposal 2 "alters the process by which supporters of permissible race-conscious admissions policies may seek to enact those policies." *Coal. To Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 473 (6th Cir. 2012) (en banc). Given the compelling interest in eliminating such "race-conscious ... policies," *id.*, this alteration should be viewed as a constitutional benefit. The point of Proposal 2 is to ensure that no such "supporters of permissible race-conscious ... policies" will ever *succeed* in "seek[ing] to enact those policies," *id.*, short of passing their own constitutional amendment. As discussed above, the State has a compelling government interest in eradicating such "permissible race-conscious ... policies." *Id.* The only method of doing so with even comparable

effectiveness is the method by which Michigan has done so—by amending its state constitution.

Furthermore, the argument that Proposal 2 passes strict scrutiny assumes, *arguendo*, that Proposal 2 triggers strict scrutiny because it restructures the state political process in a manner that impermissibly burdens minority interests. *See Seattle Sch. Dist. No. 1*, 458 U.S. at 485 & n.28. To hold that Proposal 2 fails strict scrutiny for the same reason—because it putatively restructures the state political process in a way that disfavors minority interests—would be to hold that to trigger strict scrutiny is to fail strict scrutiny. Any such holding would be fundamentally at odds with this Court's repeated assurance that strict scrutiny is *not* "strict in theory, but fatal in fact." *Fisher*, 570 U.S. ___, slip op. at 13 (quoting *Adarand*, 515 U.S. at 237).

As a practical matter, therefore, there were no "less restrictive" alternatives available to the people of Michigan to pursue the compelling interest in guaranteeing equal treatment on the basis of race in the three key areas of merit-based distribution of limited benefits. *See Coal. To Defend Affirmative Action*, 701 F.3d at 506 (Sutton, J., dissenting) ("What else at any rate could the people of Michigan have done?").

For the foregoing reasons, Proposal 2 is narrowly tailored to advance the compelling interest it serves.

III. This Court May Reverse the Judgment Below on the Basis of a Purely Legal Ground Not Raised by the Petitioner.

In the court below, Petitioner did not "assert that Proposal 2 satisfies a compelling state interest," and the en banc decision below thus did "not consider this argument." *Coal. To Defend Affirmative Action*, 701 F.3d at 489. To be sure, for prudential reasons, this Court is reluctant to consider arguments that have not been raised by the parties or passed upon by the lower court. *See, e.g., FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 n.4 (2013); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 61 n.2 (1981). But this Court clearly has authority to decide a case on a legal ground raised by *amici* rather than the parties. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961); *see also Allen v. Hardy*, 478 U.S. 255, 262 (1986) (Marshall, J., dissenting) (noting that the Court addressed a question that had "not been addressed by lower courts in this case or any other"); *Blonder-Tongue Lab. v. Univ. of Ill. Found.*, 402 U.S. 313, 320 & n.6 (1971) (noting that this Court's Rule 23(c)(1) "does not limit our power to decide important questions not raised by the parties").

This Court's reluctance to consider arguments raised only by *amici*, not the parties, arises from concerns of prudential and "equitable dimension." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 441 (1990) (Marshall, J., dissenting). In this case, several factors indicate that this Court may prudently and equitably resolve this case by holding that Proposal 2 withstands strict scrutiny. First, the

question whether Proposal 2 withstands strict scrutiny is fairly included within the scope of the question presented for review—namely, "[w]hether a state violates the Equal Protection Clause by amending its constitution to prohibit race and sex-based discrimination or preferential treatment in public-university admissions decisions." Brief for Petitioner, at i (June 24, 2013).

Second, though the en banc decision under review declined to reach this question, intervenor Eric Russell argued in both the district court and the court of appeals that Proposal 2 would withstand strict scrutiny. *See Coal. To Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607, 631 & n.11 (6th Cir. 2011); Brief for Respondent Eric Russell in Support of Petitioner, at 1-2 (June 24, 2013) (noting that Eric Russell "argued that even if Proposal 2 were subject to strict scrutiny, it would meet that standard"). Indeed, unlike the en banc opinion, the panel opinion of the court below addressed Russell's argument, albeit briefly. *Coal. To Defend Affirmative Action*, 652 F.3d at 631 n.11. This is not a case, therefore, where there is "need to ensure that each party has fair notice of the arguments to which he must respond." *Richmond*, 496 U.S. at 441 (Marshall, J., dissenting). Rather, the argument in question "is not foreign to the parties," *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion), since it was raised by a party and was addressed and decided by the lower court at the panel stage. In such circumstances, this Court may prudently rule on alternative legal grounds raised by *amici curiae*. *See Mapp*, 367 U.S. at 646 n.3, 654-55 (reconsidering and overruling *Wolf v. Colorado*, 338

U.S. 25 (1949), even though "appellant ... did not insist that *Wolf* be overruled," but "*amicus curiae* ... did urge the Court to overrule *Wolf*"); *Blonder-Tongue*, 402 U.S. at 320 & n.6 (similar).

Third, this Court prefers to rely on simpler grounds for decision, when possible, to avoid thorny constitutional questions. *See, e.g., Gomez v. United States*, 490 U.S. 858, 864 (1989). To the extent that this Court may find that the application or continued validity of the political-restructuring cases presents vexing questions, the fact that Proposal 2 clearly withstands strict scrutiny presents a valid alternative ground for reversal.

***

"The Equal Protection Clause is not incoherent." *Parents Involved*, 551 U.S. at 856 (Breyer, J., dissenting). "It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982). Proposal 2 advances the compelling state interest of guaranteeing equal treatment on the basis of race, and it is precisely tailored to do so. Even if strict scrutiny were to apply, Proposal 2 would pass muster.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the judgment of the court below.

Respectfully submitted,

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July 1, 2013

AMICUS CURIAE BRIEF

No. 12-682

IN THE

Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

AND

CHASE CANTRELL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND 48 OTHER HIGHER EDUCATION ORGANIZATIONS SUPPORTING RESPONDENTS

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AMICI ON THIS BRIEF

Accreditation Council for Pharmacy Education
American Council on Education
American Anthropological Association
American Association of Colleges for Teacher Education
American Association of Colleges of Nursing
American Association of Colleges of Pharmacy
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Association of University Professors
American College Personnel Association
American Dental Education Association
American Indian Higher Education Consortium
American Speech-Language-Hearing Association
APPA
Association of American Colleges and Universities
Association of American Medical Colleges
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land Grant Universities
Association of Research Libraries
Association of Schools of Allied Health Profession
Association to Advance Collegiate Schools of Business
College and University Professional Association for Human Resources
The College Board
The Common Application
Council for Christian Colleges and Universities
Council for Opportunity in Education
Council of Graduate Schools
Council of Independent Colleges
Educational Testing Service
EDUCAUSE

Group for the Advancement of Doctoral Education in Social Work
Hispanic Association of Colleges and Universities
National Action Council for Minorities in Engineering, Inc.
National Association for College Admission Counseling
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Diversity Officers in Higher Education
National Association of Hispanic-Serving Health Professions Schools
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
National Collegiate Athletic Association
Southern Association of Colleges and Schools Commission on Colleges
Student Affairs Administrators in Higher Education
Thurgood Marshall College Fund

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AND

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND 48 OTHER HIGHER EDUCATION ORGANIZATIONS SUPPORTING RESPONDENTS

STATEMENT OF INTEREST[1]

Amici are 49 associations of colleges, universities, educators, trustees, and other representatives of higher education in the United States. *Amici*

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amici* or their members or counsel made a monetary contribution to the brief. Petitioner and respondents filed blanket *amicus* consent letters.

represent public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions and faculty. American higher education institutions enroll over 20 million students. For decades *amici* have worked to achieve student diversity.

Amicus American Council on Education (ACE) represents all higher education sectors. Its approximately 1,800 members include a substantial majority of United States colleges and universities. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system to be the cornerstone of a democratic society. Among its initiatives, ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, chaired by former Presidents Ford and Carter, which issued *One-Third of a Nation* (1988), a report on minority matriculation, retention, and graduation. ACE regularly contributes *amicus* briefs on issues of importance to the education sector.

The Addendum contains information on the other *amici* on this brief.

SUMMARY OF ARGUMENT

A diverse student body is essential to the educational objectives of colleges and universities. The constitutionality of the pursuit of racial diversity in higher education is not, however, at issue in this case. The issue is whether Proposal 2 distorts the political process against racial and ethnic minority voters in Michigan, thereby violating the Fourteenth Amendment to the United States Constitution. Petitioner and his supporting *amici* nevertheless raise policy questions about the educational benefits

of racially diverse student enrollments and offer commentary on the methods they believe colleges and universities should employ to attain diversity. These arguments are misplaced and unnecessary to the disposition of this case. For that reason, the *amici* on this brief do not address them at length here and instead refer the Court to the briefs submitted by the higher education community in support of Respondents in *Fisher* v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013), which refute Petitioner's arguments and identify reasons why colleges and universities need flexibility to pursue diversity consistent with their educational missions.

ARGUMENT

Diversity in higher education is now more urgent than ever. Higher education institutions must equip their students to work and live in an increasingly interconnected world, stimulate students' interest in the new and unfamiliar, and prepare them to understand and account for differences. As this Court acknowledged last Term in *Fisher*, colleges and universities have a compelling interest in the educational benefits that flow from student body diversity and may pursue that interest consistent with the principles of the Equal Protection Clause. 133 S. Ct. 2411.

Petitioner rightly does not question higher education institutions' compelling interest in diversity, nor does he challenge the constitutionality of narrowly tailored race-conscious measures to attain it. This case is about a different issue, the asserted distortion of the political process in respect of public universities' authority over their admission of students. This case does not entail the legitimacy

of that compelling interest or the constitutionality of such measures. In fact, it presumes their constitutionality. The Sixth Circuit Court of Appeals correctly decided that Proposal 2, which forbids public universities in Michigan to consider, *inter alia*, race in admissions, unconstitutionally distorts the political process to the disadvantage of racial and ethnic minorities in that State. The Court should affirm the Sixth Circuit's decision.

Still, Petitioner and some of his *amici* question as a policy matter the wisdom of race-conscious admissions and the educational benefits of a diverse student body. *See, e.g.*, Brief for Petitioner at 31-36, *Schuette* v. *Coal. to Defend*, No. 12-682 (June 2013). These arguments are misplaced. The value of diversity and the policy merits of race-conscious admissions are not before the Court; those matters do not determine whether Michigan voters ran afoul of the Fourteenth Amendment by amending the State Constitution to forbid public universities to use otherwise lawful race-conscious measures in university admissions.

For that reason, *amici* do not address at length the arguments raised in this case by Petitioner and his *amici* questioning the educational benefits of racial diversity, but refer the Court to the briefs submitted by representatives of the higher education community in *Fisher*, which rebut those arguments. *See, e.g.*, Brief *Amici Curiae* of Fordham Univ. *et al.* in Support of Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief *Amicus Curiae* of the President and Chancellors of the Univ. of California in Support of Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief for *Amici Curiae* Ass'n of

Am. Med. Colleges *et al.* in Support of Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief for *Amici Curiae* The College Board and the Nat'l Sch. Boards Ass'n *et al.* in Support of Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief for California Inst. of Tech. *et al.* as *Amici Curiae* in Support of Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief for Leading Public Research Univs. as *Amici Curiae* in Support of Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief for Respondents Univ. of Texas at Austin, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief of Amherst Coll. *et al.*, *Amici Curiae*, in Support of Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief of *Amici Curiae* Am. Council on Educ. and 39 Other Higher Educ. Orgs. in Support of Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief of *Amicus Curiae* the Univ. of North Carolina at Chapel Hill Supporting Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief of Appalachian State Univ. and 35 Fellow Colleges and Universities as *Amicus Curiae* in Support of Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief of Brown Univ. *et al.* in Support of Respondents, *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).[2]

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[2] A complete listing of the *Fisher* briefs, with links to the briefs, can be found on the University of Texas at Austin's website. *See* University of Texas at Austin, *Fisher* v. *Texas*, http://www.utexas.edu/vp/irla/Fisher-V-Texas.html (last visited August 29, 2013).

It suffices to say that the cramped notion of diversity that Petitioner and his *amici* promote, and the constraints they propose on the lawful tools colleges and universities may employ to attain diversity, are at odds with this Court's decisions, *see Fisher,* 133 S. Ct. 2411; *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and this country's longstanding and salutary tradition of governmental forbearance in higher education. Institutional pluralism, the hallmark of American higher education, is traceable to that forbearance and has allowed our colleges and universities to become the envy of the world.

Whether and how, within the bounds of the Equal Protection Clause, to pursue the educational benefits of a diverse student body are questions of academic policy and practice properly assigned to the judgment of colleges and universities. In *Grutter*, 539 U.S. at 328-29, 333, the Court endorsed deference to institutional judgment that student diversity is a compelling interest, reasoning that those responsible for higher education are best qualified to evaluate the cumulative information – related, for instance, to campus dynamics, cognitive processes, nurturance of moral reasoning, and pursuit of the institution's particular educational mission – necessary to make that judgment. *See Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 (1985). Therefore, courts and States should "resist substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2988 (2010) (internal quotations omitted). To override those academic judgments by State constitutional amendment would truncate educators' traditional authority, an authority that educators

have exercised to the immense benefit of this nation from the nation's beginnings to the present day.

CONCLUSION

This Court should affirm the Court of Appeals.

August 30, 2013

Respectfully submitted,

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ADDENDUM

ADDENDUM: *AMICI* ON THIS BRIEF

- Accreditation Council for Pharmacy Education (ACPE) is the national agency for the accreditation of professional degree programs in pharmacy and of providers of continuing pharmacy education.
- The American Council on Education is described at page 2 of this brief.
- The American Anthropological Association (AAA) represents more than 11,000 archaeologists and anthropologists in the academy and practice.
- The American Association of Colleges for Teacher Education (AACTE) is a national alliance of educator preparation programs dedicated to the highest quality professional development of teachers and school leaders in order to enhance PK-12 student learning. Its 800 members represent public and private colleges and universities.
- The American Association of Colleges of Nursing (AACN), which represents more than 750 schools of nursing at public and private institutions, works to establish quality standards for nursing education, assist with implementation of those standards, improve health care, and promote public support of nursing education, research, and practice.
- The American Association of Colleges of Pharmacy (AACP), which represents the interests of pharmacy education and educators, comprises 129 accredited colleges and schools of pharmacy including more than 6,300 faculty, 61,000

students enrolled in professional programs, and 4,300 individuals pursuing graduate study.

- The American Association of Collegiate Registrars and Admissions Officers (AACRAO) includes as members more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and over 40 countries internationally.
- The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges. It represents nearly 1,200 two-year, associate degree-granting institutions.
- The American Association of State Colleges and Universities (AASCU) includes as members more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.
- The American Association of University Professors (AAUP) represents some 48,000 faculty members and research scholars. It defends academic freedom and the free exchange of ideas in higher education.
- The American College Personnel Association (ACPA) advances student affairs and engages students for a lifetime of learning and discovery. ACPA, with almost 8,000 members, supports and fosters college student learning through the

generation and dissemination of knowledge, which informs policies, practices, and programs for student affairs professionals and the higher education community.

- The American Dental Education Association (ADEA) represents all 66 dental schools in the United States, nearly 700 dental residency training programs, 600 allied dental programs, and more than 12,000 faculty who educate and train over 50,000 students and residents attending these institutions.
- The American Indian Higher Education Consortium (AIHEC) is the unifying voice of our nation's 37 Tribal Colleges and Universities—federally recognized public institutions working to strengthen tribal nations and make a lasting difference in the lives of American Indians and Alaska Natives. Through public policy, advocacy, research, and program initiatives AIHEC strives to ensure strong tribal sovereignty through excellence in American Indian higher education.
- The American Speech-Language-Hearing Association (ASHA) is the national professional, scientific, and credentialing association for more than 166,000 members and affiliates who are audiologists; speech-language pathologists; speech, language, and hearing scientists; audiology and speech-language pathology support personnel; and students.
- APPA promotes leadership in educational facilities for its more than 5,200 professional members throughout the United States, Canada, and abroad.

- The Association of American Colleges and Universities (AAC&U) has more than 1,250 member institutions, including accredited public and private colleges, community colleges, and universities of every type and size. Its mission is to reinforce commitment to liberal education and help institutions prioritize the quality of student learning.
- The Association of American Medical Colleges (AAMC) represents all 141 accredited U.S. and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems; and 90 academic and scientific societies. Through these institutions and organizations, the AAMC represents 128,000 faculty members, 75,000 medical students, and 110,000 resident physicians.
- The Association of American Universities (AAU) is an association of 61 leading public and private research universities in the United States and Canada. Founded to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to research-intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education.
- The Association of Catholic Colleges and Universities (ACCU) serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with Catholic higher education can contribute to the greater good of the world and the Church.

- The Association of Community College Trustees (ACCT) represents over 6,000 board members who govern community, technical, and junior colleges.
- The Association of Governing Boards of Universities and Colleges (AGB) serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership. Its mission is to strengthen, protect, and advocate on behalf of citizen trusteeship that supports and advances higher education.
- The Association of Jesuit Colleges and Universities (AJCU) represents all 28 Jesuit institutions in the U.S. and is affiliated with over 100 Jesuit institutions worldwide. The first Jesuit institution opened in 1548 in Messina, Sicily, and Jesuit institutions remain committed to academic rigor, with a focus on quality teaching, learning, and research to educate the whole person.
- The Association of Public and Land-grant Universities (APLU) is a research and advocacy organization of public research universities, land-grant institutions, and state university systems with member campuses in all 50 states, U.S. territories, and the District of Columbia.
- The Association of Research Libraries (ARL) is an organization of 126 research libraries at comprehensive, research-extensive institutions in

the U.S. and Canada that share similar research missions, aspirations, and achievements.

- The Association of Schools of Allied Health Professions (ASAHP) is comprised of 120 colleges and universities focused on improving health through excellence in education, interprofessional collaboration, leadership, research, and advocacy.
- The Association to Advance Collegiate Schools of Business (AACSB) represents more than 1,300 business schools worldwide in 85 countries. Its mission is to advance quality management education worldwide through accreditation, thought leadership, and value-added services.
- The College and University Professional Association for Human Resources (CUPA-HR), the voice of human resources in higher education, represents more than 14,000 human-resources professionals at over 1,800 colleges and universities. Its membership includes 92 percent of all United States doctoral institutions, 75 percent of all master's institutions, 60 percent of all bachelor's institutions, and nearly 600 two-year and specialized institutions.
- The College Board is a not-for-profit organization that connects students to college success and opportunity. Founded in 1900, The College Board was created to expand access to higher education. Today, the membership association is made up of more than 6,000 of the world's leading educational institutions and is dedicated to promoting excellence and equity in education.
- The Common Application is committed to providing reliable services that promote equity,

access, and integrity in the college application process. It serves students, member institutions, and secondary schools by providing applications that students and school officials may submit to any of its nearly 500 member institutions. Membership is open to colleges and universities that promote access by evaluating students using a holistic selection process.

- The Council for Christian Colleges & Universities (CCCU) is an international association of 173 fully accredited Christ-centered institutions of higher education committed to the integration of Christian faith and higher learning. Its member institutions transform lives by faithfully relating scholarship and service to biblical truth. CCCU member and affiliate campuses currently serve over 400,000 students.
- The Council for Opportunity in Education (COE) expands educational opportunities for low-income students, first-generation students, students with disabilities, veterans, and adult learners.
- The Council of Graduate Schools (CGS) is an organization of institutions of higher education in the United States, Canada, and across the globe engaged in graduate education, research, scholarship, and the preparation of candidates for advanced degrees.
- The Council of Independent Colleges (CIC) represents 619 liberal arts colleges and universities and 90 state associations and other higher education organizations.
- The Educational Testing Service (ETS) advances quality and equity in education for people

worldwide by creating assessments based on rigorous research. Founded as a nonprofit in 1947, ETS serves individuals, educational institutions, and government agencies by providing customized solutions for teacher certification, English language learning, and elementary, secondary and post-secondary education, as well as conducting education research, analysis, and policy studies.

- EDUCAUSE is a nonprofit association of over 2,400 colleges, universities, and related organizations whose mission is to advance higher education through the use of information technology.
- The Group for the Advancement of Doctoral Education in Social Work (GADE) promotes excellence in doctoral education in social work and facilitates information exchange among its member doctoral programs.
- The Hispanic Association of Colleges and Universities (HACU) represents approximately 450 colleges and universities in the U.S., Puerto Rico, Latin America, and Spain. HACU's mission is to promote the development of member colleges and universities; to improve access to and the quality of postsecondary educational opportunities for Hispanic students; and to meet the needs of business, industry, and government through the development and sharing of resources, information, and expertise.
- The National Action Council for Minorities in Engineering, Inc. (NACME) ensures American competitiveness in a flat world by leading and

supporting the national effort to increase the number of successful African American, American Indian, and Latino women and men in science, technology, engineering and mathematics education and careers. It has supported over 24,000 students with more than $124 million in scholarships and other support.

- The National Association for College Admission Counseling (NACAC) is a non-profit education association of more than 13,000 secondary school counselors, independent counselors, college admissions and financial aid officers, enrollment managers, and organizations that work with students as they make the transition from high school to postsecondary education.
- The National Association for Equal Opportunity in Higher Education (NAFEO) is the umbrella organization of the nation's Historically Black Colleges and Universities and Predominantly Black Institutions. It represents the presidents and chancellors of the diverse black colleges and universities: public, private, and land-grant, two-year, four-year, graduate, and professional, historically and predominantly black colleges and universities.
- The National Association of College and University Business Officers (NACUBO) represents more than 2,500 colleges, universities, and higher education service providers. It represents chief business and financial officers through advocacy efforts, community service, and professional development activities. NACUBO's mission is to advance the economic viability and business practices of higher education

institutions in fulfillment of their academic missions.

- The National Association of Diversity Officers in Higher Education (NADOHE) is the leading voice of chief diversity officers in higher education. Its membership includes almost 200 colleges and universities, as well as individual members, affiliated professional organizations, and two formal state chapters.
- The National Association of Hispanic-Serving Health Professions Schools (HSHPS) represents 29 schools of medicine and public health nationwide that strive to improve the health of Hispanics through academic development, research initiatives, and training.
- The National Association of Independent Colleges and Universities (NAICU) serves as the unified national voice of private, nonprofit higher education in the United States. It has nearly 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business, and other professions.
- The National Association of Student Financial Aid Administrators (NASFAA) represents more than 18,000 student financial assistance professionals at nearly 2,800 institutions of higher education, serving over 16 million students. It supports the training, diversity, and professional development of financial aid administrators; advocates for public policies and programs that increase student access to and

success in postsecondary education; and serves as a forum for communication and collaboration on student financial aid issues.

- The National Collegiate Athletic Association (NCAA) serves as the organizing, regulating, and standard-setting body for 23 intercollegiate sports. The NCAA's active membership includes over 1,000 institutions of higher education that jointly create seasons of amateur intercollegiate competition across three Divisions.
- The Southern Association of Colleges and Schools Commission on Colleges (SACSCOC) is the regional body for the accreditation of degree-granting higher education institutions in the Southern states. Its mission is the enhancement of educational quality throughout the region, and it strives to improve the effectiveness of institutions by ensuring that institutions meet standards established by the higher education community that address the needs of society and students.
- Student Affairs Administrators in Higher Education (NASPA) is the leading association for the advancement, health, and sustainability of the student affairs profession. It serves a full range of professionals who provide programs, experiences, and services that cultivate student learning and success in concert with the mission of our colleges and universities. NASPA has more than 13,000 members in all 50 states, 29 countries, and 8 U.S. Territories.
- The Thurgood Marshall College Fund (TMCF) is the only national organization founded for the

sole purpose of providing scholarships to students attending the nation's public Historically Black Colleges and Universities. In addition to scholarships, TMCF provides leadership development and training as well as programmatic and capacity building support to its member schools.

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR *AMICI CURIAE* CONSTITUTIONAL AND LOCAL GOVERNMENT LAW SCHOLARS MICHELLE WILDE ANDERSON, RICHARD BRIFFAULT, RICHARD THOMPSON FORD, SHEILA FOSTER, GERALD E. FRUG, DANIEL B. RODRIGUEZ, RICHARD C. SCHRAGGER, AND RICK SU IN SUPPORT OF THE CANTRELL RESPONDENTS

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INTEREST OF *AMICI*[1]

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[1] Letters from the parties consenting generally to the filing of briefs *amicus curiae* are on file with the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* submit this brief in their personal capacities; academic affiliations are provided only for purposes of identification.

They submit this brief in response to the suggestions by petitioner and intervenor Eric Russell that *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), should be overruled. *See* Petr. Br. 37-38; Russell Br. 8-33. Contrary to those arguments, *Hunter* and *Seattle Schools* are applications of mainstream Fourteenth Amendment principles that protect against racial discrimination in the political process. This Court should reaffirm and rely on those principles in deciding the case before it.

SUMMARY OF ARGUMENT

Michigan's Proposal 2 strips the governing boards of the state's public universities of their preexisting authority to make decisions about legally permissible race-based educational policies, while preserving their plenary authority to make all other educational decisions.[3] In holding that Proposal 2

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[3] Proposal 2 provides, in relevant part that governing boards of public colleges or universities cannot adopt affirmative action plans that would "grant preferential treatment" to individuals or groups "on the basis of race, sex, color, ethnicity, or national origin." Mich. Const. art. I, § 26. Petitioner acknowledges that Proposal 2 was a response to this Court's decision upholding the University of Michigan Law School's race-conscious affirmative action policy. See Petr. Br. 7. Although the text of Proposal 2 covers reliance on factors other than race, both of the courts below treated the Proposal as directed primarily against race-conscious affirmative action. *See* Pet. App. 26a n.4 (stating that the "history of Proposal 2 and its description on the ballot leave little doubt" that "the clear focus of the challenged amendment is race").

violated the Equal Protection Clause, the Sixth Circuit relied on this Court's decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1* (*Seattle Schools*), 458 U.S. 457 (1982). Those cases involve straightforward applications of basic equal protection principles. Under this Court's "precedents involving discriminatory restructuring of governmental decisionmaking," *Romer v. Evans*, 517 U.S. 620, 625, (1996), when a jurisdiction reconfigures its normal political process in ways that single out racial issues for distinctive disadvantage, that alteration triggers heightened scrutiny.

Hunter and *Seattle Schools* were not decided in a vacuum. They responded to a long history of political restructurings that disadvantaged minority citizens. In particular, states and localities have frequently changed the level of government at which decisions can be made in a manner that poses distinctive barriers to racial minorities. Courts, including this Court, have not hesitated to hold that race-focused manipulations of the political process violate the Equal Protection Clause.

Hunter and *Seattle Schools* remain entirely consistent with this Court's contemporary equal protection jurisprudence. In recent Terms, this Court has continued to overturn state laws that deny members of minority groups access to the same political process available to all other groups or that respond to minority political success by restructuring the process to make it more difficult for them to succeed in the future. The same analysis that governed this Court's decisions in *Hunter* and *Seattle*

Schools should therefore inform this Court's review of Michigan's Proposal 2.

ARGUMENT

In *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1* (*Seattle Schools*), 458 U.S. 457 (1982), this Court confronted a type of equal protection violation that was neither new when those cases were argued, nor ceased once the cases were decided. For nearly a century, states and localities had manipulated their political processes to stymie minority citizens' rights in contexts ranging from the drawing of political boundaries to the allocation of governmental decisionmaking authority. In *Hunter* and *Seattle Schools*, this Court properly treated Akron's and Washington State's attempts to change the process for adopting civil rights-related policies as simply a new iteration of a familiar equal protection problem.

In the years since *Hunter* and *Seattle Schools*, this Court has continued to see – and to strike down – discriminatory restructurings of the political process. For example, in *Romer v. Evans*, 517 U.S. 620 (1996), this Court invalidated a state constitutional amendment that removed an issue primarily affecting gay citizens from the local political process. And in *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399 (2006), this Court invalidated a mid-decade redistricting that would have prevented Latino voters from electing their candidate of choice. In doing so, this Court applied the underlying principle involved in *Hunter* and *Seattle Schools*: the political process cannot be restructured in a fashion that makes it

more difficult for traditionally excluded groups and their allies to seek beneficial policies.

I. *Hunter* And *Seattle Schools* Should Be Understood Against The Historical Backdrop Of Shifts In The Level Of Decisionmaking Authority That Disadvantaged Minority Groups.

This Court has long recognized that political rights are "fundamental" in that they are "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Accordingly, when this Court has confronted schemes to disadvantage minorities in the political process, it has shown "no hesitation in striking down those contrivances that can fairly be said to infringe on Fourteenth Amendment rights." *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

On many occasions, those contrivances involved the outright exclusion of minority citizens from the political process. Some of the more infamous examples that this Court has addressed include the white primary, *see Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); the grandfather clause, *see Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); the literacy test, *see Louisiana v. United States*, 380 U.S. 145 (1965); *Schnell v. Davis*, 336 U.S. 933 (1949), *summarily aff'g*, 81 F. Supp. 872 (S.D. Ala. 1949) (three-judge court); and the poll tax, *see Harman v. Forssenius*, 380 U.S. 528 (1965).

But the history of discrimination in configuring the political process extends more broadly. This Court's decisions in *Hunter* and *Seattle Schools*

addressed a less well-known, but no less troubling, form of discrimination: responding to effective minority participation in political decisionmaking by abandoning local control and centralizing authority in fora over which minority citizens have less influence. These transfers of governmental authority have taken a number of forms.

1. There is more than a century-long history of states discriminatorily transferring decisionmaking authority from local jurisdictions where minority citizens could effectively influence the process to higher levels of government where they had less ability to participate effectively.

Even before the end of Reconstruction, southern state legislatures used their authority to remove black officials and their white allies from local offices. In Tennessee, the state legislature placed the city of Nashville in receivership in 1869 and replaced a slate of progressive Republican officials with Democrats. In Virginia, the state legislature used the same strategy to replace the Richmond city government. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2016-17 (1981) [*hereinafter 1981 Voting Rights Act Hearings*] (statement of Professor J. Morgan Kousser).

During the 1870s, the Alabama state legislature similarly abolished the criminal court in Dallas County after efforts to force a black judge to resign failed. In justifying this decision, a state legislator admitted that he "had always believed in the right of the people to select their own officers," but believed he had no other choice given that the "life, liberty and

property of the Caucasians" were threatened by "the Negro and his cohorts." *Id.* The Alabama legislature used this tactic during the late nineteenth century to remove at least nine other county commissions and city councils in areas with large black populations. Will Parker, *Still Afraid of "Negro Domination?": Why County Home Rule Limitations in the Alabama Constitution of 1901 Are Unconstitutional*, 57 Ala. L. Rev. 545, 557 (2005). Alabama further entrenched these local manipulations by ratifying a new state constitution in 1875 that gutted home rule. This shift was openly spurred by a desire to deprive majority-minority counties of the right to enact favorable legislation. *Id.* at 554-64.

North Carolina went further. In 1875, in order to minimize black political power, the state legislature gave itself the right to appoint local justices of the peace and subsequently gave those appointed officials the right to appoint *all* county commissioners. Howard N. Rabinowitz, Race Relations in the Urban South, 1865-1890, at 269 (1978). When progressive Republicans managed to return some authority to municipalities during the early 1890s, whites responded by violently removing black officeholders from the Wilmington city government and passing legislation returning control over local governments to the state. *See* 1898 Wilmington Race Riot Comm'n, Final Report 208-10 (2006), *available at* http://tinyurl.com/cantrell-wrrc.

2. A second round of racially discriminatory political restructuring occurred in response to rising minority political power during the Civil Rights Movement.

Gomillion v. Lightfoot, 364 U.S. 339 (1960), provides a textbook example. During the late 1950s, Alabama responded to increased black voter registration and political activism in the city of Tuskegee by revamping its political structure in two ways. First, it amended the state constitution to authorize legislative abolition of Macon County, where Tuskegee was located. Ala. Const. Amend. No. 132 (1957), *repealed by* Ala. Const. Amend. No. 406 (1982); *see also* Bernard Taper, Gomillion Versus Lightfoot 51 (1962). Second, it enacted a statute – Local Act 140 – that redrew Tuskegee's municipal boundaries to remove all the black voters within the city "while not removing a single white voter or resident." *Gomillion*, 364 U.S. at 341. Black voters remained subject to Tuskegee's policies under Alabama's police jurisdiction law, although they were now disenfranchised in municipal elections. *See* Ala. Code § 11-40-10; *see also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66-75 (1978). "Though the ejected Negroes would still be able to vote in county, state, and national elections, there were not enough of them registered as voters to influence the political situation on any scene larger than the municipal one." Taper, *supra*, at 15.

Faced with Local Act 140, this Court found it "inconceivable that guaranties imbedded in the Constitution" could be "manipulated out of existence" by being "cloaked in the garb of [political] realignment." *Gomillion*, 364 U.S. at 345 (internal quotation mark omitted). It therefore reversed the dismissal of the black voters' constitutional challenge. On remand, the district court held that Local Act 140 violated the Constitution because it

was "solely concerned" with "putting the Negro citizens out of the municipal limits so as to deprive them of their municipal vote." *Gomillion v. Rutherford*, 6 Race Rel. L. Rep. 241, 243 (M.D. Ala. 1961).

3. This Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), spurred a separate wave of jurisdictional realignment. To avoid integration in even a single school district, many Southern states stripped power from local officials who planned to comply with *Brown*'s holding, whether voluntarily or in response to a court order.

A particularly striking example of this shift in decisionmaking authority involves Little Rock, Arkansas. The very day that this Court announced that it would require the Little Rock school board to comply with a federal court desegregation order, *see Aaron v. Cooper*, 358 U.S. 5 n.* (1958), the Governor signed into law a bill empowering him to close any public school or school system in the state and to keep that school or school system closed absent a new executive order countermanding the closure. *Aaron v. Cooper*, 261 F.2d 97, 99 (8th Cir. 1958). The law also stripped local school boards of their power to decide student assignment policies with respect to racial desegregation, instead requiring a special election and providing, with respect to any integration plan, that "[u]nless a majority of the qualified electors of the district voted in favor of such integration, 'no school within the district shall be integrated.'" *See id.* (quoting the Arkansas statute). Governor Orval Faubus invoked this law and immediately closed all of Little Rock's high schools. *Id.* at 99-100. Nowhere else in the state was

gubernatorial control substituted for local control. Nor was any other issue of educational policy subjected to a plebiscite. Quoting this Court's statement that the principle announced in *Brown* "can neither be nullified openly and directly" nor nullified indirectly "whether attempted ingeniously or ingenuously," the court of appeals directed the district court to issue an injunction to accomplish the previously ordered integration of Little Rock schools. *Aaron v. Cooper*, 261 F.2d at 108 (quoting *Cooper v. Aaron*, 358 U.S. 1, 17 (1958)) (internal quotation marks omitted).

Other states acted similarly. In Virginia, for example, when Arlington tried to integrate in 1956, the Virginia General Assembly stripped the county of its right to elect a school board. Bob Smith, They Closed Their Schools 142-43 (1965). In 1958, Governor J. Lindsay Almond, Jr., expanded this tactic, closing schools in Charlottesville, Norfolk, and Warren County because they were poised to comply with federal court orders requiring desegregation. Benjamin Muse, Virginia's Massive Resistance 73-75 (1961).

In Louisiana, the state legislature went further by authorizing the Governor to close every school in the state if any one of them chose to integrate. *See Bush v. Orleans Parish Sch. Bd.*, 187 F. Supp. 42, 45 (E.D. La. 1960). When the Orleans Parish School Board announced its intention to comply with a federal court order mandating desegregation in November 1960, the Louisiana Legislature was immediately called into extraordinary session and passed a law removing four of the five school board members from office. *See Bush v. Orleans Parish*

Sch. Bd., 188 F. Supp. 916, 920-21 (E.D. La. 1960). Soon after, a district court struck down this measure "sole[ly]" designed to "deprive colored citizens of a right conferred on them by the Constitution" as a violation of the principles announced by this Court in *Gomillion*. *Id.* at 929. This Court subsequently affirmed. *Orleans Parish Sch. Bd. v. Bush*, 365 U.S. 569 (1961).

In Mississippi, in response to the massive enfranchisement promised by the Voting Rights Act of 1965, the state legislature selectively took away the authority to elect superintendents of education from eleven counties with large black populations. *Voting Rights Act Extension: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary* 149 (1969) [*hereinafter 1969 Voting Rights Act Hearings*] (statement of Thomas E. Harris, Assoc. Gen. Counsel, AFL-CIO). Eventually, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969). this Court held that these changes in government structure should have been subject to preclearance under section 5 of the Voting Rights Act of 1965 because they could involve a "discriminatory purpose or effect" with respect to voting. *Id.* at 569-70.

4. In the years leading up to *Hunter* and *Seattle Schools* discriminatory restructuring was not limited to avoiding *Brown*'s mandate. In the late 1960s and 1970s, Mississippi, Alabama, and Georgia each changed the way local offices were filled to frustrate the ability of minority voters to elect candidates of their choice.

On four separate occasions Mississippi attempted to change the method of filling a local office from

municipal election to state-level appointment. Each time, the Department of Justice objected under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, because of the "racially discriminatory" nature of the change. *1981 Voting Rights Act Hearings, supra*, at 501 (statement of Frank R. Parker, Dir., Voting Rights Project).

Alabama took a more wholesale approach and tried to make all municipal judgeships across the state into appointive rather than locally elected offices. The Department of Justice rejected this realignment under the Voting Rights Act. *1981 Voting Rights Act Hearings, supra,* at 815 (report of Jane Reed Cox & Abigail Turner). Similarly, a three-judge district court recognized the "potential for discrimination" in Alabama's decision to change the method for selecting the Greene County Racing Commission, the source of two-thirds of the county's budget, from appointment by locally elected legislators to gubernatorial appointment. *Hardy v. Wallace*, 603 F. Supp. 174, 179 (N.D. Ala. 1985).

Finally, Georgia similarly engaged in widespread attempts to make local elective offices appointive as soon as the prospect of a minority-supported candidate winning the position emerged. *1981 Voting Rights Act Hearings, supra,* at 1955 (report of Richard A. Hudlin & K. Farouk Brimah, Voter Educ. Project, Inc.).

II. This Court's Decisions In *Hunter* And *Seattle Schools* Vindicated The Principle That States Cannot Restructure The Political Process To The Disadvantage Of Racial Minorities.

This Court's decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1* (*Seattle Schools*), 458 U.S. 457 (1982), responded to the history described in the previous section. In each case, this Court treated the challenged legislation as an impermissible response to local political gains achieved by minority citizens. By altering the political structure in ways that undermined minority citizens' ability to participate on equal terms, these changes violated the Equal Protection Clause.

1. *Hunter* concerned a restructuring of the process for enacting antidiscrimination legislation in Akron, Ohio. In 1964, the Akron City Council passed a fair housing ordinance that prohibited, among other things, racial discrimination in housing. Soon after, an initiative amended the city charter both to invalidate this ordinance and to require that any future ordinance "regulat[ing] the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property" on the basis of "race, color, religion, natural origin or ancestry" be submitted to the entire electorate, as opposed to just the city council, before going into effect. 393 U.S. at 387 (quoting the charter amendment). The charter amendment left untouched the city council's decisionmaking authority with respect to all other regulations of real property. As this Court noted, "[t]he automatic referendum system [did] not reach housing discrimination on sexual or political grounds,

or against those with children or dogs, nor [did] it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes." *Id.* at 391.

This race-specific shift of decisionmaking authority from the city council to the electorate as a whole had the effect of making it "substantially more difficult" for racial minority groups to obtain antidiscrimination legislation both in an absolute and a comparative sense. *See id.* at 390. First, under the prior regime, minority citizens could obtain beneficial legislation simply by persuading the city council of its desirability. Under the new system, by contrast, even if they succeeded in persuading the city council, they were still required to undertake the time-consuming and potentially expensive task of obtaining approval from tens of thousands of voters as well. *See id.* at 387. Second, in comparison to other groups seeking antidiscrimination protection or other housing-related benefits, *racial* minorities faced distinctive barriers. *Id.* at 391.

This Court had no trouble concluding that "in reality" the Akron charter amendment "place[d a] special burden on racial minorities within the governmental process." *Id.* Thus, this Court treated the amendment as a racial classification "subject to the most rigid scrutiny." *Id.* at 392 (internal quotation marks omitted). And it concluded that the alteration of the political process at issue in *Hunter* constituted a "real, substantial, and invidious denial of the equal protection of the laws." *Id.* at 393.

2. *Seattle Schools* involved a Washington State initiative (Initiative 350) governing public school student assignment policies. After the Seattle school board approved a plan to voluntarily desegregate the city's schools by pairing predominantly white and predominantly minority attendance zones and busing students between them, Washington voters adopted an initiative that provided that no school board "shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." 458 U.S. at 462 (quoting Initiative 350). But Initiative 350 contained so many exceptions allowing busing for essentially any reason other than racial desegregation that it could be understood only as a prohibition on voluntary desegregation plans. *Id.* at 462-63.

As in *Hunter*, this Court held that the challenged provision violated the Equal Protection Clause. Despite the formally neutral language of Initiative 350, this Court found that the initiative in fact involved a racial classification. *Id.* at 485-86 & n.29. This Court recognized that Initiative 350 involved a "reallocation of power" from the "existing decisionmaking body" to the state legislature in a way that "burden[ed] minority interests." *Id.* at 474. Before the initiative, minority parents in Seattle were able to obtain voluntary desegregation by persuading the local school board to adopt ordinary student assignment policies. But after Initiative 350, "[t]hose favoring the elimination of *de facto* school segregation" were forced to "seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment

decisions, as well as over most other areas of educational policy, remain[ed] vested in the local school board." *Id.*

III. *Hunter* And *Seattle Schools* Fit Comfortably Within Contemporary Equal Protection Doctrine And Should Govern Analysis Of Proposal 2.

This Court has long held that when the government purposefully draws racial distinctions, those distinctions are subject to heightened scrutiny under the Equal Protection Clause. *See Washington v. Davis*, 426 U.S. 229, 241 (1976); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). There are two kinds of racial classifications. Some are express: they explicitly use racial terminology to categorize individuals or issues. Others, by contrast, are facially neutral but in fact classify individuals or issues in a racial manner. Both types of classification trigger heightened scrutiny.

In recent Terms, in the context of challenges to redistricting plans, which on their face do not classify individuals or issues at all, this Court has held that when race is "the predominant factor" explaining how the political system has been organized and race "subordinate[s] traditional" principles for allocating power, a reviewing court should apply strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).[4]

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[4] By contrast, unless "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," strict scrutiny is not triggered by the legislature's mere awareness or discussion of the racial makeup of the districts at issue. *Miller*,

This Court's decisions in *Hunter* and *Seattle Schools* reflect these contemporary principles even though they do not use precisely the same vocabulary as this Court's most recent decisions. Put in contemporary terms, *Hunter* and *Seattle Schools* held that the reorganizations of the political process undertaken by Akron and Washington State triggered strict scrutiny because racial considerations subordinated traditional principles for allocating governmental decisionmaking authority. The same analysis should also apply to Michigan's Proposal 2.

A. Proposal 2, Like The Laws At Issue In *Hunter* And *Seattle Schools*, Should Be Understood As A Racial Classification Because It Singles Out Racial Issues For Distinctively Disadvantageous Treatment In The Political Process.

1. *Hunter* and *Seattle Schools* both involved racial classifications of an issue. *Hunter* involved an express racial classification; *Seattle Schools* involved an implicit one.

The law at issue in *Hunter* expressly singled out laws that focused on "race" for differential treatment within the political process. 393 U.S. at 387. As Justice Harlan explained in his concurrence, Akron had "not attempted to allocate governmental power

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515 U.S. at 916; *see also Easley v. Cromartie*, 532 U.S. 234, 253 (2001) (refusing to apply strict scrutiny because the fact that "the legislature considered race, along with other partisan and geographic considerations ... says little or nothing about whether race played a *predominant* role comparatively speaking").

on the basis of any general principle." *Id.* at 395 (Harlan, J., concurring). Having concluded that the law was a racial classification, this Court applied "the most rigid scrutiny." *See id.* at 392 (opinion for the Court) (internal quotation marks omitted).

In subsequent cases, this Court has treated *Hunter* as involving the racial classification of individuals as well as the racial classification of issues. For example, in *Gordon v. Lance*, 403 U.S. 1 (1971), this Court characterized *Hunter* as having classified an "independently identifiable group or category" of individuals. *See id.* at 5. But the same year, in *James v. Valtierra*, 402 U.S. 137 (1971), this Court described the law at issue in *Hunter* as having "created a classification based upon race because it required that laws dealing with racial housing matters" be subject to differential treatment in the political process. *Id.* at 140-41. And in *Seattle Schools* this Court treated *Hunter* as involving both when it described Akron as having "allocate[d] governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, 'places special burdens on racial minorities within the governmental process.'" 458 U.S. at 470 (emphases omitted) (quoting *Hunter*, 393 U.S. at 391).[5]

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[5] In this sense, this Court's analysis of *Hunter* dovetails with this Court's explanation in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), that heightened scrutiny is called for both when the government "restricts those political processes which can ordinarily be expected to bring

Seattle Schools also involved the racial classification of an issue, although Initiative 350 did not expressly use the term "race." As this Court explained, given all of the exceptions Initiative 350 contained, its ban on busing could be understood only as a racial classification since it restricted only busing voluntarily directed at achieving racial desegregation. When this Court concluded that the "community's political mechanisms" were modified "to place effective decisionmaking authority over a racial issue at a different level of government," *id.* at 474, it was therefore concluding that Initiative 350 involved the racial classification of an issue. The Initiative thus impermissibly restructured the political process in a manner tainted by race. *See id.* at 476-77, 487.

2. This Court's recent decisions reinforce the conclusion that racial classifications can occur even when no individual has been singled out for differential treatment on account of his or her race. *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, provide the best example of this point. *See also Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996). In those cases, this Court did not require plaintiffs to prove that they personally had been assigned to a district on the basis of their race. (Indeed, even individuals who had moved into a district after the boundaries had been drawn could presumably have brought suit.) Nor did this Court require that the plaintiffs prove that their votes had

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about repeal of undesirable legislation" and when it targets "discrete and insular minorities."

been rendered meaningless or that their elected representatives had not served them adequately. Rather, it required only that race have played the predominant role in the decision of where to draw political boundaries. When race predominates in a governmental decisionmaking process, individuals are denied the right "to compete on an equal footing," *Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). *See United States v. Hays*, 515 U.S. 737, 744-45 (1995) (relying on *Northeastern Florida Contractors* to explain that the injury recognized in *Shaw* is distinct from the denial of any tangible benefit).

3. Like *Hunter* and *Seattle Schools*, Michigan's Proposal 2 involves the racial classification of an issue. It expressly singles out educational policy decisions that involve race for differential treatment in the political process.[6] While the governing boards of Michigan's three public universities retain control over all other educational decisions, Proposal 2 strips them of their ability to make constitutionally permissible decisions involving race. *See* Pet. App. 31a-37a. Proposal 2 thereby changes the level at which race-related educational decisions – and no other educational decisions – are made by transferring them away from an expert body of university administrators capable of making and refinining "considered judgments[s]" about racial diversity and admissions policies, *see Grutter v.*

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[6] *See supra* n. 3.

Bollinger, 539 U.S. 306, 387-88 (2003) (Kennedy, J., dissenting), and turning them into policies controlled by plebiscite. In so doing, the amendment requires advocates of permissible race-conscious policies to appeal to the statewide electorate, while permitting advocates of all other policies to pursue a less onerous path. It thus creates, for racial issues and racial issues alone, a decisionmaking process far different from Michigan's ordinary process for educational decisions, one that threatens to make race a more, rather than a less, salient issue.

At first glance, it may seem that a measure such as Proposal 2 eliminates race from the political process by taking race-conscious policies off the table. In reality, however, Proposal 2 threatens to exacerbate racial resentment. Questions about the fairness of Michigan's university admissions processes will not go away. When the University of Michigan's Board of Regents debates whether legacy status will play a greater role in admissions from one year to the next, or to what extent a family member's employment with the university might improve an applicant's chances, *see* Pet. App. 35a, it is entirely foreseeable that members of the public will also raise concerns about racial diversity within the incoming class. But if they take these concerns to the Board of Regents, they will be told that the Board lacks the authority to respond to *their* concerns, although it retains that authority with respect to everyone else's.

Proposal 2 thus substitutes the prospect of up-or-down popular judgments on discrete admissions proposals for deliberative discussion about the role of race in the educational process. Under Proposal 2, an advocate for constitutionally permissible policies to

consider race as one factor in university admissions could not approach the Board with any hope of success. Instead, for the simple reason that their preferred policy involves the legitimate use of race, advocates would have to appeal to the state's entire electorate. Pet. App. 36a-37a.

An example based on California's experience with an initiative similar to Proposal 2 illustrates this point. Consider two different admissions policy proposals. The first seeks to increase legacy presence in the student body by holding more family-oriented alumni events. The second seeks to increase racial diversity in the student body by conducting outreach sessions at inner city high schools with high minority student populations. Supporters of the first proposal need only attend governing board meetings and persuade the board members to adopt their preferred policy. By contrast, it is quite plausible that underrepresented minorities supporting the second proposal would be precluded from using this path. *See Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1085 (Cal. 2000) (interpreting a California initiative whose language mirrors Proposal 2 as barring such efforts). Thus Proposal 2 would presumably force supporters of minority outreach either to abandon their efforts – a troubling result given the proven success of such programs, *see* David Leonhardt, *Better Colleges Failing to Lure Talented Poor*, N.Y. Times (Mar. 16, 2013), http://tinyurl.com/cantrell-minority-outreach – or to undertake an expensive effort to convince the entire electorate to change the Michigan Constitution.

4. Subjecting educational decisions to radically different political processes depending on whether or

not they involve racial issues triggers the same concerns that prompted this Court to find a violation of the Equal Protection Clause in *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer,* this Court found a Colorado constitutional amendment unconstitutional because it denied to gay, lesbian, and bisexual individuals "safeguards that others enjoy or *may seek* without constraint." *Id.* at 631 (emphasis added). The constraint imposed on gay people in *Romer* mirrors the constraint imposed on members of racial minorities by Proposal 2: rather than being able to appeal to local governments for policy changes, gay people were forced to "enlist[] the citizenry of Colorado to amend the State Constitution." *Id.* So too with members of racial minority groups in Michigan.

Proposal 2 should be seen for what it is: a decision by Michigan to subject laws involving the constitutionally permissible use of race, and only the permissible use of race, to distinctive disadvantages within its educational decisionmaking process. Such a decision constitutes a racial classification of an issue and thus should trigger strict scrutiny.

B. Proposal 2, Like The Laws At Issue In *Hunter* And *Seattle Schools*, Also Triggers Strict Scrutiny Because It Responds To A Minority Group's Success In Achieving Beneficial Policies By Restructuring The Process To Make Future Success More Difficult.

Not only did the challenged amendments in *Hunter* and *Seattle Schools* classify issues on the basis of race, but they did so with the intent to make

it more difficult for minority citizens and their allies to obtain future success within the political process. Because a similar motivation is the predominant factor explaining the passage of Proposal 2, it too triggers strict scrutiny.

1. Even when a law does not constitute a facial racial classification, strict scrutiny is triggered when the state "select[s] or reaffirm[s] a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). This Court has acknowledged that a discriminatory purpose must frequently be inferred from "such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In particular, the "historical background of the decision," including the "specific sequence of events leading up to the challenged decision," is a probative evidentiary source. *Id.* at 267. Additionally, this Court has noted that governmental action involving "[d]epartures from the normal procedural sequence" is often suggestive of "improper purposes." *Id.*

2. This Court has long expressed special concern when realignments of the political process occur in response to a minority group's effective exercise of political power and impose new barriers to future minority success. *See Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (condemning "fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote"); *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013) (condemning states that

"came up with new ways to discriminate as soon as existing ones were struck down").

League of United Latin American Citizens v. Perry (*LULAC*), 548 U.S. 399 (2006), provides an especially powerful recent example of this longstanding principle. There, this Court confronted a mid-decade Texas congressional redistricting plan that divided a cohesive Latino community by removing about 100,000 Latinos from a preexisting district. *Id.* at 439. Justice Kennedy's opinion for the Court pointed to the fact that the redistricting was undertaken just as "Latino voters were poised to elect their candidate of choice." *Id.* at 438. As he explained, the mid-decade redistricting "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active." *Id.* at 439. "In essence, the State took away the Latinos' opportunity because Latinos were about to exercise it." *Id.* at 440. Thus, this Court concluded that the plan "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.*[7]

3. *Hunter* and *Seattle Schools* are earlier embodiments of this still-vital principle.

In *Hunter*, this Court's decision reflected its understanding that the charter amendment was

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[7] Because the Court held that the plan violated Section 2 of the Voting Rights Act, *see LULAC*, 548 U.S. at 442, it was unnecessary to reach the question whether the plan also violated the Constitution.

directed at undercutting minority success in achieving beneficial legislation. First, this Court identified the substantial disproportionality of the amendment's impact on minority groups: "[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority." *Id.* at 391 (opinion of the Court).

This Court also looked to the historical background and sequence of events leading up to the passage of the Akron city charter amendment. *Id.* at 386-88. It found particular significance in the fact that the Akron city council specifically identified the existence of racial discrimination in housing, implemented a fair housing ordinance to address it, and was subsequently reversed by the amendment. *See id.* at 391. The amendment, however, went beyond simply reversing the fair housing ordinance, by also prospectively requiring that future non-discrimination housing proposals be subjected to a more burdensome political process. *See id.* at 389-90 & n.5. Accordingly, as Justice Harlan explained in his concurrence, the city charter amendment had "the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395 (Harlan, J., concurring).

Similarly, in *Seattle Schools*, this Court found that "there [was] little doubt that the initiative was effectively drawn for racial purposes." 458 U.S. at 471. As this Court explained, "the notion of school board responsibility for local educational programs is [one that is] firmly rooted." *Id.* at 478. Indeed, even the statement in favor of the initiative on the

Washington ballot itself emphasized the importance of "local control of schools" generally. *Voters and Candidates Pamphlet* 4 (1978).

As with the charter amendment in *Hunter*, Washington's Initiative 350 directly overrode an existing program adopted for the benefit of minorities. Indeed, this Court noted that the initiative was drafted and passed precisely to do so: "[T]he text of the initiative was carefully tailored to interfere only with desegregative busing. Proponents of the initiative candidly represented that there would be no loss of school district flexibility other than in busing for desegregation purposes.'" *Seattle Schools*, 458 U.S. at 471 (footnote omitted) (internal quotation mark omitted).

In light of the fact that Washington had revamped its ordinary political structure to "impose[] comparative burdens on minority interests," *id.* at 477, this Court found that it was "beyond reasonable dispute" that the initiative "was enacted 'because of, not merely in spite of, its adverse effects upon' busing for integration." *Id.* at 471 (quoting *Feeney*, 442 U.S. at 279) (some internal quotation marks omitted).[8]

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[8] Also significant to this Court's finding of a discriminatory purpose was the fact that the initiative went beyond merely reversing course on a matter of racial policy – it cemented that reversal by subjecting all further consideration of desegregative busing to a different political process. Without that "reallocation of power," *Seattle Schools*, 458 U.S. at 474, the simple repeal of a preexisting voluntary desegregation plan would not necessarily have involved a racially discriminatory purpose, as this Court's decision in *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982), shows. There, this Court distinguished a California

4. Michigan's Proposal 2 similarly reflects a purposeful effort to make it more difficult for minority citizens to achieve beneficial government programs. Article VIII, section 5 of the Michigan Constitution normally confides decisions about educational policy to the governing boards of the state's universities. Proposal 2 upsets this conventional balance only with respect to permissible race-conscious affirmative action programs.

The decisions by Michigan's public universities to adopt, revise, and maintain constitutionally permissible race-conscious affirmative action policies were not uncontroversial. Those policies are in significant part the product of sustained public debate and minority "lobb[ying] for the adoption of such policies." Pet. App. 7a; 123a. Moreover, Proposal 2 was a direct response to this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), upholding the University of Michigan Law School's affirmative action policy and providing a roadmap for continued race-conscious affirmative actions by the state's institutions of higher education. Pet. App. 7a.

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proposition that repealed desegregative busing without changing the level of government at which decisions would be made because the repeal did not "distort[] the political process for racial reasons" or "allocate[] governmental or judicial power on the basis of a discriminatory principle." *Id.* at 541. Similarly, a decision by the University of Michigan Board of Regents simply to forgo an otherwise permissible race-based affirmative action policy would not itself violate the Equal Protection Clause; it would simply reflect ordinary government decisionmaking.

Just as in *Hunter* and *Seattle Schools*, Proposal 2 "involved more than a 'mere repeal'" of the University of Michigan's affirmative action policy, *Crawford*, 458 U.S. at 541. As with Washington's Initiative 350, Proposal 2 intentionally reorganized the political process to the detriment of racial minorities by singling out a policy that benefited them for "peculiar and disadvantageous treatment," *Seattle Schools*, 458 U.S. at 485.

To be sure, members of minority groups are not the only individuals who support race-conscious affirmative action programs, nor are they the only individuals who benefit from them. But the benefit they receive goes beyond the educational benefit of increased diversity that all students may receive; almost by definition, constitutionally permissible race-conscious affirmative action plans result in the admission of some students who would not be selected absent some consideration of race. In any case, those facts do not undercut the conclusion that Proposal 2 imposes a disproportionate burden on members of racial minority groups. After all, in *Seattle Schools*, this Court observed that "Negroes and whites may be counted among both the supporters and the opponents of Initiative 350" and that "white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom," 458 U.S. at 472 (internal quotation marks omitted). Yet this Court still found the initiative infected by a discriminatory purpose.

Thus, this Court's decisions from *Gomillion* through *Hunter* and *Seattle Schools* to *LULAC* support the conclusion that Proposal 2, by intentionally subjecting racial minority groups to

distinctive obstacles in the political process, constitutes a racial classification that triggers strict scrutiny.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of the respondents.[1]

ADL was organized in 1913 – at a time when anti-Semitism was rampant in the United States – to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. Today, in its 100th year, it is one of the world's leading civil and human rights organizations, and its history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority group or not.

As a leading civil rights organization, ADL has vigorously supported enactment and enforcement of the Nation's major anti-discrimination laws. It is also a leader in producing educational materials and programs designed to fight hate, bias, and prejudice.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

ADL believes that each person in our country has the constitutional right to receive equal treatment under the law and that each person has the right to be treated as an individual, rather than as simply part of a racial, ethnic, religious, or gender-defined group. ADL has often filed briefs *amicus curiae* in this Court in cases arising under the Equal Protection Clause of the Fourteenth Amendment to the Constitution or the Nation's civil rights laws.[2] Its history of *amicus*

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[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Cardona v. Power*, 384 U.S. 672 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Taxman v. Bd. of Educ.*, 92 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244

(Continued...)

activity in this Court's school desegregation cases extends back to *Brown v. Board of Education*,[3] and ADL repeatedly has condemned *de facto* discrimination in the Nation's schools.

In the context presented here – a ballot initiative amending the Michigan Constitution to prohibit the State and its political subdivisions from "grant[ing] preferential treatment to[] any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting" ("Proposal 2") – ADL agrees with the respondents that, to the extent that the amendment is read to bar *any consideration* of race in admissions decisions by Michigan public colleges and universities, it violates the Equal Protection Clause because it removes a constitutionally permissible topic from the ordinary political process of governmental decisionmaking solely because it is "racial in nature."

(2003); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Ricci v. DeStefano*, 557 U.S. 557 (2009); and *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013).

[3] 347 U.S. 483 (1954).

SUMMARY OF THE ARGUMENT

1. ADL's experience in a variety of education-related settings confirms that exposure to a diverse academic community serves critical societal needs. At the same time, ADL firmly believes that the Constitution prohibits affirmative action programs from imposing quotas, assigning persons to categories based on their race, or using race as a determinative factor in making admissions decisions.

2. Although the Sixth Circuit read Proposal 2 to ban any "consideration" of race by admissions officers at public educational institutions, by its terms the ballot amendment only bars the State of Michigan (and its public colleges and universities) from "grant[ing] preferential treatment . . . on the basis of race, sex, color, ethnicity, or national origin." "Consideration of race" and "preferential treatment . . . on the basis of race" are distinct concepts which should not be conflated.

3. To the extent that Proposal 2 is read as eliminating *any consideration* of race, sex, color, ethnicity, or national origin in individualized admissions decisions by public educational institutions and entrenching that prohibition at the state constitutional level, it deprives the respondents of equal protection of the law by making the process to adopt race-conscious admissions policies more burdensome than the process to adopt other admissions policies.

ARGUMENT

I. EXPOSURE TO A DIVERSE ACADEMIC COMMUNITY SERVES CRITICAL SOCIETAL NEEDS, BUT PUBLIC INSTITUTIONS MAY NOT VIOLATE CORE EQUAL PROTECTION PRINCIPLES TO ACHIEVE DIVERSITY

Experience confirms that diverse academic environments enhance learning by exposing students to new ideas, breaking down stereotypes, and better preparing students for life in an ever-increasingly interconnected world. The benefits of diversity in higher education, however, do not permit universities to violate Equal Protection guarantees in crafting admissions policies. This Court has held that affirmative action programs must be narrowly tailored to fit the compelling government interest in diversity, and it has struck down programs that impose racial quotas, award extra points to minority applicants, and in other ways fail to meet the high test of strict scrutiny. *See Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

A. DIVERSITY IN HIGHER EDUCATION ENHANCES THE EDUCATIONAL EXPERIENCE FOR ALL STUDENTS AND BETTER PREPARES THEM FOR THE WORLD

ADL has long opposed both *de jure* and *de facto* segregation in our schools. Its premier educational initiative, the A WORLD OF DIFFERENCE® Institute (the "Institute"), brings

children of all races together to learn the values of respect and diversity, bridging racial, ethnic, and religious differences and striving to reduce the tensions that spring from them. The Institute has reached literally hundreds of thousands of teachers and peer trainers and, through them, millions of students, in an effort to eradicate bias and hate before it hardens, as well as to promote diversity and pluralism.

ADL's real-world, front-line experience confirms that efforts to further diversity bear educational fruit. For example, ADL's CAMPUS OF DIFFERENCE™ program, which provides college and university students with practical, experiential, hands-on training to foster intergroup understanding and equip students to live and work successfully in a diverse world, has demonstrated that a diverse educational environment challenges all students to explore ideas, perspectives, and experiences that they might not otherwise explore, to see issues from new points of view, to rethink their own premises and prejudices, and to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with different perspectives.

ADL's experience with the CAMPUS OF DIFFERENCE™ program underscores what the American Council on Education[4] has recognized:

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[4] American Council on Education, *On the Importance of Diversity in Higher Education*, http://www.acenet.edu/newsroom/Documents/BoardDiversityStatement-June2012.pdf (last visited August 26, 2013).

learning in a diverse educational environment promotes personal growth by challenging stereotyped preconceptions, encouraging critical thinking, and helping students to communicate effectively with people of varied backgrounds, thereby preparing students to become good citizens in an increasingly complex, pluralistic society.

Studies confirm these findings. There is a growing body of literature demonstrating that "diverse student populations enhance educational outcomes in undergraduate and graduate higher education . . . ." *See* Kathryn A. McDermott, *Diversity or Desegregation? Implications of Arguments for Diversity in K-12 and Higher Education*, 15 EDUC. POLICY, no. 3, 2001 at 452, 456. Specifically regarding racial diversity, "[r]esearch indicates that cross-race interaction has positive impacts on a range of important outcomes and that the greater the structural diversity of an institution, the more likely students are to engage in these types of interaction." *See* Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES, Ch. 5-11 (Mitchell Chang, et al. eds., 2003).

In addition to aiding colleges and universities in achieving these educational goals, a diverse campus environment can also create opportunities for people from diverse backgrounds, with different life experiences, to come to know one another outside the classroom as more than passing acquaintances and to develop mutual respect for one another. Informal interactions of this kind "help students develop the skills to

participate and lead in a diverse democracy." *See* Patricia Gurin, *et al.*, *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. no. 3, 2002 at 330, 353. Diversity in higher education provides societal benefits beyond the university setting as well. As this Court has recognized, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). In addition, "high-ranking retired officers and civilian leaders of the United States military assert that, 'based on [their] decades of experience,' a 'highly qualified, racially diverse officer corps...is essential to the military's ability to fulfill its principle mission to provide national security.'" *Id.* at 331.

For many of these reasons, this Court has recognized the importance of diversity in the context of higher education. *See Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007) ("The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*. . . . The diversity interest was not focused on race alone but encompassed 'all factors that may contribute to student body diversity.'") (citing *Grutter*, 539 U.S. at 328, 337) (internal quotations omitted); *Grutter*, 539 U.S. at 330 (explaining the "educational benefits that flow from student body diversity" and citing studies showing that student body diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals") (citations

omitted); *id.* at 392-93, 395 (Kennedy, J., dissenting) (explaining that "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity" and approving the use of admissions policies that "giv[e] appropriate consideration to race" in the "special context" of university admissions, while rejecting the particular policies adopted by Michigan Law School).

In short, ADL's experience indicates that exposure to a diverse academic community not only reduces prejudice, but it also enriches and improves the educational experience, increases civic engagement, better prepares students for possible graduate education and career opportunities, and enhances the United States' ability to compete in a globalized economy. Embracing diversity and promoting a fully integrated society is crucial not only to the struggle to defeat discrimination, but also to the continued vitality of our Nation and our society.

B. PUBLIC INSTITUTIONS MAY NOT VIOLATE CORE EQUAL PROTECTION PRINCIPLES TO ACHIEVE DIVERSITY

ADL's staunch commitment to diversity has not diminished its belief in the centrality of the precept that the Equal Protection Clause obligates government to refrain from racial discrimination in all forms. While ADL has endorsed limited racial preferences in order to remedy specific discrimination, it has *opposed* virtually all of the non-remedial racial classifications that have been challenged in this Court, including racial preferences and quotas in affirmative action

programs, arguing that they discriminate on the basis of impermissible characteristics and thus violate the core value of equal protection. *See* ADL amicus filings cited in fn. 2, *supra*. ADL's longstanding position has been that affirmative action programs are invalid when they impose quotas, use race as a determinative factor in making admissions decisions, use race as a proxy for diversity, or act in a manner that assigns persons to categories based on their race.[5]

Affirmative action programs can, however, be structured in a manner that will not violate equal protection principles. When implemented properly, such programs provide educational

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[5] *See, e.g.*, Brief Amicus Curiae of Anti-Defamation League in Support of Neither Party at 15, 18, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (arguing that the University of Michigan's admissions policies "den[ied] to non-minority applicants the individualized consideration that is at the core of equal protection"); Brief Amici Curiae of Anti-Defamation League of B'nai B'rith, et al. at 6, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (taking the position that the University of California was not entitled to "utilize race as the determinative factor in the admission and exclusion of candidates for its medical school at Davis"); Brief of Anti-Defamation League of B'nai B'rith as Amicus Curiae at 22, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (arguing that the University of Washington Law School violated the Fourteenth Amendment by instituting a policy "that amounted to the establishment of a quota, no matter what 'cloak of language' was . . . used by the Law School to disguise the fact from itself as well as from others").

benefits to all students by facilitating a more diverse student body. So long as a public college or university's admissions process is flexible enough that it considers *all* pertinent elements of diversity, rather than using race as a proxy for diversity, the consideration of race as one factor among many does not violate the Equal Protection Clause.[6]

II. "CONSIDERATION" OF RACE AND "PREFERENTIAL TREATMENT" ON THE BASIS OF RACE ARE DISTINCT CONCEPTS WHICH SHOULD NOT BE CONFLATED

Both the Sixth Circuit's *en banc* and panel decisions interpreted Proposal 2 as "eliminat[ing] the *consideration* of 'race, sex, color, ethnicity, or national origin' in individualized admissions decisions." *See Coalition to Defend Affirmative Action v. Regents of the Univ. of Michigan*, 701 F.3d 466, 471 (6th Cir. 2012) (*en banc*) (emphasis added); *Coalition to Defend Affirmative Action v. Regents of University of Michigan*, 652 F.3d 607,

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[6] Applying these principles, ADL recently submitted a brief in support of the University of Texas at Austin in *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013). In ADL's view, the record in that case demonstrated that the university took an applicant's race into account only as part of a holistic review of applicants in which race was never a determinative factor in making an admissions decision, and, as such, ADL believed that the university's consideration of race as part of the admissions process was consistent with equal protection principles.

611 (6th Cir. 2011) (same). A plain language reading of Proposal 2, however, suggests that it does not bar the "consideration" of race. Instead, it bars the State of Michigan (and its public colleges and universities) from "discriminat[ing] against, or grant[ing] *preferential treatment* to, any individual or group on the basis of race, sex, color, ethnicity, or national origin . . . ." MICH. CONST. art. I, § 26 (emphasis added). ADL respectfully submits that the Sixth Circuit erred by failing to recognize a difference – supported by this Court's decisions – between "consideration" of race and "preferential treatment" on the basis of race. To the extent that this Court finds that the Sixth Circuit erred in failing to consider the difference between consideration of race and preferential treatment based on race, this case should be remanded to give the Sixth Circuit the opportunity to determine the scope of Proposal 2's ban on "preferential treatment" and the legal consequences thereof.

A. THERE IS A DISTINCTION BETWEEN THE CONSIDERATION OF RACE AS ONE FACTOR IN A HOLISTIC REVIEW OF A STUDENT'S APPLICATION AND THE CONFERRAL OF PREFERENTIAL TREATMENT ON THE BASIS OF RACE

There is a distinction between affirmative action programs that confer preferential treatment on the basis of race and programs that consider race as one of many non-determinative factors in a holistic approach to admissions decisions. This Court has struck down affirmative action programs that confer preferences based on race –

such as quotas and programs that provide extra points to minority applicants – while upholding programs that take race into consideration as one of many non-determinative factors in a holistic review of a student's application. *See, e.g. Grutter,* 539 U.S. at 334 ("[U]niversities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, *consider* race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant.") (emphasis added and citations omitted).

Racial quotas that set aside a number of seats for minority applicants, thereby barring applicants who are not members of a minority group from consideration for those seats, confer preferential treatment based on race. As Justice Powell explained in reference to the medical school's admissions process at issue in *Bakke*, such a quota system "*prefers* the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class." *Bakke,* 438 U.S. at 305 (emphasis added). Similarly, admissions practices that award points to members of minority groups without providing individualized consideration confer preferential treatment based on race. Under such an admissions system, students who belong to a particular racial group would automatically receive points unavailable to others, giving them an advantage.

By contrast, admissions practices that take race into consideration as one non-determinative factor among many in a holistic review of prospective students' applications do not necessarily confer preferential treatment based on race. Unlike admissions practices that provide points based on race, a program that considers race as one of many factors in a holistic review "awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Grutter*, 539 U.S. at 337. In distinguishing between affirmative action programs that are constitutional and those that are not, "[t]he importance of this individualized consideration in the context of race-conscious admissions is paramount." *Id.* at 337 (citation omitted). This Court has explained it thus:

> [S]o long as a race-conscious admissions program uses race as a 'plus' factor in the context of *individualized consideration*, a rejected applicant 'will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname...His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Grutter, 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 318) (emphasis added).

In *Bakke* this Court considered whether admissions programs that take race into consideration as one of many factors are "simply a subtle and more sophisticated – but no less

effective – means of according racial preference" than the racial quotas at issue in that case. 438 U.S. at 318. The Court resoundingly rejected that suggestion, concluding that quota systems evince "[a] facial intent to discriminate," whereas "[n]o such facial infirmity exists in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process." *Id.*

In a holistic review of individual applicants, in which the university takes into account all factors, giving each student the opportunity to demonstrate how his or her unique experiences will enhance the university's learning environment, students of all races, ethnicities, and backgrounds can compete fairly with one another. An admissions policy like the one at issue in *Grutter*, which considered race as only one non-determinative factor in a holistic review of students' applications, "can (and does) select non-minority applicants who have greater potential to enhance student body diversity over underrepresented minorities." 539 U.S. at 341. In other words, "[d]iversity does not 'prefer' anyone. . . . Diversity works to benefit all students, even if it might result in some applicants with lower SAT scores being admitted over those who did better on the test. A university does not predetermine who might be preferred by an admissions process seeking a racially diverse student body any more than the music school predicts which year violinists will have poor test scores." *See* Teresa A. Bingman & Daniel M. Levy, *More Fair to Whom?: Winners and Losers Post Proposal 2*, 91 MICH. B.J. 24, 28 (Jan. 2012). The Court has found these admissions practices to be constitutional. *See Fisher*, 133 S.Ct. at 2419.

With the limited exception of programs designed to remedy past institutional discrimination, admissions practices that confer preferential treatment based on race, including quotas and systems that award extra points to members of minority groups, have been found unconstitutional.[7] This Court has "never approved preferential classifications in the absence of proved constitutional or statutory violations." *Bakke*, U.S. 438 at 301-02. Simply put, "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 307 (citations omitted). *See also Grutter*, 539 U.S. at 341 (finding "that 'there are serious problems of justice connected with the idea of preference itself'") (quoting *Bakke*, 438 U.S. at 298).

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[7] This Court has found the conferral of preferential treatment based on race to be constitutional only in the limited circumstance wherein a particular public institution has deliberately excluded minorities in the past. *See, e.g., Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 451 (1986) ("courts may utilize certain kinds of *racial preferences* to remedy past discrimination . . . ") (emphasis added and citation omitted); *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) ("A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions.") (citation omitted).

B. PROPOSAL 2 CAN BE INTERPRETED AS BANNING PREFERENTIAL TREATMENT BASED ON RACE, RATHER THAN AS BANNING ALL CONSIDERATION OF RACE IN ADMISSIONS DECISIONS

Both the Sixth Circuit's *en banc* and panel decisions interpreted Proposal 2 as "eliminat[ing] the *consideration* of 'race, sex, color, ethnicity, or national origin' in individualized admissions decisions." *See Coalition*, 701 F.3d at 471 (emphasis added); *Coalition*, 652 F.3d at 611 (same). The Sixth Circuit appears to have made that assumption because Proposal 2 was created by activists who had previously opposed any consideration of race in admissions decisions. *See Coalition*, 701 F.3d at 471 (citing the fact that Proposal 2 was championed by "Jennifer Gratz, the lead plaintiff in *Gratz*"); *Coalition*, 652 F.3d at 610 (same).[8] The Sixth Circuit concluded that this case constituted "the latest chapter in the battle over the use of *race-conscious* admissions policies at Michigan's public colleges and universities," *Coalition*, 652 F.3d at 610 (emphasis added). *See*

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[8] *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 921 (1995) (Thomas, J., dissenting) ("inquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters").

also Coalition, 701 F.3d at 470 (asserting that "[t]hese appeals are before us as an epilogue to the long-running battle over the use of *race-conscious* admissions policies at Michigan's public colleges and universities") (emphasis added).

The only evidence cited by the Sixth Circuit in support of its characterization of Proposal 2 as barring admissions policies that take race into consideration is the "Notice of State Proposals for November 7, 2006 General Election," which, according to the Sixth Circuit, characterized Proposal 2 "as a proposal 'to amend the State Constitution to ban affirmative action programs.'" *Coalition*, 701 F.3d at 471; *Coalition*, 652 F.3d at 610-11. However, the Sixth Circuit's citation of that notice was imprecise and potentially misleading. The notice in question made clear that Proposal 2 was – consistent with its language – a "proposal to amend the State Constitution to ban affirmative action programs *that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes.*" *See* Notice of State Proposals for November 7, 2006 General Election, http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf, at 5 (last visited Aug. 27, 2013) (emphasis added). In other words, the notice in question made clear that Proposal 2 did *not* ban all forms of affirmative action – it only banned forms of affirmative action that "give preferential treatment."

A plain language reading of the statute supports the conclusion that Proposal 2 did not ban all forms of affirmative action, but rather only those forms of affirmative action that afford

preferential treatment to applicants based on race. By its terms, Proposal 2 bars the state and its state universities from "grant[ing] preferential treatment to any individual or group on the basis of race." MICH. CONST. art. I, § 26. On its face, it does not bar affirmative action programs that consider race but do not confer preferential treatment on the basis of race. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 72 P.3d 151, 163, 164, 166 (Wash. 2003) (*en banc*) (state constitutional ban on "preferential treatment" barred only "programs that promote a less qualified applicant over a more qualified applicant" and did not prevent the state from engaging in certain "race conscious" decision-making; rejecting plaintiff's argument that ballot initiative's language barring "preferential treatment . . . on the basis of race . . . in the operation of public education" operated to "bar any consideration of race whatsoever" because, *inter alia*, the plaintiff "would have us read the initiative as if the words 'shall not discriminate against, or grant preferential treatment to any individual or group on the basis of' did not exist, and instead substitute the word 'consider'").[9]

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[9] *See generally Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring) (citing the "venerable principle that if the language of a statute is clear, that language must be given effect"); *Bishop v. Linkway Stores, Inc.*, 655 S.W.2d 426, 428-29 (Ark. 1983) (refusing to construe a state constitutional amendment enacted by Arkansas voters through a referendum "to mean anything other than what it says" because "when a constitutional amendment or a statute is plain and unambiguous, there is no room left for judicial

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The Sixth Circuit assumed that Proposal 2 barred the use of all affirmative action programs, but "[w]hether an affirmative action program constitutes a preference is an assertion that has to be proved, not assumed." *See* Kimberle Crenshaw, *Playing Race Cards: Constructing A Pro-Active Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196, 211 (1999-2000); *see also* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1091 & n.46 (2009) (explaining that, as a general matter, "state anti-affirmative action laws do not impose an absolute ban on race-conscious action" and noting, in reference to the State of Michigan ballot initiative at issue here, that "[r]ace-based affirmative action is arguably permissible under [Proposal 2] so long as it does not constitute 'discrimination' or 'preferential treatment'") (citation omitted).

An analysis of the textual context of Proposal 2 also supports the interpretation that Proposal 2 only bans affirmative action programs that grant preferential treatment based on race. Proposal 2 groups "public education" in a list alongside "public employment" and "public contracting," thereby suggesting that these terms have something in common. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012) ("When several nouns or verbs or adjectives or adverbs – any words – are associated in a context suggesting that the words

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construction, and neither the exigencies of a case, nor a resort to extrinsic facts will be permitted to alter the meaning of the language used").

have something in common, they should be assigned a permissible meaning that makes them similar. The [*noscitur a sociis*] canon especially holds that 'words grouped in a list should be given related meanings.'") (citation omitted). But this Court has recognized diversity as a compelling government interest, and permitted consideration of race to achieve diversity, only in "the unique setting of higher education." *See Gratz*, 539 U.S. at 271; *Parents Involved*, 551 U.S. at 721-22 ("The specific interest found compelling in *Grutter* was student body diversity 'in the context of higher education.'"). The fact that the reach of Proposal 2 extends well beyond the educational context suggests that it was not directed at barring the types of diversity-oriented affirmative action programs that this Court has permitted in the unique context of higher education. *See, e.g.*, *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754, 1757, 1760 (2013) (interpreting a statutory term in light of its "statutory neighbors" and ruling that the term imposed a requirement "akin to that which accompanies application of the other terms in the same statutory phrase," citing *noscitur a sociis*).[10]

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[10] It is not entirely clear what (if anything) is barred by Proposal 2 that would not already be prohibited under this Court's precedents. This Court has permitted forms of affirmative action that give preferential treatment on the basis of race only in a very limited remedial context, what a plurality of the Court has referred to as an "extreme case." *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 509 (1989); *see also id.* at 504-05 (permitting states to use racial preferences only when they "possess evidence that their

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The Sixth Circuit failed even to entertain the possibility that Proposal 2 should be interpreted to bar "preferential treatment" but not to bar all consideration of race in admissions decisions. *See, e.g., Coalition*, 701 F.3d at 473 ("the sole issue before us is whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even *consider* using race as a factor in admissions decisions") (emphasis in original). For that reason, the case should be remanded to the Sixth Circuit so that it can determine in the first instance the scope of Proposal 2 and the legal consequences thereof. *See, e.g., Fisher*, 133 S.Ct. at 2421 ("fairness to the litigants and the courts that heard the case requires that [the case] be remanded" so

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own spending practices are exacerbating a pattern of prior discrimination" and when they can "identify that discrimination, public or private, with some specificity;" "past societal discrimination alone can[not] serve as the basis for rigid racial preferences") (internal citations omitted). To the extent that the impact of Proposal 2 is to attempt to ban remedial affirmative action programs in that "extreme case," such a ban would raise grave constitutional concerns because it could prevent states from eradicating discrimination. *See, e.g., id.* at 519 (Kennedy, J., concurring in part and concurring in judgment) (a race-conscious remedy "may be the *only adequate remedy* after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause") (emphasis added); *United States v. Paradise*, 480 U.S. 149, 174 (1987) (plurality opinion) (remedial affirmative action programs are "*necessary* to eliminate the effects of . . . past discrimination") (emphasis added).

that those courts can apply the correct mode of analysis in the first instance); *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings College of Law v. Martinez*, 130 S.Ct. 2971, 2995 n.28 (2010) ("When the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration, not to seize the opportunity to decide the question ourselves."); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) ("We ordinarily 'do not decide in the first instance issues not decided below.'") (citations omitted).

III. TO THE EXTENT THAT THE COURT READS PROPOSAL 2 TO ENTRENCH IN THE STATE CONSTITUTION A BAN ON ANY CONSIDERATION OF RACE, IT IS UNCONSTITUTIONAL

Although ADL believes that the Sixth Circuit erred by conflating "consideration" of race with "preferential treatment" on the basis of race (*see supra* Sec. II), to the extent that the Court interprets Proposal 2's ban on "preferential treatment" to bar any consideration of race by public colleges and universities, the Sixth Circuit's determination that Proposal 2 violates the Equal Protection Clause should be affirmed.

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain[s] open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

Romer v. Evans, 517 U.S. 620, 633 (1996). Proposal 2, by "entrench[ing] [its] prohibition at the state constitutional level . . . prevent[s] public colleges and universities or their boards from revisiting this issue — and only this issue — without repeal or modification of article I, section 26 of the Michigan Constitution." *Coalition*, 701 F.3d at 471-72, 474.

As the Court made clear in *Hunter v. Erickson*, 393 U.S. 385, 393 (1969), "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size" (citations omitted). The Equal Protection concerns raised by *Hunter* are implicated whenever laws "differentiate[] between the treatment of problems involving racial matters and that afforded other problems in the same area." *See Lee v. Nyquist*, 318 F. Supp. 710, 718 (W.D.N.Y. 1970) (three-judge court)), *summarily aff'd*, 402 U.S. 935 (1971); *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 480 (1982) ("By placing power over desegregative busing at the state level, . . . Initiative 350 plainly 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.'") (citing *Lee*, 318 F. Supp. at 718). For these reasons, the court in *Lee* determined that a statute that "denie[d] appointed officials the power to implement non-voluntary programs for the improvement of racial balance" violated the Equal Protection Clause because the statute "treat[ed] educational matters involving racial criteria differently from other educational matters." *See Lee*, 718 F. Supp. at 715, 719.

So too here, Proposal 2 (to the extent that it is interpreted to bar any consideration of race) treats educational matters involving racial criteria differently from other educational matters. Prior to the enactment of Proposal 2, a citizen who wanted Michigan public educational institutions to change their admissions criteria could "lobby the admissions committees directly, . . . petition higher administrative authorities at the university, such as the dean of admissions, the president of the university, or the university's board[,] . . . seek to affect the election — through voting, campaigning, or other means — of any one of the eight board members whom the individual believes will champion his cause and revise admissions policies accordingly[,] [or] . . . campaign for an amendment to the Michigan Constitution." *Coalition*, 701 F.3d at 484. After the enactment of Proposal 2, however, all of those methods to attempt to change public educational institutions' admissions criteria remain possible for proposed changes that do not relate to race, but "race-conscious admissions policies" may only be changed through the most "expensive, lengthy, and complex" of those methods, an amendment to the State Constitution. *See id.* As such, "[b]y amending the Michigan Constitution to prohibit university admissions units from using even modest race-conscious admissions policies, Proposal 2 thus removed the authority to institute any such policy from Michigan's universities and lodged it at the most remote level of Michigan's government, the state constitution." *See id.*

To the extent that Proposal 2 is interpreted to entrench in the state constitution a ban on the use of even modest race-conscious admissions

policies by public colleges and universities, it violates the Equal Protection Clause.

* * *

CONCLUSION

For the foregoing reasons, insofar as Proposal 2 by its terms bans "preferential treatment" on the basis of race, not "consideration" of race, the Court should remand this case to the Sixth Circuit and should not reach the issue of whether a state may, consistent with the Equal Protection Clause's political-process doctrine, enshrine in its state constitution a ban on the consideration of race by public educational institutions. However, to the extent that the Court interprets Proposal 2 to bar all race-conscious admissions policies by public educational institutions, Proposal 2 deprived the respondents of equal protection of the law by making it more burdensome to change admissions policies that are racial in nature than to change other admissions policies, and the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF ARIZONA, ALABAMA, GEORGIA, OKLAHOMA, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae, the States of Arizona, Alabama, Georgia, Oklahoma, and West Virginia (the "Amici States") have a strong interest in eradicating discrimination and fostering diversity in their public institutions by affording equal treatment to all, regardless of race, sex, color, ethnicity, or national origin. Indeed, Arizona, Michigan, California, Florida, Nebraska, New Hampshire, Oklahoma, and Washington have adopted laws that bar preferential treatment or discrimination "on the basis of race, sex, color, ethnicity or national origin" in public education, including university admissions, public employment, and public contracting. *See* Ariz. Const. art. II, § 36(A); Cal. Const. art. I, § 31; Mich. Const. art. I, §26; Neb. Const. art. I, § 30, Okla. Const. art. II, § 36A; N.H. Rev. Stat. Ann. § 187-A:16-a(I); Wash. Code Ann. § 49.60.400(1); Fla. Exec. Order 99-281. These laws are materially identical to article I, Section 26 of the Michigan Constitution (Section 26). The Sixth Circuit declared Section 26 unconstitutional under the Equal Protection Clause in *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the University of Michigan*, 701 F.3d 466 (6th Cir. 2012) (en banc). The Amici States have a significant interest in reversing the Sixth Circuit decision and upholding the States' prerogative to enact laws like Section 26 that are wholly consistent with the Equal Protection Clause.

In *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), this Court stated that States "can and should" look to "race-neutral alternatives" to achieve diverse student

populations in state universities. The federal system allows States to be "'laboratories for experimentation to devise various solutions where the best solution is far from clear.'" *Grutter*, 539 U.S. at 342 (Kennedy, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995)). The Amici States therefore urge the Court to hold that the so-called political structure doctrine in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), does not prevent States from continuing the experimentation that is crucial to developing creative solutions and working toward the time when race-based college admissions policies reach their "logical end point." *Grutter*, 539 U.S. at 342.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Justice Harlan captured a fundamental American value in his dissent in *Plessy v. Ferguson*: "Our Constitution is *color-blind*, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." 163 U.S. 537, 559 (1896) (emphasis added), *overruled by Brown v. Board of Education*, 347 U.S. 483 (1954). Justice Harlan also opined that "the constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." *Id.* at 554 (Harlan, J., dissenting).

This same principle is embodied in President John F. Kennedy's executive order that governmental decisions should be undertaken "without regard to race, creed, color or national origin." Exec. Order No.

10925, 26 Fed. Reg. 1977, sec. 301(1) (Mar. 6, 1961). President Kennedy later reiterated that "race has no place in American life or law." Pres. John F. Kennedy, Civil Rights Announcement (June 11, 1963). Reverend Dr. Martin Luther King said the same thing in the summer of 1963 in words now familiar to most Americans.

Recently, this Court struck down a student assignment plan that relied on racial classification, repeating: "'[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745-46 (2007) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995)). This Court also emphasized that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748.

The Sixth Circuit held below that Michigan's constitutional provision prohibiting discrimination or preferences based on race in public university admissions decisions violated equal protection principles. This gets it precisely backward. The United States Constitution requires treatment of citizens as individuals and *prohibits* treatment based on the race they happen to have been born into. U.S. Const. Amend. XIV, § 1 (no person can be denied "equal protection of the laws"); *see also Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) ("A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by

race or gender" and "does not violate the Equal Protection Clause in any conventional sense.").

In *Wilson*, the Ninth Circuit addressed an equal protection challenge to an initiative measure that amended the California Constitution to prohibit the State from discriminating or granting preferential treatment "on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." 122 F.3d at 696 (quoting Cal. Const. art. I, § 31(a)) (Section 31). The Ninth Circuit rejected the argument that California's Section 31 denied equal protection under the political structure doctrine outlined in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). *Wilson*, 122 F.3d at 708 ("Nothing in the Constitution suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications—race and gender—must be readily available at the lowest level of government while preferences based on any other presumptively legitimate classification—such as wealth, age or disability—are at the mercy of statewide referenda.").

A bare majority of the en banc Sixth Circuit, however, expressly declined to follow the Ninth Circuit's long-standing decision in *Wilson*. *BAMN*, 701 F.3d at 486 n.8. Instead, the Sixth Circuit held that under the political structure doctrine articulated in *Hunter* and *Seattle School District*, Michigan's Section 26 deprived minority groups of equal protection because it "targets race-conscious admissions policies" and it "reallocates political power or reorders the

political process in a way that places special burdens on racial minorities." *Id.* at 485.

This Court should reject the Sixth Circuit's misapplication of the political structure doctrine. The Sixth Circuit's reasoning is flawed as reflected in *Wilson* and the California Supreme Court's decision in *Coral Construction, Inc. v. City of San Francisco*, 235 P.3d 947 (Cal. 2010) (holding that California's Section 31 did not violate the political structure doctrine). The Court should also reject the Sixth Circuit's reasoning because it conflicts with the principles in *Grutter*.

In *Grutter*, 539 U.S. at 342, this Court held that, under limited circumstances, some race preferences can be constitutionally permissible for a limited period of time. This Court said that the States "can and should" look to "race-neutral alternatives" to achieve diverse student populations in state universities. *Id.* Arizona, Michigan, and six other States have adopted laws that require them to implement race-neutral university admissions policies. The universities in these States, concerned with maintaining diverse student populations, have implemented race-neutral admissions policies that have nonetheless taken into account and, for the most part, achieved the universities' goal of maintaining diverse student populations.

The Sixth Circuit decision will restrict a State's ability to pass laws requiring race-neutral admissions policies, which in turn hampers the experimentation and innovation in race-neutral policies that *Grutter* sought to encourage. Although in *Grutter* this Court held that the Constitution permitted limited race-

conscious admissions policies in conventional equal protection analysis, it did not hold that such policies are required. 539 U.S. at 342. The Sixth Circuit contravened *Grutter* by holding that the political structure doctrine prohibits Michigan from amending its constitution to eliminate race-conscious policies implemented by state university admissions committees. The decision below discourages, rather than encourages, "'innovation and experimentation'" in the federal system. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

ARGUMENT

I. State Laws that Prohibit Discrimination or Preferences Based on Race, Sex, Color, Ethnicity, and National Origin Do Not Violate the Equal Protection Clause.

The Sixth Circuit determined that Section 26 violated the Equal Protection Clause by "removing the power of university officials to even *consider* using race as a factor in admissions decisions," 701 F.3d at 473, and thereby "reorder[ing] the political process in Michigan to place special burdens on minority interests," *id.* at 485. In reaching its conclusion, the court relied solely on *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982).[1] *BAMN*, 701 F.3d at 473-85. This

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[1] The Sixth Circuit acknowledged that traditional equal-protection analysis was foreclosed by *Grutter*. 701 F.3d at 473. In upholding Section 31, a California constitutional provision similar to Section

Court should reject the Sixth Circuit's interpretation of *Hunter* and *Seattle School District* and its application of the political process doctrine to Section 26. As the Ninth Circuit explained, "*Hunter* and *Seattle* addressed the constitutionality of political obstructions that majorities had placed in the way of minorities to achieving protection against unequal treatment." *Wilson*, 122 F.3d at 704. In contrast, and consistent with equal protection principles, Section 26 and similar state laws forbid preferential treatment to applicants for admission to public universities based on race or sex.

In *Hunter*, the plaintiff had sought enforcement of a fair housing ordinance passed by the Akron City Council that banned discrimination in the sale or lease of real property. 393 U.S. at 386-87. The plaintiff brought an equal protection challenge to the amendment to the Akron City Charter that repealed the fair housing ordinance and prevented the city council from enacting an ordinance that addressed racial discrimination in housing without the approval of a majority of Akron voters. *Id.*

This Court found in the charter amendment "an explicitly racial classification" that drew "a distinction between those groups who sought the law's protection

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26, the Ninth Circuit likewise rejected a traditional equal-protection challenge: "A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender" and therefore "Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense." *Wilson*, 122 F.3d at 702.

against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.* at 389-90. Because the Akron amendment made it "more difficult for minorities to enact legislation in its behalf," the Court held that the Akron amendment "discriminates against minorities, and constitutes a real, substantial, and invidious denial of equal protection of the laws." *Id.* at 393.

In *Seattle School District*, this Court addressed a statewide referendum that repealed a local ordinance that had implemented a series of school desegregation measures. 458 U.S. at 460-62. In finding that the Washington referendum violated the political structure doctrine, this Court explained that "when the political process or decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on "distinctions based on race."'" *Seattle School District*, 458 U.S. at 485 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971) (quoting *Hunter*, 393 U.S. at 391).

In *Wilson,* 122 F.3d at 696, the Ninth Circuit addressed an equal protection challenge to a California initiative measure that amended the California Constitution to prohibit the State from discriminating or granting preferential treatment "on the basis of race, sex, color, ethnicity, or nation origin in operation of public employment, public education, or public contracting," Cal. Const. art. I, § 31(a). The language of California's Section 31 mirrors Michigan's Section 26. The court framed the question as "whether a

burden on achieving race-based or gender-based preferential treatment can deny individuals equal protection of the laws." *Id.* at 705.

The Ninth Circuit rejected the plaintiffs' argument that Section 31 violated minorities' equal protection rights under *Hunter* and *Seattle School District*. 122 F.3d at 709. The Ninth Circuit distinguished between the laws invalidated in *Hunter* and *Seattle School District*, which "reallocated political authority in a discriminatory manner" and the California initiative that this Court upheld in *Crawford v. Board of Education*, 458 U.S. 527 (1982), which repealed "'race-related legislation or policies that were not required by the Federal Constitution in the first place.'" *Wilson*, 122 F.3d at 706 (quoting *Crawford*, 458 U.S. at 538). The court concluded that Section 31, like the law upheld in *Crawford*, is "a law that addresses in neutral fashion race-related and gender-related matters" because "[i]t does not isolate race or gender antidiscrimination laws from any specific area over which the state delegated authority to a local entity," or "treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another." *Id.* at 707.

The Ninth Circuit also concluded that Section 31 did not deny equal protection because it did not burden an individual's right to equal treatment:

> It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstruction to preferential treatment.

> While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.

Id. at 708.

Thirteen years after *Wilson*, the California Supreme Court also held that Section 31 did not violate the political structure doctrine articulated in *Hunter* and *Seattle School District*: "Nothing in *Hunter* or *Seattle* supports extending the political structure doctrine to protect race- or gender-based preferences that equal protection does not require." *Coral Constr., Inc. v. City of San Francisco*, 235 P.3d 947, 959 (Cal. 2010) (internal citation omitted).

Although the court accepted the City's characterization of the pupil transportation program involved in *Seattle School District* as providing race-conscious affirmative relief, the court rejected the City's argument that the case required invalidation of Section 31. *Coral Constr.*, 235 P.3d at 959-60. The court explained that although the "race-conscious pupil assignment programs repealed by Washington's voters would be presumptively unconstitutional" under *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007), this Court decided *Seattle School District* at a time when its decisions indicated that such programs were within the school districts' discretion. 235 P.3d at 959. The court also noted that the *Seattle School District* Court did not understand "the pupil assignment policies in question as providing unequal *preferences*, as opposed simply to '*equal* educational opportunity.'" *Id.* at 960 (quoting

Seattle School District, 458 U.S. at 479) (emphasis added by court) (other internal quotation marks omitted). The court concluded that "*Seattle* cannot fairly be read as holding that the political structure doctrine protects presumptively unconstitutional racial preferences, as opposed to programs intended to bring about immediate equal treatment." *Id.*

The Sixth Circuit rejected the cogent reasoning of the Ninth Circuit in *Wilson* and the California Supreme Court in *Coral Construction* when it concluded that Section 26 violates the political structure doctrine. *BAMN*, 701 F.3d at 485-87. In so doing, the Sixth Circuit misconstrues the political structure doctrine and creates precedent that is irreconcilable with *Grutter*'s recognition, 539 U.S. at 342, that "all governmental use of race must have a logical end point" and that therefore States should experiment with race-neutral alternatives to achieve diversity.

II. Upholding the Sixth Circuit Decision Would Undermine the Quest for Race-Neutral Alternatives that Achieve Diversity.

As this Court recognized in *Grutter*, "'[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'" 539 U.S. at 341 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). The Court expressed the expectation that the race-conscious law school admissions policies it approved in 2003 would have "a logical end point" and no longer be necessary in another twenty-five years. *Grutter*, 539 U.S. at 342-43. The Court in *Grutter* also approvingly cited some of the

laws prohibiting racial preferences in several States that were already experimenting with race-neutral admissions policies to achieve the compelling state interest of student body diversity. *Id.* at 342 (noting California, Florida, and Washington state laws that prohibit racial preferences in admissions).

Following *Grutter*, the States of Arizona, Michigan, Nebraska, and Oklahoma used the initiative process to amend their constitutions to include prohibitions on race-based discrimination and preferential treatment in public employment, public education, and public contracting that are nearly identical to California's Proposition 209. Ariz. Const. art. II, § 36(A) (adopted 2010); Mich. Const. art. I, § 26 (adopted 2006); Neb. Const. art. I, § 30 (adopted 2008); Okla. Const. art. II, § 36A (adopted 2012). New Hampshire recently followed suit, adopting a statutory prohibition on race-based discrimination and preferential treatment in recruiting, hiring, promotion, or admission within the state college and university system. N.H. Rev. Stat. Ann. § 187-A:16-a(I) (adopted 2011). As a result of these state laws enacted both before and after *Grutter*, States have adopted race-neutral admissions policies that also seek to achieve a diverse student body.

After the California voters enacted Section 31 in 1996, which barred sex- and race-based preferences in college admissions, the California Board of Regents adopted an automatic admissions plan, known as the 4% Plan, which guaranteed that the top 4% of students from each California high school senior graduating class would be admitted if they also completed eleven specific units of college preparatory coursework. U.S. Dep't of Educ., *Race-Neutral Alternatives in*

Postsecondary Education: Innovative Approaches to Diversity (hereinafter *Race-Neutral Alternatives*) at 11 (March 2003), available at http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html. The University of California Board of Regents also adopted a "Comprehensive Review" admissions plan that evaluates socioeconomic status and supplements the 4% Plan. *Id.* at 10. Although the California University admission system is more difficult to evaluate than systems in some other states where admission criteria is less selective, California's race-neutral criteria have produced some positive results. *See* Peter Arcidiacono, Esteban Aicejo, Patrick Coate, and V. Joseph Hotz, *The Effects of Proposition 209 on College Enrollment and Graduation Rates in California* at 27 (December 2011), available at http://www.public.econ.duke.edu/~psarcidi (concluding that minority enrollments increased in less-selective UC campuses after Section 31 was enacted, while minority enrollment decreased in more-selective UC campuses, but that Section 31 resulted in higher minority graduation rates).

Florida also adopted race-neutral admissions policies after the Governor ended the use of race, ethnicity, or gender in university admission decisions in Executive Order 99-281. *Race Neutral Alternatives, supra* at 11. Florida guarantees all public high school seniors within the top 20% of their class admission into the state university system, the "Talented 20 Program," but they still must compete to gain admission at the institution that they prefer. *Id.* Florida supplements the Talented 20 Program by consideration of socioeconomic factors. *Id.* Instead of experiencing a decline in the number of minority students enrolled after the elimination of race- and

–gender based preference and the implementation of the new admissions policies, the number of minority students increased modestly. *Id.* at 14.

In 1998, Washington voters passed an initiative that prohibited discrimination or preferential treatment "based on race, sex, color, ethnicity or national origin in public employment, education, and contracting." Wash. Code Ann. § 49.60.400(1). After the initiative went into effect, the University of Washington adopted a holistic review admissions process that considers socioeconomic factors. Richard D. Kahlenberg, *Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, 40 (2012), available at http://www.tcf.org/work/education/detail/a-better-affimative-action-state-universities-that-created-altrnatives-to/. Although African American and Hispanic admissions dropped in the first year that the University of Washington eliminated race-based admission criteria, the number of African American and Hispanic admissions in subsequent years under the holistic review admissions criteria equaled or exceeded the pre-ban admissions numbers. *Id.* at 42.

Although Texas did not choose to eliminate race-based admission policies, the Fifth Circuit held that the University of Texas's consideration of race in its admissions policy violated the Equal Protection Clause. *Hopwood v. Texas*, 78 F.3d 932, 955 (5th Cir. 1996). After *Hopwood*, the University of Texas "stopped considering race in admissions and substituted a new holistic metric of a candidate's potential contribution to the University," which included a variety of factors, some of which involved the applicant's socioeconomic

background. *Fisher v. Univ. of Texas*, 570 U.S. __, slip op. at 2-3 (U.S. June 24, 2013). Texas also passed the "Top Ten Percent Law" that grants "automatic admission to any public state college, including the University [of Texas], to all students in the top 10% of their class at high schools in Texas that comply with certain standards." *Id.* at 3 (referring to Tex. Educ. Code Ann. § 51.803). The University of Texas's revised admission policy plus the Top Ten Percent Law "resulted in a more racially diverse environment" post-*Hopwood* than that which existed when race was explicitly considered. *Id.*[2]

In November 2010, Arizona voters passed Proposition 107, which amended the Arizona Constitution, just as Michigan voters amended their constitution in 2006, to prohibit programs that grant "preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting." *Compare* Ariz. Const. art. II, § 36 *with* Mich. Const. art. I, § 26. Since Proposition 107 became Arizona law, Arizona State University's Sandra Day O'Connor College of Law (ASU) and Arizona's other public law school, the University of Arizona's James E. Rogers College of Law, no longer consider race or ethnicity in

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[2] After this Court decided *Grutter*, the University of Texas "adopted a third admissions program, the 2004 Program in which the University reverted to explicit consideration of race." *Fisher*, slip op. at 3. The Petitioner in *Fisher* challenged the 2004 Plan. This Court vacated the court of appeals' judgment upholding the 2004 Plan and remanded the case "so that the admissions process can be considered and judged under a correct analysis." *Id.* at 13.

admissions decisions. Stephanie Snyder, *A Year After Preferential Treatment Ban, Little Change on State Campuses* (May 5, 2012) http://AzCapitolTimes.com/news/2012/05/03/a-year-after-preferential-treatment-ban-little-change-on-state's-campuses.

Instead, at the University of Arizona law school after Proposition 107, admission depends on "many. . . factors," including grades and LSAT scores, but also "the applicant's educational experiences, grade trends, graduate study, significant or extracurricular activities, unique educational or occupational experiences, substantial community service, socioeconomic background, educational, and personal challenges." http://www.law.arizona.edu.Admissions/application_process.cfm. Similarly at ASU, law school admissions committees evaluate such qualitative factors as "the rigor of the undergraduate course of study, graduate study, demonstrated commitment to public service, work experience, leadership experience, extracurricular or community activities, history of overcoming economic or other disadvantage, personal experiences with discrimination, overcoming disability, geographic diversity, diversity of experience and background, maturity, ability to communicate, foreign language proficiency, honors and awards, service in the Armed Forces, publications, and exceptional personal talents." http://www.law.asu.edu/admissions/Admissions/HowToApply.aspx.

In the first classes admitted after Proposition 107, both Arizona law schools "saw about a 3 percent drop in minority enrollment." Snyder, *supra* at 8. That small drop was well within the range of minority enrollment percentages achieved when ASU gave

preferences in admissions to race and ethnicity—and far less than the thirty percent drop that ASU predicted would result if such preferences were no longer allowed. Brief for the Arizona State University College of Law as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 398328 at *8 (U.S. Feb. 18, 2003).

The experience of California, Florida, Texas, and Arizona shows that public universities can achieve diverse student bodies without the race- and ethnicity-conscious admissions policies prohibited by state law. As stated in a Proposition 107 frequently-asked-questions sheet issued by the University of Arizona, "Proposition 107 does not prevent the University from using legally permissible means to create a diverse and high quality student body and educational environment. The University will continue to pursue diversity using factors that are race and gender neutral." University of Arizona, Office of the President, Proposition 107 FAQ, available at http://www.president.arizona.edu/node/661.

The state-specific experimentation in law school admissions policy that *Grutter* endorsed, and that several States have chosen to engage in, is a virtue of our federal system of government. As this Court has repeatedly recognized, "the federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond*, 131 S. Ct. at 2364 (quoting

Gregory, 501 U.S. at 458). The Sixth Circuit's en banc decision undermines these federalism values and, if not overruled, will chill local experimentation and innovation that advances equal protection in university admissions.

Moreover, due to the Sixth's Circuit's reliance on the political process doctrine, States wishing to implement race-neutral policies in college admission decisions face uncertainty about how to do so constitutionally. In *Grutter*, the Court envisioned that twenty-five years after its decision, "the use of racial preferences will no longer be necessary to further the interest approved" in the decision. 539 U.S. at 343. Yet the Sixth Circuit decision seems to require that only the body that implemented a race preference can eliminate that preference. *See BAMN*, 701 F.3d at 487. Under the Sixth Circuit's reasoning, States that wish to experiment with race-neutral policies will not be able to so as part of a cohesive, statewide plan. Instead, such programs would need to be implemented in a piecemeal fashion, school by school. As such, even if there is sufficient political support for a statewide ban on race-based preference, and the time when such preferences comport with equal protection has come to its end, it will be up to individual public colleges and universities to end preferential treatment based on race. This Court could not have intended that its political structure cases would so hamper the States' authority to adopt uniform race-neutral policies.

CONCLUSION

This Court should reverse the Sixth Circuit decision.

Respectfully submitted this 1st day of July, 2013.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-682

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IN THE

Supreme Court of the United States

BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE ASIAN AMERICAN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Asian American Legal Foundation ("AALF") is based in San Francisco, California.[1] It was founded to promote the civil rights of Asian Americans. For much of this nation's history, Americans of Asian origin were denied equal access to public schools and universities due to racial prejudice. They have often needed the protection of laws to live free of racial persecution.

If this Court finds Article I section 26 of the Michigan Constitution ("Section 26") invalid, its decision will likely lead to renewed discrimination against Asian Americans in school admissions—not only in Michigan, but also in San Francisco, California and across the United States. For example, Section 26 is very similar to Article I section 31 of the California Constitution ("Section 31"), which likewise prohibits racial discrimination in state school admissions and contracting. Invalidation of Section 26 would inevitably lead to invalidation of California's anti-discrimination law, with consequences throughout the State.

Among other things, such a decision would endanger the remedy secured by AALF's constituents in *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998), where San Francisco's K-12 schoolchildren of Chinese descent fought for five years to end racial and ethnic

---

1. This brief is filed pursuant to blanket letters of consent by all parties that have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

admissions quotas in the San Francisco public school system. *See Ho v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999). In the years since the *Ho* case, proponents of the use of race have lobbied unceasingly to resume race-based admissions in the San Francisco school system but have, so far, been stymied by the presence of Section 31. If this Court were to invalidate anti-discrimination protections in a State's constitution, such a ruling would likely mean renewed race-based discrimination in San Francisco's schools—and in schools throughout the United States.

AALF members supported the *Ho* litigation as well as Proposition 209, the voter initiative that amended the California constitution to add Section 31. AALF and its constituents therefore have a strong interest in the issues that this Court will decide in the instant case.

Accordingly, AALF and its constituents respectfully ask this Court to hear their arguments in favor of Petitioner.

SUMMARY OF ARGUMENT

The Court should apply common sense and reject the argument of Respondents that a State law protecting the civil rights of everyone somehow offends equal protection. A law forbidding race- and gender-based discrimination in public employment, education and contracting cannot violate the Fourteenth Amendment. In particular, Respondents' argument that members of minority groups are somehow harmed by Section 26 flies in the face of reason. Section 26 does not single any group out for unequal treatment, nor does it reorder the political

process to make it more difficult for individuals of any group to vindicate their right to equal treatment. To the contrary, it protects the rights of all individuals to equal treatment under the law.

As the history of Asian Americans in this country amply demonstrates, it is ethnic minorities that are most benefited from laws such as Section 26 that prohibit discrimination. The long struggle of Chinese Americans for equal access to schools in California and elsewhere is a case in point. Viewed historically as faceless members of a "yellow horde," in years past, individuals of Chinese descent were often the victims of official actions directed at "race" meant to serve the greater public good. The onus extended to Chinese American children who sought to attend public schools. *See, e.g.,* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools,* 5 Asian L.J. 181, 207-208 (May 1998).

San Francisco and other cities flatly denied "Chinese" children the right to attend public schools. When courts ordered their admission, the State of California established separate "Chinese" schools, to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho,* 147 F.3d at 864. Even in our times, school officials who believed they were acting in good faith have sought to classify Chinese American students by race for unequal treatment. *See* David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer,* 16 Harv. BlackLetter J. 39, 54 (Spring 2000).

In case after case, it was appeals to the courts under laws such as the one at issue here that brought equal rights to citizens of Chinese descent. While the equal protection clause of the Fourteenth Amendment is, of course, paramount, the struggle has always been to persuade states, counties and cities to prohibit the kinds of discrimination forbidden by the Fourteenth Amendment. Article I section 31 of the California Constitution, paralleling Article I section 26 of the Michigan Constitution, now emphatically prohibits race-based discrimination in public education and contracting. It provides important protections to Asian Americans and to individuals of all races. If this Court were to strike down Section 26, California's similar provision would follow. The result would be a great setback for all Americans, but particularly for vulnerable minorities who need the protection of laws guarantying them the right to be judged as individuals rather than as faceless members of some "race."

For these and other reasons set forth herein, the Court should uphold Section 26 and grant the relief sought by Petitioner.

ARGUMENT

I. SECTION 26 IS NEEDED TO PROTECT THE RIGHT OF ASIAN AMERICANS TO LIVE FREE OF RACIAL PERSECUTION.

This Court has repeatedly stated that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509

U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). As this Court has explained, "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Nonetheless, in case after case, it has been appeals to laws protecting individual rights that have allowed individuals to live free of persecution. This has particularly been true for Asian Americans.

The experience of Chinese Americans in this country illustrates the importance of laws such as Section 26 that protect individual rights. Throughout their history in this country, individuals of Chinese descent have sought to participate in and contribute to American society but have often faced significant barriers solely because of their race. *See, e.g.*, Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982). Their treatment gave rise to the expression "a Chinaman's Chance," a term meaning "having little or no chance of succeeding." News Watch Diversity Style Guide, *at* http://www.ciij.org/publications_media/20050321-133409.pdf (last checked, June 30, 2013).

Time and again, Chinese Americans received equal treatment only after appealing to the courts for vindication of their rights.

For example, in *Ho Ah Kow v. Nunan*, 12 F. Cal. 252 (C.C.D. Cal. 1879) (No. 6,546), a district court invalidated San Francisco's infamous "Queue Ordinance" on equal protection grounds.

In *In re Ah Chong*, 2 F. 733 (C.C.D. Cal.1880), the court found unlawful an act forbidding Chinese Americans from fishing in California waters.

In *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880), the court declared unconstitutional a provision of California's 1879 constitution that forbade corporations and municipalities from hiring Chinese.

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court ruled that Chinese were "persons" under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance.

In *In re Lee Sing*, 43 F. 359 (C.C.D. Cal. 1890), the court found unconstitutional the "Bingham Ordinance," which mandated residential segregation of Chinese Americans.

In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), this Court ruled that a Chinese American boy, born in San Francisco, could not be prevented by San Francisco officials from returning to the city after a trip abroad.

Chinese American schoolchildren were long denied access to the public schools. In *Tape v. Hurley*, 66 Cal. 473, 6 P. 12 (1885), the court had to order San Francisco public schools to admit a Chinese American girl who was denied entry because, as stated by the State Superintendent of Public Instruction, public schools were not open to "Mongolian" children. *See* McClain, *supra*, at 137. In response, the California legislature authorized separate "Chinese" schools to which Chinese American

schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864; *see also* Kuo, *supra*, at 207-208 (noting that "Chinese" were segregated even when "Japanese" were not).

Even though it is not widely known, Chinese American schoolchildren were some of the earliest victims of "separate but equal" jurisprudence as it related to education. In *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the "Chinese" school in Chinatown was "separate but equal." 119 F. at 382.

In *Gong Lum v. Rice*, 275 U.S. 78 (1927), this Court affirmed that the separate-but-equal doctrine articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old Chinese American girl residing in Mississippi could be denied entry to a "white" school because she was a member of the "yellow" race. *Id.* at 87.

Thus, in *Lee v. Johnson*, 404 U.S. 1215 (1971), Justice Douglas wrote that California's "establishment of separate schools for children of Chinese ancestry . . . was the classic case of *de jure* segregation involved [and struck down] in *Brown v. Board of Education*, 347 U.S. 483 [1954]. . . ." *Id.* at 1216. "*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco. *See Yick Wo v. Hopkins*, 118 U.S. 356." *Lee*, 404 U.S. at 1216.

AALF therefore respectfully submits that Asian Americans have more reason than most individuals in this great nation to appreciate laws such as Section 26 (and California's Section 31) and to know that these laws do not burden but rather promote the rights of Asian Americans and other minorities.

II. THIS COURT SHOULD BE WARY OF EXPERTS AND LUMINARIES WHO ARGUE THAT SECTION 26 SOMEHOW REORDERS THE POLITICAL PROCESS TO BURDEN MINORITIES.

The Court should apply common sense and disregard the blandishments of "experts" and other luminaries who argue that Section 26 reorders the political process to violate equal protection. The purpose of the equal protection clause of the Fourteenth Amendment "is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). By its plain words, Section 26 has that same purpose. States have always been free to enact laws protecting personal rights, even—especially—those protected by the federal Constitution. As this Court has stated in an analogous situation, "It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Crawford v. Board of Ed. of Los Angeles*, 458 US 527, 535 (1982).

The self-serving and cynical statements proffered to show that Section 26 somehow burdens individual rights are a transparent effort to eliminate important protections of individual rights at the state level and do not have as their goal the protection of civil rights. They

are analogous to similar statements that were made in the past in efforts to impede courts from protecting individual rights.

In *Plessey v. Ferguson*, 163 U.S. 537, the Court accepted the view of the experts of the day that, even though all persons were equal before the law, the public good allowed the use of "distinctions based upon color." The lone dissenter, Justice John Harlan, wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case . . . " *Id.* at 558. History proved Justice Harlan to be right.

In *Brown v. Board of Education*, 347 U.S. 483, this Court properly rejected arguments by state officials from Kansas, Delaware, Virginia and South Carolina that black and white children learned better in a single-race environment and for societal purposes should be kept separate by state mandate. Expressly rejecting any contrary findings regarding "psychological knowledge" made in *Plessey v. Ferguson*, the Court found that use of race produces a "sense of inferiority." "We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place." *Brown*, at 494-495.

Today, it is universally acknowledged that the Roosevelt administration and military authorities infringed the constitutional rights of Japanese Americans when, during World War II, the government placed them under curfew, then removed them from their West Coast homes and placed them in internment camps, in violation

of state and federal law.[2] Yet, at the time, when the affected citizens pled with the courts to uphold their rights, the courts passively accepted statements by administration and military officials that such use of race was necessary in the national interest.

In *Hirabayashi v. United States*, 320 U.S. 81, this Court affirmed the conviction of an American citizen found guilty of violating the curfews imposed on Japanese Americans. In *Korematsu v. United States*, 323 U.S. 214 (1944), this Court upheld the conviction of an American citizen of Japanese descent, who had violated an exclusion order by remaining in his San Leandro, California home, rather than go to an internment camp. The courts at all levels deferred to declarations by military authorities that such discrimination by race was necessary to advance compelling government interests. *Id.* 217-219.[3] *Amicus Curiae* briefs submitted by officials from the states of Oregon, Washington and California, urged and supported

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2. Executive Order No. 9066 was issued on February 19, 1942. It authorized the Secretary of War and certain military commanders "to prescribe military areas from which any persons may be excluded as protection against espionage and sabotage." Congress enacted § 97a of Title 18 of the United States Code, making it a crime for anyone to remain in restricted zones in violation of such orders. Military commanders then, under color of Executive Order No. 9066, issued proclamations excluding Japanese Americans from West Coast areas, and sending them to internment camps. *See Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984).

3. "It was uncontroverted at the time of conviction that [Fred Korematsu] was loyal to the United States and had no dual allegiance to Japan. He had never left the United States. He was registered for the draft and willing to bear arms for the United States." *Korematsu*, 584 F. Supp. at 1409.

the discrimination. *See Korematsu v. United States*, 584 F. Supp 1406, 1423 (N.D. Cal. 1984).

Much later, of course, it was discovered that government and military figures had misled the courts; and that the government officials had known that there was no national necessity requiring the use of race. *See Korematsu*, 584 F. Supp. at 1420; *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). The 1980 Commission on Wartime Relocation and Internment of Civilians found that the curfew and exclusion orders had been motivated by "racism" and "hysteria" and not "military necessity," and stated:

> [A]t the time of the issuance of Executive Order 9066 and implementing military orders, there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry
> . . .

See Korematsu, 584 F. Supp at 1416. "[T]he government deliberately omitted relevant information and provided misleading information in papers before the court. The information was critical to the court's determination. . ." *Id.* at 1420.[4]

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4. Referring to the *Hirabayashi* and *Korematsu* cases, Justice Powell later wrote, "Only two of this Court's modern cases have held the use of racial classifications to be constitutional." *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). Ironically, those two cases have recently been joined by a third, *Grutter v. Bollinger*, 539 U.S. 306 (2003), where this

Here, also, this Court should be wary of the attempts by Respondents' declarants and *amici curiae* – no matter how well-intentioned and no matter how illustrious their credentials – to manufacture specious arguments to invalidate a state law that protects individuals of all races from discrimination.

III. INVALIDATION OF SECTION 26 WOULD MEAN RENEWED DISCRIMINATION AGAINST CHINESE AMERCIAN SCHOOLCHILDREN IN SAN FRANCISCO.

In a relevant case involving AALF's constituents, if this Court were to invalidate Section 26, it would almost certainly result in San Francisco's schoolchildren of Chinese descent again facing racial discrimination in the city's public school system. In *Ho v. San Francisco Unified School District*, filed in 1994, San Francisco's Chinese American schoolchildren were forced to turn to the courts for redress of their rights, in order to halt the school district's policy of classifying and assigning them to the city's K-12 schools on the basis of their race. *See Ho*, 147 F.3d 854; Ho, 59 F. Supp. 2d 1021 (on remand); *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (1997) (decision giving rise to appeal in 147 F.3d 854).

Court heeded the judgment of experts, including educators, business leaders and even military leaders, to decide that a public school, at least at the university level, may treat students differently based on race. *See Grutter*, 539 U.S. at 330-331. While its decision in *Grutter* is not before the Court in the instant case, the sad truth is that, until *Grutter* is overturned or limited, the clock has been turned back almost a century, to the days of *Gong Lum v. Rice*, 275 U.S. 78, again giving school officials the power to discriminate against students solely because of their race.

In *Ho*, the plaintiff class challenged a consent-decree-mandated racial balancing scheme imposed in *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34 (N.D. Cal. 1983). Without any finding of a constitutional violation to remedy, and doing exactly what Respondents here believe they will be able to do in the absence of Section 26, a consortium of pedagogical and race experts set up a racial balancing scheme with the stated goals of preventing "racial isolation" and providing "academic excellence" in the San Francisco's schools. *See Ho*, 965 F. Supp. at 1322; *see also Ho*, 147 F.3d at 859; *San Francisco NAACP*, 576 F. Supp. at 40-42, 58. Filled with zeal for their vision of racial engineering, the proponents ignored that the San Francisco school district was already one of the most ethnically diverse in the nation.

Under San Francisco's admissions program, nine ethnic groups were arbitrarily defined, including "Chinese." Members of at least four of the groups were required to be present at each school; and no one group could represent more than 45 percent of the student body at any regular school or 40 percent at any alternative school. *See id.; see also Ho*, 147 F.3d at 856. By the time of the *Ho* challenge, the school district had enlarged the original nine arbitrary racial categories to thirteen equally arbitrary categories to take into account the growing prominence of additional racial groups in the district. *See Ho*, 147 F.3d at 858. As they were the largest racially identifiable group, the burden of this system of quotas and caps fell heaviest on students identified as "Chinese," who were most likely to be "capped out" at their neighborhood schools or at desirable magnet schools. *See Levine, supra*, at 55-56. Also, even where preferences were not required to maintain the district's racial quotas

and caps, the district nevertheless adopted a policy of granting preferences to applicants classified as "Hispanic" or "African American," *See Ho*, 147 F.3d at 858.

The named plaintiffs' stories amply illustrate the discrimination:

• Brian Ho was five years old. He was turned away from his two neighborhood kindergartens because the schools had accepted the maximum allowed percentage of "Chinese" schoolchildren. He was assigned to a school in another neighborhood. *See Levine, supra*, at 61.

• Patrick Wong, then fourteen years old, applied for admission to Lowell High School, a selective magnet school. He was rejected because his index score was below the minimum required for "Chinese" applicants. However, his score was high enough that he would have been admitted to Lowell had he been a member of any other racial or ethnic group. He was then rejected at three other high schools because such schools had already "capped out" for "Chinese" students. *Id.*

• After moving into a San Francisco neighborhood, Hillary Chen, then eight years old, was not allowed to transfer into any of three elementary schools near her new home because all three schools had accepted the maximum number of "Chinese" schoolchildren allowed under the district's scheme. *Id.*

As this Court warned in *Richmond v. Croson*, 488 U.S. 469 (1989), San Francisco schoolchildren were stigmatized by the district's use of race. *See Croson*, 488 U.S. at 493 (use of race promotes feelings of "racial inferiority"

and "racial hostility"). As stated by the parent of one "Chinese" youth turned away because of his ethnicity, "He was depressed and angry that he was rejected because of his race. Can you imagine, as a parent, seeing your son's hopes denied in this way at the age of 14?" Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, San Francisco Examiner, at C-2 (Feb. 14, 1999).

As Lee Cheng, Secretary of AALF, testified in a written statement for hearings held by the U.S. House of Representatives, Sub-Committee on the Constitution:

> Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

Lee Cheng, *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution Hearings (June 1, 1995), *at* http://judiciary.house.gov/legacy/274.htm (last checked June 30, 2013).

Another insidious byproduct of San Francisco's racial balancing plan was "rampant dishonesty," as parents of all races attempted to misreport children's racial identity to gain admission to desired schools. *See* Michael Dorgan, *Desegregation or Racial Bias?*, San Jose Mercury, at 1A (June 5, 1995). "[S]ome black families in Bayview-Hunter's Point have gone so far as to take Hispanic surnames to protect their children from busing." *Id.* at 10A. "People know if they want to go to a particular school that has a

lot of Caucasians, they should put down something other than Caucasian, and they do." *Id.* at 10A (quoting School Board President Dan Kelly).[5]

After five years of vigorous litigation, the *Ho* case settled on the first day of trial with the defendants agreeing to (i) cease using race to assign students to the city's schools and (ii) end the mandatory requirement of self-classification by race on student enrollment forms. *See Ho*, 59 F. Supp 2d at 1025 (approving settlement). Settlement in *Ho* would never have been reached if the district court and the Ninth Circuit Court of Appeals (on an interlocutory appeal from the district court's denial of plaintiffs' request for dissolution of the consent decree) had not emphasized to defendants that under prevailing law they were almost certain to lose at trial. *See Ho*, 59 F. Supp. 2d at 1024-25 (noting burdens placed by Ninth Circuit's ruling and district court's prior finding that "defendants had shown little likelihood of prevailing at trial").

In addition to bringing the *Ho* case, members of AALF worked to pass Proposition 209, a California voter initiative that added Article I Section 31 to the State constitution. Similar to Article 26 at issue in this case, Section 31 provides, "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. Art. I § 31(a).

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5. On the school enrollment forms, parents were threatened with "perjury" if they misreported the race of their child. *See Ho*, 147 F.3d at 862.

Section 31 safeguards the remedy secured in *Ho*. If this Court invalidates Michigan's Section 26, California's similar Section 31 will follow. If that happens, it is almost certain that the San Francisco school district will again try to implement a race-based student assignment program, in spite of the *Ho* settlement. This is not idle conjecture. San Francisco school officials who favor use of race debate the issue every time a new Supreme Court case surfaces that might offer them support. *See e.g.*, Bob Egelko, Heather Knight, SCHOOLS, Justices Take Cases On Race-Based Enrollment, San Francisco Chronicle, at B-1 (June 6, 2006) ("If the Supreme Court upholds the Seattle system . . . Prop. 209 is a moot point. . . Federal laws would override a state initiative." (quoting board member Mark Sanchez).)

It is therefore very important to AALF and its constituents—and to the schoolchildren of San Francisco—that this Court uphold Section 26.

CONCLUSION

Section 26, by its plain words, protects the right of all individuals to be free from race- and gender-based discrimination. As the experience of Asian Americans in this country demonstrates, such laws are needed. Furthermore, invalidation of Section 26 would almost certainly lead to invalidation of California's similar Section 31 and to renewed attacks on the remedy secured in the *Ho* case, emboldening proponents of racial engineering to resume discrimination against Chinese American schoolchildren in San Francisco.

Because Section 26 is congruent with and does not violate the equal protection clause of the Fourteenth Amendment, and because Section 26 represents a lawful measure to protect individual rights, the Court should grant the relief sought by Petitioner.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

JUL 1 - 2013

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL, PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF PETITIONER

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Petitioner in Case 12-682 ("*BAMN*").[2] Amicus wrote a pre-certiorari brief in this case, recommending both certiorari and summary reversal, *see id.* The Court saw fit to grant only the former request; but if the Court does not grant some variant on summary reversal (e.g., deciding the case on the pleadings, sans oral argument) after this point—which it still possibly can—, it should still reverse the court of appeals' decision, and Amicus shall list reasons why.

As mentioned in his previous brief, Amicus has actively addressed issues of alumni-child preferences in college admissions vis-à-vis affirmative action, *see, e.g.*, his amicus brief ("*Fisher* Br.") in *Fisher v. University of Texas at Austin*,[3] *passim*, and his Detroit News opinion article *It's time to end alumni*

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[1] No party or its counsel, nor anyone besides Amicus himself, wrote or helped write this brief or Amicus' previous brief in this case, or gave money to its (their) writing or submission, *see* S. Ct. R. 37. Blanket permission is on record with the Court for *amicae/i* to write briefs. —By the way, Amicus thanks the Court for revising Rule 37, in a way resembling what Amicus had suggested in his January 3, 2013 Motion for Leave to File Brief as *Amicus Curiae* in this case, *see id.* at ii-iii.

[2] *Bill Schuette, Att'y Gen. of Mich., v. Coal. to Defend Aff. Action, Integration and Immigrant Rts. And Fight for Equal. by Any Means Necessary (BAMN), et al.*, 701 F.3d 466 (6th Cir. 2012) (en banc) (*cert. granted*, 81 U.S.L.W. 3539) (U.S. Mar. 25, 2013) (No. 12-682).

[3] 570 U.S. ____ (June 24, 2013).

preferences.[4] Amicus also noted, "Just because affirmative action is *allowed*, that does not mean it is *mandatory*, and that the will of the State's people, if the people oppose affirmative action . . . means nothing[.]" *Fisher* Br., *supra*, at 26. Amicus also has commentary here on the June 24, 2013 *Fisher* opinion, and other affirmative action-related issues. This is relevant especially since the present case, frankly, may be seen by some as a referendum not just on mandatory affirmative action in Michigan, but on affirmative action in general.

SUMMARY OF ARGUMENT

The Sixth Circuit opinion in *BAMN* is groundless, since the Court essentially decided the relevant issues otherwise in *Grutter v. Bollinger* ("*Grutter*"), 539 U.S. 306 (2003), *Washington v. Seattle School District No. 1* ("*Seattle*"), 458 U.S. 457 (1982), and *Crawford v. Board of Education of Los Angeles* ("*Crawford*"), 458 U.S. 527 (1982). Those opinions are true as they were before, re mandatory affirmative action and States' choices.

Although alumni-child preferences in university admissions are reprehensible, demean the recipients of those preferences, and are tinged with racial and class bias, and the concomitant snobbery and inequity: the wrong from such preferences, does not *ipso facto* make it right to demand mandatory affirmative action in a State. Abolishing the alumni/legacy preferences themselves makes more sense.

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[4] Nov. 15, 2012, at 3B, originally *available at* http://www.detroitnews.com/article/20121115/OPINION01/211150337, now *available at* http://www.oakland.edu/upload/docs/Clips/2012/121115%20-%20alumni.pdf.

Some amici in *United States v. Bond*,[5] another case under Court consideration, offer an interesting and instructive mirror image, though from the political "Right" instead of the "Left", of the "feudal anarchy" that Respondent BAMN would have us follow. Such disorder is to be eschewed.

Fisher and *Shelby County v. Holder*[6] do not help BAMN's case.

Opponents of Michigan's Proposal 2 had plenty of opportunity to win, and could still overturn it, or put up a ballot proposal to ban alumni-child preferences.

Seattle, *supra*, and similar "political-process" cases are valuable safeguards against bigotry and should not be overturned.

Seeking affirmative action in a harmonious, democratic way reflecting Martin Luther King's ideals is different from using affirmative action in a divisive, undemocratic way. King supported Israel; that nation, as a state with racial preference for Jews, is one example of why race preference is not always a bad thing. King may have had a point.

The University of Michigan's awarding hereditary alumni preferences, and its lack of transparency about racial-diversity efforts, are a cautionary tale about how the powerful must frequently be watched by the People, whistle-blowers, and the Courts.

The People, after all, are what the universities, government, and affirmative action are supposed to serve, not the other way around.

ARGUMENT

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[5] 681 F.3d 149 (3d Cir. 2012) (*cert. granted*, 81 U.S.L.W. 3408 (U.S. Jan. 18, 2013) (No. 12-158).

[6] 570 U.S. ____ (June 25, 2013).

I. *SEATTLE* AND *CRAWFORD* PRECLUDE MANDATORY AFFIRMATIVE ACTION

The *BAMN* Sixth Circuit opinion, *see* 701 F.3d 466, 470-71, 484-85 (2012), argues that following the 2006 vote of Michiganders in "Proposal 2", 58%-42%, to amend their constitution (adding Section 26 to Article I) to end publicly-granted race and other (e.g., gender) preferences: because it might now be harder to advocate affirmative action than to advocate legacy preferences in colleges (and who is trying to inaugurate legacy preferences right now? A strange hypothetical), this is, at least re public education, an unfair political constraint violating the Fourteenth Amendment's Equal Protection Clause. But this is an extremely strained argument.

Grutter helps disprove that argument, mentioning "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law . . . . Cf. *United States* v. *Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ('[T]he States may perform their role as laboratories for experimentation to devise various solutions[.]'"). *Id.* at 342 (O'Connor, J.). So, affirmative action can indeed be "prohibited by state law", *id.* And since the *States* are "laboratories", *id.*, it is illogical that subparts of the State, such as universities, should be allowed to perform "laboratory experiments" when not just the legislature, but the permanent primary sovereign, the People, have amended a State's central legal charter, its Constitution, to prohibit such experimentation. So the Court confirmed, in *Grutter*, that a State's banning race preference is proper and constitutional.

Moreover, the political-process cases BAMN cites to make its point actually hurt the point more than help it. The law here has seemed quite clear for three decades, against the idea of mandatory legality of affirmative action. *Seattle* (June 30, 1982) calls it "evident" that divisions of power among administrative bodies over affirmative action "have nothing to do with the ability of minorities to participate in the process of self-government", 458 U.S. at 480 n.23 (Blackmun, J.).[7] This alone, *see id.*, disproves BAMN's point.

What hurts BAMN's argument even more is a case also from June 30, 1982, and from Justice Harry Blackmun again, *Crawford*, *supra* at 2. Blackmun's words in *Crawford*, since they are from the same Justice who wrote the *Seattle* opinion, and decided on the exact same day as *Seattle*, are one of the best possible interpretive keys of what he meant in *Seattle*.

The Justice offers the Kafkaesque scenario, "[R]uling for petitioners[, who lost,] on a *Hunter* [*v. Erickson*, 393 U.S. 385 (1969), i.e., political-process] theory seemingly would mean that statutory affirmative-action . . . programs never could be repealed[.]" *Crawford*, 458 U.S. at 546-47 (Blackmun, J., joined by Brennan, J., concurring). There, in black and white, Blackmun expresses horror, *see id.*, that misuse of political-process case law could lead to the freakish result that the People could never get rid of affirmative action, since

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[7] So, political-rights cases like *Seattle* are still good law and need not be revisited; they can be kept "in the bag" in case some draconian affirmative-action ban comes one day, e.g., poll-taxing the ban's opponents. Proposal 2 has no such evil feature.

affirmative action would be impervious to repeal. These thoughts of Blackmun, combined with what he said in *Seattle* at 480 n.23 about affirmative action, leave little, or nothing, left of BAMN's case.

However, there is a grain of truth in BAMN's position, since legacy preferences are unjust and disturbing. But does that mean that this Court should grant BAMN's prayer that mandatory affirmative action ensue, just, or largely, because other college-admissions preferences, especially legacy ones, persist?

II. THE UGLINESS OF ALUMNI PREFERENCES DOES NOT LEGITIMATE PERPETUAL AFFIRMATIVE ACTION

"[I]t demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (Kennedy, J.). This must be referring to alumni children given advantages in college admissions due to their parentage, must it not? Well, it actually refers to race, *see id.* at 517, but it should refer just as much to legacy preferences. Or even more to them than to diversity admittees, since the latter are "judged" by being given a few points for what their racial or gender background can add to the entire community in the present and future, but legacy preferences are rewarded for relatively aristocratic ancestry from the

past, and often *de facto* rewarded for being white and rich.[8]

Why, then, should the Nation continue to "demean[ ]", *id.*, and stigmatize alumni children, by allowing admissions preferences for them, especially at public universities? Are they to be viewed forever as spoiled blockheads who couldn't get into college on their own? Does the Nation have some kind of animus towards them? This Court seems to dislike animus, and the stigmatization of alumni offspring through their being judged on ancestry, *see id.*, should end, if the Court wants to be consistent.

And some theorize that legacy preferences should actually be illegal. *See, e.g.*, *Affirmative Action for the Rich: Legacy Preferences in College Admissions* (The Century Found., Inc. (Richard D. Kahlenberg, ed., 2010)) ("Kahlenberg"), at 12-15 (citations omitted), mentioning that the Nobility Clause (U.S. Const. art. I, § 9, cl. 8) should prevent any hereditary privilege given by public universities; and that the Equal Protection Clause, combined or considered with, the Civil Rights Act of 1866 (14 Stat. 27-30) (amended 1991), should forbid discrimination based not only on race, but also on ancestry, period.

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[8] With alumni preferences, we are always, as in nightmare, "borne back ceaselessly into the past." *The Great Gatsby* (directed by Baz Luhrmann; Village Roadshow Pictures et al./Warner Bros. Pictures (2013); based on the 1925 book by F. Scott Fitzgerald). *Gatsby*, *supra*, by the way, has interesting notes, *see id.*, on the corruptive effects of inherited wealth and social status (e.g., the depravity or shallowness of Tom and Daisy Buchanan), and the contempt of the wealthy and powerful toward racial minorities including Jews (Tom Buchanan's various diatribes against those groups).

Also, the tax-deductibility of donations to colleges is questionable either for alumni, who are trying to buy admission for their children, or for the school, which is conferring something of value (the degree, which increases earning power) in exchange for donations, which all thus may not be a true non-profit transaction, *see* Kahlenberg, *supra*, at, e.g., 16-17 (citation omitted).

But Amicus is not asking the Court to *sua sponte* end alumni preferences, but merely asking the Court to reflect on the social good of ending alumni preferences. And the good of not ending the legality of affirmative action nationwide until legacy preferences—and, one hopes, donor preferences, celebrity preferences, and suchlike—are gone forever.

However, what was just said is distinguishable from what BAMN is asking for. And re what they ask for, and what the Sixth Circuit decided, Amicus wonders if others' misinterpretation of some of his words from the past helped cause this mess. After all, his own *Fisher* brief said that affirmative action should not disappear until there were no more alumni or donor preferences in college admissions anywhere, *see id.* at 8, 15. The Sixth Circuit BAMN decision looks like a gross misreading of what Amicus said. It is time to clarify.

Under Amicus' model, *see Fisher* Br. *passim*,

1) each State would decide about affirmative action, and

2) both alumni preferences and affirmative action would eventually disappear.

But under the Sixth Circuit's model, *cf.* 701 F.3d 466 *passim*,

1) a State effectively has no choice to end affirmative action, and

2) both alumni preferences and affirmative action could last *permanently*, maybe propping each other up in a synergistic or collusive way.

So the model that BAMN trumpets, *see id.*, disrespects the People of each State, and does not terminate either of two problematic school-admissions criteria, alumni-child status and racial (or gender) status. Thus, it is not a tenable model for the Nation to follow. In fact, it is a dangerous model reeking of abuse.

If BAMN had argued that affirmative action should be a court-ordered remedy, in order to alleviate the pernicious effects of alumni preferences: even that would be a tall order to ask the courts, but it would make slightly more sense than their current posture, i.e., that the political process itself was somehow distorted by Proposal 2. That posture itself distorts reality, and is a very convoluted, attenuated way to deal with the ugliness of legacy preferences. *Inter alia*, a much simpler remedy would be for courts, or others, to abolish alumni preferences. The "two wrongs make a right" theory that both affirmative action and alumni preferences should last forever in some crazy sort of "mutual balance", is an unappealing idea.

If BAMN and comrades had spent the last seven years attempting to put a proposal on the Michigan ballot to outlaw alumni and donor preferences at

universities, that might have been more helpful to diversity than what they are doing now.

The brief of *amici* Professor Carl Cohen et al. in Support of the Petitioner in this case (undated but c. June 24, 2013) argues that a black student has the same right to ask the University of Michigan for alumni preferences as a white one does, and that there are thousands of black U. of M. alumni, *see id.* at 21.

However, that University already *has had* alumni preferences for a long time; and second, the proportion of black alumni to others, in general, may be small. *Cf., e.g.*, "[A]t the University of Virginia, 91 percent of early decision legacy admits in 2002 were white, 1.6 black, and 0.5 Hispanic." Kahlenberg at 10 (citation omitted). So, the supposed "race-neutrality" of alumni preferences may be honored more in breach than in observance. *Cf.* U.S. Const. amend. XXIV (banning a *prima facie* "race-neutral" poll tax which disproportionately affected minorities and poor whites).[9]

Finally: it is interesting to note that when the "Supreme Court upheld [affirmative action in *Grutter*] in 2003, five of the nine justices or their children qualified for legacy preference." Kahlenberg

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[9] Alumni preferences may have had a racial tint (instead of being "race-neutral") from the beginning: many of them inaugurated around the 1920's had an "additive" racial bias (adding, or preserving, Anglo-Saxons) and also a "subtractive" bias (keeping out Jews or others). These days, legacy preferences may benefit Jews instead of hurting them; but in any case, there was once an ugly racial tinge to such preferences, and this may help make them immoral or illegal.

at 89 (citation omitted). Amicus is not trying to commit *lèse-majesté* by mentioning this; but some frank discussion of power relations in this country can be helpful if we are really interested in achieving justice. Again, Amicus notes that privilege to an alumnus creates animus. Should we tolerate that?

III. *BOND V. UNITED STATES* AS A MIRROR IMAGE OF *SCHUETTE V. BAMN*; OR, FEUDAL ANARCHY VS. THE PEOPLE

But not only is feudal aristocracy (echoed in legacy privilege) a problem; so is feudal anarchy. —In the case of *United States v. Bond*,[10] currently before this Court, Pennsylvania resident Carol Anne Bond used a noxious chemical to injure a woman who had an affair with Bond's husband; though, being perhaps less skilled in causing mayhem than is the fictional secret agent who shares her last name, she caused little more damage than a thumb burn, *see* Br. for Pet'r (May 8, 2013) at 2. Anyway, Bond was charged, *see id.*, with violating a federal law re an international agreement about chemical weapons. This prosecution sounds heavy-handed, perhaps. Then again, in the wake of the Tsarnaev brothers' reign of terror at the Boston Marathon, perhaps it is good for prosecutors to be able to do such things—what if the Tsarnaevs had made it to Times Square in New York with chemical weapons? And should U.S. treaty-making power be gelded because of this one unusual Bond incident?

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[10] *Supra* n.5.

The Brief of Cato Institute ("CI") et al. in Support of Petitioner (May 15, 2013) argues, *see id. passim*, that *Missouri v. Holland*, 252 U.S. 416 (1920) be overturned, since Justice Oliver Wendell Holmes, Jr., there upheld necessary expansion or deployment of federal power if a treaty were made and the power were needed, *see id.* at 432. And CI, notoriously, is suspicious of federal power.

In *Holland*, *supra*, the problem was migratory birds flying over national boundaries, *see id.* But what if, say, those birds were carrying a deadly avian flu, now in 2013, and a State refused to deal with the bird problem, and the birds were killing many people in other countries? Should the federal government really be powerless to deal with this, even sans an enumerated "Bird Power" in the Constitution? It would probably be more sensible for the Government to deal with the birds than for the foreign country to try to invade or take other reprisals.

By contrast, if there were a treaty saying that American parents must now abort children with Down syndrome, for eugenics purposes, this would likely violate the Bill of Rights. Birds may not have many rights, though, and one could argue that the deadly birds impact interstate commerce, etc., so that a wholly *new* federal power was not created by the treaty.

States are sovereigns, but if they are overly irresponsible or disruptive, then a higher authority may have to step in. Otherwise, a sort of feudal anarchy, which our Civil War should have made outdated, takes hold.

(A little, teeny bit of anarchy or chaos is not always bad, and may prevent excessive rigidity in the system. It may be harmless and thought-provoking for Johnny Rotten (John Lydon) of the Sex Pistols punk rock band (1975-78) to scream "Anarchy!" But that is not serious, venomous anarchy such as armed gangs—or armed lone snipers—going around and doing what they want and disregarding law and morals. Or States nullifying federal law. And there is a whiff of "bad anarchy" about overturning *Holland*, or invalidating Proposal 2 in Michigan.)

What CI wants in *Bond* is an octave above, so to speak, what BAMN is asking for in the instant case. One State's holding out from fair or rational policy, and needlessly defying the Government, can make life hellish for everyone. Similarly, colleges' making their own affirmative action policies, like independent dukedoms in despite of State and People, mocks law, order, and democracy, and also may hinder the attainment of a colorblind society at some point.[11]

BAMN is well to the "left" politically, and CI is well to the "right" (in *Bond*, *supra*), but both are well off the mark in terms of federalism and fairness. And Amicus is happy to criticize on the Right or the Left equally. Subunits of a State ignoring the State, or States avoiding fair regulation by the federal Government, both evoke Professor Michael Heller's

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[11] Memorials like "Black History Month" (February), or "Jewish American Heritage Month" (May), may not violate colorblindness, in that they are historical and informational, instead of granting privileges.

"tragedy of the anticommons",[12] his idea that a holdout by one stakeholder can ruin property rights for all the other stakeholders. And tragedy is best avoided.

So, just as *Missouri v. Holland* should not be overruled, neither should Michigan's Proposal 2 be.

IV. *FISHER* AND *SHELBY* HURT BAMN'S CASE

And last week was not a good week for BAMN's theories on why Proposal 2 should be overturned. First, in *Fisher*, the Court "toughened up" the standards for affirmative action, *see id. passim*. That ethos, limiting affirmative action,[13] is the opposite

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[12] *See* Wikipedia, *Tragedy of the anticommons*, http://en.wikipedia.org/wiki/Tragedy_of_the_anticommons (as of 7:02 GMT, Apr. 26, 2013).

[13] Though not limiting it, or criticizing it, as much as some would like. E.g., Justice Clarence Thomas, concurring, claims that the "73 *amici* briefs for racial discrimination" (!!!) in *Fisher* did not really address the problem of academic mismatch, *id.*, slip op. at 17. However, Amicus' own *Fisher* brief mentioned academic mismatch, *see id.* at 37; offered tutoring or remedial classes (such as college athletes often receive) as ways to help students not quite as prepared as average students, *see id.* at 27-28; and mentioned the importance of students' free agency in choosing whether to attend a harder college, or an easier one where high grades might be easier to get, *see id.* at 37-38. If someone chooses to risk being in the bottom of the class at exclusive Yarvton University, rather than being valedictorian at Joe Schmo Community College, perhaps that student should be allowed to take the risk. Sometimes small fish in big ponds end up better than big fish in small ponds, so to say.

Then again, some think that things were toughened too much. Justice Ruth Bader Ginsburg, dissenting, finds difficulty with the putative amorphousness or evasiveness of race preferences that are not locked down into something rigid (e.g.,

direction from the mandatory, thus expanded, affirmative action BAMN seeks. Second, in *Shelby*, the Court gave more deference, *see id.*, to individual States to determine how to deal with alleged race discrimination, and effectively lessened federal supervision (e.g., federal "preclearance" of State voting measures) over what States do in that field. (The Court overturned Section 4(b) (42 U.S.C. § 1973b(b) (amended 2008)) of the Voting Rights Act of 1965, *Shelby*, slip op. at 24, including the formula which allows Section 5 (42 U.S.C. § 1973c (amended 2006)) of that Act to operate.) Thus, BAMN's case, which was perched on a cliff in the first place, may be in full flight over the cliff now.

V. PROPOSAL 2'S OPPONENTS DID NOT LACK POLITICAL POWER

This case, naturally, would not be here if Proposal 2 had not passed, 58% to 42%. Amicus himself was in Michigan in 2006, and voted against Proposal 2; but it won, and that was that, he thought. And it was something of an uphill struggle for the proposal's proponents, too. *See, e.g.*, PR Newswire, *One United Michigan Stepping Up Campaign*

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a 20-point bonus for being a racial minority), *see Fisher*, slip op. at 3. While the more strictly-defined preferences may seem more honest and aboveboard, though: they are also more rigid, to the point of counterproductiveness. For example, if there is not a rigid bonus for being African-American, then the school may decline to offer such a bonus, or lower the level of it from the "maximum strength" available. And in the case of President Obama's two daughters, for example, it may be a very good thing not to offer them that bonus. So the *Grutter* and *Fisher* majorities' upholding of a holistic, flexible bonus for race (or gender) preferences is proper, despite Ginsburg's concerns.

Activities, Jan. 20 (presumably 2006),[14] mentioning, *see id.*, that over 100 prominent organizations under the umbrella organization One United Michigan, plus both the Democratic and Republican Michigan gubernatorial and U.S. senatorial candidates that year, publicly opposed Proposal 2. *See also* Ballotpedia,[15] revealing, *see id.*, that Proposal 2's opponents spent over 2 and ½ times as much money as proponents did, i.e., c. $4.9 million vs. c. $1.86 million. With that lavish funding, and powerful organizational support, there may still be plenty of resources left to overturn Proposal 2 the regular way: by popular vote, not by the courts.[16]

See U.S. Const. art. IV, § 4, "The United States shall guarantee to every State . . . a Republican Form of Government", *id.*, i.e., a democratic republic where the people reign. But the Sixth Circuit opinion largely precludes majoritarian democracy.

VI. *SEATTLE* AND *HUNTER* SHOULD BE UPHELD

Majoritarianism is not always sacrosanct, of course, *see, e.g.*, *Seattle* and *Hunter* (overturning ballot measures for their racist abuse of political process). However, the June 24, 2013 brief for Respondent, Eric Russell ("Russell Br."), claims, *see id. passim*, that *Seattle* and *Hunter* should be

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[14] http://www.prnewswire.com/news-releases/one-united-michigan-stepping-up-campaign-activities-59989087.html.

[15] *Michigan Civil Rights Amendment, Proposal 2 (2006)*, http://ballotpedia.org/wiki/index.php/Michigan_Civil_Rights_Amendment,_Proposal_2_(2006) (as of June 25, 2013, at 14:28 GMT).

[16] Amicus is for affirmative action, and would not mind seeing Proposal 2 ended...but only by the will of Michigan's people.

overturned. But this would be an extreme over-reaction to the extreme claims of BAMN.

The Russell Brief conjectures that *Hunter* would have been resolved as it was even without the political-process doctrine, *see* Russell Br. at 32-33. However, this is conjecture, *see id.* Moreover, *Seattle*, especially considered in light of *Crawford*, has a large "escape vent" that allows absurd results like permanent affirmative action to be avoided, as discussed *supra* at 5-6. Thus, it was better-written and more sensible than the Russell Brief believes.[17]

When things are not broken, perhaps they should not be "fixed". Petitioner Schuette explains well that *Seattle* and *Hunter* do not mandate affirmative action, *see* Br. for Pet'r (June 24, 2013) at 17-24, and that should help guide this Court to decide not to overturn *Seattle* and *Hunter*.

In *Fisher*, *see id.*, slip op. at 9, 12, the Court declined to overturn *Grutter*, since the parties did not ask for it to be overturned. Similarly: in this case, *BAMN*, Petitioner is not requesting the overturning of *Seattle* and *Hunter*, so they should not be overturned, especially since they do not deserve to be. If some "clarification" or "updating" of either *Seattle* or *Hunter* is needed, that would be

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[17] Also claimed, *see* Russell Br. at 3-4, 15, is that *Seattle* violates the spirit of *Washington v. Davis*, 426 U.S. 229 (1976), since the latter case claims that to violate equal protection, a supposedly race-neutral law must have a discriminatory purpose, *see id.* at 240. The problem with the Russell Brief's notion is that *Seattle* itself distinguishes *Davis*, *supra*, *see Seattle*, 458 U.S. at 485-86 (noting that in *Hunter*, the statute dealt with race in a way hurting minorities as minorities, so used race to distort the political process; thus, *Davis* is not applicable). So it may be too late to complain that *Seattle* does not follow *Davis*.

preferable to overturning either case. After all, even if affirmative action should not be permanent, measures to prevent segregative legislation, such as the Fifteenth Amendment, should always have a place in American life.

VII. MARTIN LUTHER KING, ISRAEL, AND LOVE AND HATE IN AFFIRMATIVE ACTION

Martin Luther King himself may have agreed both with affirmative action and with ending it. *See, e.g.*, his book *Why We Can't Wait* (Signet Classic 2000) (1963, 1964), ch. 9, "The Days to Come": "No amount of gold could provide an adequate compensation for the exploitation and humiliation of the Negro in America. . . . Yet a price can be placed on unpaid wages[,] in the form of a massive program by the government of special, compensatory measures[, resembling] a settlement[.]" *Id.* at 127.

Note that King, *see id.*, approves a form of "race preference" (reparative measures for blacks), but also an endpoint, and "closure", since a "settlement", *id.*, implies that the special measures will not be perpetual. Reparations are different from affirmative action, but there are some similarities too.

Thus, those who think affirmative action is intrinsically "racist" and "evil" might have King to contend with, *see id.* Also, as noted in *Fisher* Br. at 18, Amicus has noted few opponents of affirmative action screaming for Israel to cease existence just because Israel gives race preferences to Jews, which could be considered affirmative action.

See, e.g., Rabbi David Hoffman, *Zionism is not a 'settler-colonial undertaking'*, The Mail & Guardian

(South Africa), June 28, 2005,[18] "In its essence, Zionism is not a 'settler-colonial undertaking' but a national programme of affirmative action. . . . [I]f the Jews are the only people who are to be denied their right to a nation state, then anti-Zionism is anti-Semitism." *Id.*

On that note, compare Martin Luther King's letter to Dr. Maurice N. Eisendrath, Sept. 29, 1967,[19] "Israel's right to exist as a state of security is uncontestable. . . . Peaceful solutions[, not] military measures[,] can provide a permanent solution . . . . SCLC [Southern Christian Leadership Conference] has expressly, frequently and vigorously denounced anti-semitism and will continue to do so", *id.* at 1, 2 (pages unnumbered), with BAMN, *The Victory of the Palestinian Struggle is Within Reach*, Dec. 17, 2012,[20]

> In face of the Zionist regime of genocidal intimidation and massacre, . . . over and over young women and men have fought with sticks and rocks and bricks against tanks and the advance [sic] weaponry the US has always provided the Zionist military machine. . . .
>
> . . . .
>
> . . . [T]he American imperialists and the Zionist rulers will never agree to

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[18] *Available* under "Zionism Commentary" *at* http://www.zionismontheweb.org/Zionism_is_not_a_settler-colonial_undertaking.htm.

[19] *Available* on the King Center website *at* http://www.thekingcenter.org/archive/document/letter-mlk-dr-eisendrath#.

[20] http://www.bamn.com/social-justice/the-victory-of-the-palestinian-struggle-is-within-reach.

> anything other than a Palestine as a subservient client state to Israel . . . .
>
> . . . .
>
> . . . The Arab and Islamic governments that claim to support Palestine must arm the Palestinians. This is the only way to prevent Zionist atrocities and place the Palestinian people once and for all on the road to victory.
>
> . . . .
>
> **In solidarity with the people of Palestine—**
>
> **Our Blood Is Your Blood!**
>
> London and Detroit, 24 November 2012
>
> Movement For Justice/By Any Means Necessary

Id. BAMN has a First Amendment right to its opinion, but its article above raises interesting questions about its support of affirmative action. If Israel and Zionism comprise affirmative action (for Jews), why would BAMN, as a "Coalition to Defend Affirmative Action", oppose them, *see The Victory of the Palestinian Struggle is Within Reach, supra*?

Additionally, one reason for affirmative action is to strengthen our Nation's military, *see, e.g., Grutter*, 539 U.S. at 331 (noting how American officer corps needs to be both diverse and selective). But for BAMN, Americans are apparently "imperialists", *Victory of the Palestinian Struggle, supra.* This raises the interesting question of whether 1) the arms that BAMN calls to be given Palestinians

against the "Zionist regime of genocidal intimidation and massacre", *id.*, 2) might actually be turned against American soldiers—including minorities who entered the officer corps by way of affirmative action—, in case the American military helps Israel in the future? Fascinating, to put it mildly.

Cf. also Mich. Daily, *Sectarian sojourn: BAMN must work well with others or take Trotskyite philosophy elsewhere*, Sept. 27, 2001[21] (recommending that BAMN, despite its Trotskyism, cooperate civilly with other parties).

If affirmative action involves "bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought", *Grutter*, 539 at 395 (Kennedy, J., dissenting), then perpetual affirmative action despite the People's vote to end it may not fulfill that harmonious goal. (Opposition to Zionism, *see Zionism is not a 'settler-colonial undertaking'*, *supra* (positing Zionism as affirmative action for Jews), may not promote harmony or respect either.)

(Speaking of Jews and affirmative action: Ron Unz, *The Myth of American Meritocracy: How corrupt are Ivy League admissions?* The American Conservative, Nov. 28, 2012,[22] notes that despite the "dramatic collapse in Jewish academic achievement" in recent years, "based on factors of objective academic performance and population size, we would

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[21] http://www.michigandaily.com/content/sectarian-sojourn-bamn-must-work-well-others-or-take-trotskyite-philosophy-elsewhere.

[22] http://www.theamericanconservative.com/articles/the-myth-of-american-meritocracy/.

expect Asians to outnumber Jews by perhaps five to one [at certain colleges;] instead, the total Jewish numbers across the Ivy League are actually 40 percent higher. This implies that Jewish enrollment is roughly 600 percent greater relative to Asians", *id.* So, is some form of (legacy?) "affirmative action" for Jews, or "reparation" for colleges' former exclusion of Jews, going on, *cf. id.*? If so, that would seem to militate against ending affirmative action for others, e.g., blacks, Latinos, and Native Americans, lest inequity or favoritism appear to result.)

In short, harmony, equity, kindness—which is usually a virtue—, and historical context, may all be of value in considering affirmative action, and how, where, and how long it takes place.

VIII. KEEPING AN EYE ON MICHIGAN

However, mixed with the kindness etc., there should also be due skepticism and scrutiny. As Amicus has mentioned, *Fisher* Br. at 34-35, he had to pay c. $1560 to get some accurate information, under the Freedom of Information Act, about the controversial, now-defunct "Wolverine Scholars Program" which let applicants with high grades apply to Michigan Law School, but only if they had not taken the LSAT before an admissions decision: a strange burden to put on applicants.[23]

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[23] *See* Elie Mystal, *The Life and Death of the Michigan 'Wolverine Scholars' Program*, Above the Law, Nov. 17, 2011 at 12:55 p.m., http://abovethelaw.com/2011/11/the-life-and-death-of-the-michigan-wolverine-scholars-program/, for some intriguing details.

The requested information, *available at* http://tinyurl.com/WoScFOIA, shows on page 4 of an April, 2009 Decision and Recommendation of the ABA Accreditation Committee (p. 33 of the PDF), "A third goal of the program is to increase student diversity. Under Michigan law, race may not be taken into account . . . [E]liminating the LSAT as a factor in admissions decisions removes a potential impediment to minority admissions[.]" *Id.* The problem is that the University had never told the public, to Amicus' knowledge, that the Program was a racial diversity program.[24] This does not seem to fulfill a public school's duty of candor to the taxpayers who fund it. *Cf. Grutter*, discussing U. of M. "faculty members [who] were 'breathtakingly cynical' in deciding who would qualify as a member of underrepresented minorities", 539 U.S. at 393 (Kennedy, J., dissenting).

So, even if the Program did not violate the law, *see id.*, it should have been made transparent to the People from the beginning, especially since in Proposal 2, they had shown suspicion of "racial diversity" efforts. If the University "forgets" to tell the truth (unless questioned under FOIA and paid over $1500) about a "race-neutral" program, how easily can it be trusted to tell the truth about a race-preferential program like affirmative action? Thankfully, the courts are here to keep an eye on Michigan and other universities, *see, e.g., Fisher.*

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[24] One also wonders how thoughtful the "increase diversity" effort really was, since the Program essentially excluded the University of Michigan-Dearborn and -Flint campuses, which may have relatively less-affluent and more-minority student bodies than the Ann Arbor campus.

It is also disturbing that even after being deprived of affirmative action, the University did not do away with alumni preferences. Despite posing as defenders of diversity, the school handicaps diversity by allowing preferences to that predominantly white and wealthy pool. One almost wonders if affirmative action was just a "beard" or distraction in the first place, to let the school continue with legacy preferences, and possibly similar preferences, e.g., for big donors. *See Grutter*, "Were this Court to . . . forbid the use of racial discrimination in admissions, legacy preferences (and similar practices) might quickly become less popular—a possibility not lost, I am certain, on the elites (both individual and institutional) supporting the Law School in this case." 539 U.S. at 368 n.10 (Thomas, J., dissenting). (Amicus believes, though, that legacy preferences should be attacked directly, instead of through the circuitous means of abolishing affirmative action and hoping that that will end legacy preferences; that strategy didn't work at the University of Michigan.)

Although the argument for mandatory legal affirmative action is the kind of hollow argument that could give civil rights lawyers a bad name, universities, too, may get a bad name if they "hide the ball", even through neglect instead of malice, on race- or gender-diversity issues. Hopefully Amicus' citing the FOIA *supra* will remind universities to behave well, since they can always be found out.

* * *

With our Nation's birthday later this week, one remembers that around the time of the Whiskey Rebellion, George Washington noted, "If the laws are to be trampled upon with impunity, and a minority .

. . . is to dictate to the majority, there is an end put, at one stroke, to republican government."[25] While the lower court's *BAMN* decision may not literally let a minority dictate to a majority, it does void the will of the majority, in highly inappropriate fashion. To overturn Proposal 2 "by any means necessary" does not comport with our great Nation's rule of law. Nor does it respect the People; and this disrespect will not help hasten the time when "in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all their scintillating beauty." (Martin Luther King, Letter from Birmingham Jail, Apr. 15, 1963)

CONCLUSION

Amicus respectfully asks the Court to reverse the court of appeals' judgment, in relatively summary fashion if appropriate, so upholding *Grutter*, *Seattle*, and *Crawford*; and humbly thanks the Court for its time and consideration.

July 1, 2013

Respectfully submitted,

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[25] *Available at George Washington: A National Treasure* (Smithsonian Inst.), http://georgewashington.si.edu/life/chrono_presidential.html.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-682

In The
Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE STATES OF CALIFORNIA, HAWAI'I, ILLINOIS, IOWA, NEW MEXICO, OREGON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

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2012 Census, Table 18 (Resident Population by Hispanic Origin and State: 2010), *available at* http://www.census.gov/compendia/statab/cats/population.html.....2

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Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum,* 29 Chicano-Latino L. Rev. 1 (2010).....21

INTEREST OF AMICI CURIAE

Amici, the States of California, Hawai'i, Illinois, Iowa, New Mexico and Oregon, as well as the District of Columbia,[1] submit this brief pursuant to Supreme Court Rule 37 in support of the respondents. Sup. Ct. R. 37, ¶4. Amici States, like all states, operate public systems of higher education. They necessarily have a significant interest in the types of restrictions that may constitutionally be imposed on their efforts to ensure that their educational institutions are truly open to all. Amici States strive to achieve a level of diversity on their campuses that will best educate and prepare students to excel in both civic and professional life following graduation. They recognize – as this Court has – that "'[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.'" *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003) (*Grutter*), quoting Brief for United States as *Amicus Curiae* at 13.

It is particularly important for states with large non-White populations to ensure that students of all races have meaningful access to their public colleges and universities. California, for example, is one of the most diverse states in the Union. According to 2010 U.S. Census data, California has the largest White,

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[1] For ease of reference, amici, including the District of Columbia, will be referred to collectively as "Amici States."

Latino and Asian populations in the country, as well as the most American Indians/Alaskan Natives and Native Hawaiians/Pacific Islanders.[2] It also has the fifth largest Black/African-American population.[3] In California, 96% of students from underrepresented minority groups who attend college attend public institutions. Richard Atkinson & Saul Geiser, *Beyond the Master Plan: The Case for Restructuring Baccalaureate Education in California,* Center for Studies in Higher Education, 13 (2010), *available at* http://cshe.berkeley.edu/publications/publications.php?id=369.

This Court held in *Grutter*, and reaffirmed in *Fisher v. University of Texas at Austin*, that states have a compelling interest in attaining a diverse student body in public institutions of higher education. *Grutter*, 539 U.S. at 328; *Fisher v. University of Tex. at Austin*, ___ U.S. ___, 133 S.Ct. 2411, 2419 (2013) (*Fisher*). Thus, states may, if they find it necessary to obtain the benefits of a diverse student body, adopt admissions policies that consider an applicant's race in an individualized, non-dispositive manner. Amici States have an interest in seeing that such flexibility

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[2] 2012 Census, Table 18 (Resident Population by Hispanic Origin and State: 2010) and Table 19 (Resident Population by Race and State: 2010), *available at* http://www.census.gov/compendia/statab/cats/population.html.

[3] 2012 Census, Table 19 (Resident Population by Race and State: 2010), *available at* http://www.census.gov/compendia/statab/cats/population.html.

in the vitally important arena of education is preserved.

Equally important, Amici States share a commitment to the notion that:

> equal protection of the laws is more than a guarantee of equal treatment under existing law. It is also a guarantee that minority groups may meaningfully participate in the process of creating these laws and the majority may not manipulate the channels of change so as to place unique burdens on issues of importance to them.

Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary v. Regents of Univ. of Mich., 701 F.3d 466, 474 (6th Cir. 2012), *cert. granted sub nom. Schuette v. Coalition to Defend Affirmative Action*, 133 S.Ct. 1633 (2013) (*Coalition*).

Amici States acknowledge the importance of ensuring that the "tools of political change" (*Coalition* at 470) are available to all on an equal basis. Education is one such tool. As far back as this Court's historic decision in *Brown v. Board of Education*, this Court recognized that "education . . . is the very foundation of good citizenship." 347 U.S. 483, 493 (1954). Public colleges and universities are the training ground for many of our Nation's leaders. *Grutter*, 539 U.S. at 332. For this reason, nowhere is it more important that our public institutions be open to all than in the context of higher education. *Id.*

Amici States recognize that only by ensuring equal access to the political process can respect for, and trust in, governmental institutions be maintained. Thus, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity if leaders are to have legitimacy in the eyes of the citizenry. *Grutter,* 539 U.S. at 332.

In addition to the shared interests of the Amici, California has a particular interest in the outcome of this case because, as in Michigan, its voters amended its Constitution to add language virtually identical to the constitutional provision at issue in this case.[4] Thus, this Court's decision in this matter will necessarily affect California.

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[4] Article I, section 26 of the Michigan Constitution provides, in relevant part, that:

> The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.

Mich. Const. art. I, § 26.

California's Constitution similarly provides that:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici States submit this brief in support of the respondents to emphasize that, indeed, Michigan's constitutional amendment prohibiting race-conscious admissions policies in public universities alters the political structure in such a way as to violate the Equal Protection Clause.[5] It does so by erecting barriers to the adoption of race-conscious admissions policies that do not exist for non-racial admissions policies, such as those that allow consideration of familial legacy, athletic ability or geographic or economic diversity.

By banning admissions programs that are permissible under the United States Constitution, article I, section 26 of the Michigan Constitution ("Section 26") violates the political-structure doctrine set forth in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (*Seattle*) and *Hunter v. Erickson*, 393 U.S. 385 (1969) (*Hunter*). It imposes unique political burdens on minority interests. Under Section 26, to have a characteristic other than race or gender considered as a factor in the university admissions process one need only successfully lobby the school's admissions committee, university leadership, or the

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[5] Although the Michigan constitutional amendment prohibits consideration of race or gender in admissions decisions, this brief focuses only on the prohibition of race as a diversity factor because that is the issue decided by the Sixth Circuit below. *Coalition*, 701 F.3d at 473.

school's governing board. But to have race be considered a factor would require the extraordinary step of amending the state constitution. As the Sixth Circuit accurately expressed in its well-reasoned decision below, "[t]he existence of such a comparative structural burden undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change." *Coalition*, 701 F.3d at 470.

Education's position as one of the most vital tools for political change has long been recognized. Public colleges and universities are the training ground for future leaders. *Grutter*, 539 U.S. at 332. This may be especially true for students of color, who are more likely to attend public institutions. *See Atkinson & Geiser, supra,* at 13; and research shows that access to education not only affects the student admitted or rejected; it also affects subsequent generations. Anthony P. Carnevale & Jeff Strohl, *Separate & Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege*, Georgetown Public Policy Institute (2013) at 7-8 and note 6. Parental education may now be the strongest predictor of a child's educational attainment and future earnings – more important even than family income. *Id.*[6]

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[6] This same study finds that the likelihood that a child in the United States will exceed her parents' educational level is less than 40%, lower than in any other advanced nation. *Id.*

Given these realities, it is clear that while diversity in the public education setting benefits all students and even society at large, greater classroom integration is of particular interest to Blacks, Latinos/as and Native Americans. These are the groups who are most directly and adversely impacted by bans on consideration of race in admissions policies at public universities and colleges. When campuses are not diverse, these are the students who are generally excluded.

Yet, it is as important to remember what is not at issue in this case as it is to recognize what is. The *Hunter-Seattle* doctrine does not purport to dictate the level of government at which decisions about university admissions must be made. Amici States merely assert that the doctrine requires that decisions about whether to consider race as a factor in university admissions be made at the *same* level of government as decisions about other admissions factors.

Similarly, Amici States do not argue that the doctrine requires Michigan's educational decision-makers to adopt a race-conscious admissions policy, nor does it authorize them to adopt a policy that would be unconstitutional under this Court's ruling in *Grutter*. Rather, Amici States argue simply that decisions about whether to consider race – in the manner permitted under *Grutter* – must be made at the same level of decision-making as decisions about other admissions factors. Here, as in *Hunter*, the Michigan amendment did not simply repeal race-conscious admissions policies. It effectively rigged the political

process to prevent them from ever being re-adopted except through the burdensome mechanism of amending the state constitution.

ARGUMENT

I. Laws That Restructure The Political Process So As To Burden Only Minority Interests May Violate The Equal Protection Clause

The Equal Protection Clause provides, in relevant part, that no state shall "deny to any person . . . equal protection of the laws." U.S. Const. amend. XIV, § 1. This Court has long recognized that the Equal Protection Clause may be violated by a restructuring of the political process so as to impose unique political burdens on racial minorities. *Seattle*, 458 U.S. 457; *Hunter*, 393 U.S. 385.

In *Hunter,* an Akron, Ohio referendum not only repealed a fair housing ordinance, but also amended the city charter to require a city-wide election to enact any ordinance to prevent housing discrimination "on the basis of race, color, religion, national origin or ancestry." *Hunter,* 393 U.S. at 387. This Court held that by imposing that additional burden in the political process, the Akron provision "discriminate[d] against minorities, and constitute[d] a real, substantial, and invidious denial of the equal protection of the laws." *Id.* at 393. This Court reasoned that the charter amendment created "an explicitly racial classification treating racial housing matters differently

from other racial and housing matters." *Id.* at 389. The charter amendment "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.* at 390. Only those laws directed at ending housing discrimination based on race, color, religion, national origin or ancestry were required to go through the referendum process. *Id.*

Although the charter amendment "on its face treat[ed] Negro and white, Jew and gentile in an identical manner," this Court recognized that, in reality, "the law's impact falls on the minority." *Hunter*, 393 U.S. at 391. Imposing this disadvantage on minority groups "by making it more difficult to enact legislation on their behalf" was as unacceptable in this Court's view as "dilute[ing] any person's vote or giv[ing] any group a smaller representation than another of comparable size." *Id.* at 393.

Thirteen years later, in *Seattle*, this Court reaffirmed the political-structure doctrine, holding that an initiative to prohibit mandatory busing to achieve racial integration of schools violated the Equal Protection Clause. *Seattle*, 458 U.S. at 470. In so holding, this Court reiterated that "[t]he Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community." *Id.* at 467. This Court recognized that the Fourteenth Amendment even reaches "'a political structure that

treats all individuals as equals,' [citations omitted], yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.*

The initiative at issue in *Seattle* provided that "'no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student.'" *Seattle*, 458 U.S. at 462. However, the initiative contained numerous broad exceptions so that it effectively prohibited only busing for the purpose of desegregation, while permitting busing for all non-racial reasons. *Id.* at 471.

This Court held that the initiative violated the Equal Protection Clause because "it use[d] the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities." *Seattle*, 458 U.S. at 470. The practical effect was "a reallocation of power of the kind condemned in *Hunter*," because the initiative "remove[d] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474.

Section 26 suffers from the same constitutional defects this Court addressed in *Hunter* and *Seattle*.

II. Michigan's Section 26 Restructures The Political Process By Erecting Obstacles To Achieving Race-Conscious Admissions Policies That Do Not Exist For Other Admissions Policies

A. Michigan's Amendment Does Not Address Race-Related Matters In A Neutral Fashion

Article I, section 26 of the Michigan Constitution provides, in relevant part, that:

> The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.

Mich. Const. art. I, § 26. It was passed in the aftermath of this Court's decision in *Grutter*, which held that narrowly-tailored race-conscious admissions criteria are constitutionally permissible. *Grutter,* 539 U.S. at 334. In *Grutter*, this Court approved the University of Michigan Law School's race-conscious admissions process. It held that such processes are constitutionally permissible when they consider race or ethnicity only as a "plus" factor in the context of individualized consideration of each applicant. *Id.* at 334. In so holding, this Court recognized that states

have a compelling interest in achieving the benefits that flow from a diverse student body at public universities. *Id.* at 343. This compelling interest enables a narrowly-tailored race-conscious admissions program to withstand the strict scrutiny to which all racial classifications are subjected because, "[a]lthough all uses of race are subject to strict scrutiny, not all are invalidated by it." *Id.* at 326-27.

In response to that ruling, Michigan voters amended their constitution to add Section 26. While Section 26 may treat all race-conscious programs similarly, what is relevant here is that it treats race differently from other permissible factors, such as an applicant's income level, place of residence or legacy status. That distinction is explicit on the face of the provision. It expressly prohibits consideration of race, but is silent as to these other potential diversity factors.

In this regard, Section 26 is no different from the charter amendment in *Hunter* or the initiative in *Seattle*. In *Hunter*, the fatal flaw with the city's charter amendment was that it applied only to housing antidiscrimination laws affecting race or religion. Thus, this Court recognized in the charter amendment "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Hunter,* 393 U.S. at 389. As this Court made clear, that explicit racial classification existed even where the charter amendment made "no distinctions among racial and religious groups." *Id.* at 390.

Similarly, the initiative in *Seattle* treated all busing to achieve racial integration the same, but it treated such busing differently from busing for non-racial purposes. Although the initiative – unlike Section 26 here – did not use the words "race" or even "integration," this Court concluded that the "racial focus of Initiative 350 . . . suffices to trigger application of the *Hunter* doctrine." *Seattle,* 458 U.S. at 474.

Section 26 likewise distinguishes based on race. Just as in *Hunter,* Section 26 creates an explicit racial classification. And just as in *Seattle*, Section 26 "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." *Seattle*, 458 U.S. at 470. Section 26 is not merely a neutral law of general application. Rather, its racial focus brings it within the *Hunter-Seattle* doctrine.

B. Section 26 Creates An Unequal Political Process That Burdens Minority Interests

It is irrelevant that Section 26 treats all races the same on its face. What is relevant is that it treats racial issues differently from other issues in a way that disadvantages minority interests. This Court made it abundantly clear that the key consideration when applying the *Hunter-Seattle* doctrine is the equality of the *political decision-making process. Seattle,* 458 U.S. at 474, n.17 ("The evil condemned by the *Hunter* Court was not the particular political

obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests."). Of concern to this Court in both *Hunter* and *Seattle* was that the effect of the changes wrought by voters "was to redraw decisionmaking authority over racial matters – and only racial matters – in such a way as to place comparative burdens on minorities." *Id.*

By banning constitutionally-permissible admissions programs, Michigan's constitutional amendment imposes unique political burdens on racial minorities. It requires a state constitutional amendment to achieve constitutionally-permissible admissions policies that consider race as a "plus" factor, but policies considering nonracial diversity factors may be obtained by persuading the school's admissions committee, university officials, or the school's governing board. As discussed below, policies permitting the narrow consideration of race are of particular interest to racial minorities. By requiring those seeking constitutionally-permissible race-conscious admissions policies to surmount more formidable obstacles to achieve their political objectives than other groups face, Section 26 violates the political-structure doctrine under the Equal Protection Clause.

III. Policies Can Be Of Primary Benefit To Racial Minorities For Purposes Of The Political Structure Doctrine, Even Though They Provide A Benefit To All Students

The *Hunter-Seattle* doctrine applies when the practical effect of the law in question is to remove the authority to address a racial issue "from the existing decision-making body, in such a way as to burden minority interests," making it "more difficult for the minority to enact legislation on its behalf." *Seattle*, 458 U.S. at 474; *Hunter*, 393 U.S. at 393. Petitioner argues that Section 26 cannot fulfill this criterion because race-conscious admissions policies are only constitutionally permissible if their purpose is to benefit *all* students, not just minority interests. Brief for Petitioner at 22-23. Petitioner is wrong for two reasons.

First, contrary to Petitioner's assertion, *Grutter* did not hold that "'obtaining the educational benefits that flow from a diverse student body'" is the "one and only" compelling state interest that can justify a race-conscious admissions policy. Brief for Petitioner at 22. While achieving the benefits of student body diversity is the only compelling state interest that this Court has so far specifically sanctioned in the context of higher education, this Court has never held that such an interest is the *only* one that can justify race-conscious policies. In fact, as Justice Ginsburg explained, *Grutter* did not require this Court to reconsider "whether interests other than 'student body diversity,' [citation] rank as sufficiently important to

justify a race-conscious government program." *Grutter*, 539 U.S. at 346, n.* (Ginsburg, J., concurring). This Court's recent decision reaffirming *Grutter* also did not address that question. *Fisher*, 133 S.Ct. at 2419.

Second – and more importantly – even if one assumes that achieving the benefits of a diverse student body for all students is the only state interest that can justify considering race in the admissions process, it does not follow that the *Hunter-Seattle* doctrine is inapplicable here. Policies that benefit all may be of particular interest to certain groups, just as policies that benefit certain groups may be of interest to all. This is particularly true where the goal at issue involves racial diversity in education, or, as referred to at the pre-college level, integration.[7] *Seattle*, 458 U.S. at 472 ("desegregation of public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose"). And it is settled "that mandatory desegregation strategies present the type of racial issue implicated by the *Hunter* doctrine." *Id.* at 473 (footnote omitted).

As this Court recognized in *Grutter*, White, as well as non-White, students – and, indeed, society as a whole – profit from a multi-racial educational

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[7] This Court warned more than half a century ago that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Educ.*, 347 U.S. at 493.

environment. *Grutter,* 539 U.S. at 330-33. But the broader gains in large part flow from, and, in fact, reflect, the benefits derived by students of color. This Court has recognized that where the environment where students of color are likely to find themselves as adults is "largely shaped by members of different racial and cultural groups," students of color "can achieve their full measure of success only if they learn to function in – and are fully accepted by – the larger community." *Seattle,* 458 U.S. at 473. This Court expressed the hope that attending ethnically diverse schools would help to accomplish this goal, not only by preparing non-White students "'for citizenship in our pluralistic society,'" but also by "teaching members of the racial majority 'to live in harmony and mutual respect' with [students] of minority heritage." *Id.* (citations omitted).

Many of the substantial benefits of diversity hailed by this Court in *Grutter,* while benefitting all students and society in general, clearly have their greatest impact on people of color. For example, this Court acknowledged that student body diversity promotes cross-racial understanding, breaks down racial stereotypes, and enables better understanding of different races. *Grutter,* 539 U.S. at 330. Although all students may share in these valuable effects of diversity, we may fairly assume that, at bottom, these impacts inure primarily to the benefit of Black, Latino/a and Native American students.

No one would argue, for example, that separate schools for White and Black school children *equally*

discriminated against both, though the school assignment of both were restricted based on race. Undoubtedly, anti-miscegenation laws primarily targeted people of color even though they also prohibited the White member of the couple from marrying the person of his or her choice. It follows, then, that laws abolishing these racist practices inured primarily to the benefit of non-White school children and prospective brides and grooms, even though their White counterparts also benefited.

In *Seattle,* this Court acknowledged that both Whites and Blacks supported and opposed the Washington busing initiative and easily accepted that both White and Black children benefit from exposure to ethnic and racial diversity in the classroom. *Seattle,* 458 U.S. at 472. But this Court said that neither of these factors provided a basis to distinguish *Hunter*, because "we may fairly assume that members of the racial majority both favored and benefited from" the fair housing ordinance invalidated in that case. *Id.*

Thus, while majority and minority students alike profit from campus environments that more realistically reflect the pluralistic society in which they live, it must be recognized that opening up the nation's institutions of higher learning to students from historically underrepresented racial and ethnic groups is of particular interest to those groups.

This is even more self-evident when one considers the drastic impact that bans on constitutionally-permissible race-conscious admissions policies have

had on the admissions of Black and Latino/a students. California, as the first state in the country to explicitly prohibit affirmative action in college admissions, is an instructive example. In 1996, California voters, like those in Michigan, chose to prohibit the state from considering race in its efforts to achieve diversity in public education by adding Article I, section 31(a) to the state constitution. The impacts to Black and Latino/a students were immediate and dramatic. Brief of Amicus Curiae, President and Chancellors of the University of California in Support of Respondents (UC Amicus Brief), filed with this Court in *Fisher*, 133 S.Ct. 2411, at 3. Officials of the University of California have described California's experience as follows:

> In the immediate aftermath of Proposition 209 becoming effective, the rates at which underrepresented minority students applied to, were admitted to, and enrolled at the University of California fell, often by very significant percentages, at every UC campus. In 1998, the first year in which race-neutral admission policies were implemented at UC, admission rates (*i.e.*, the percentage of applicants admitted) for underrepresented minority students and the proportion that these students represented of the total admitted class fell for UC as a system and on every campus.

UC Amicus Brief at 18. And despite "numerous and varied efforts at increasing diversity on each of its campuses, UC has enjoyed only limited success." *Id.*

at 14-15. Admission and enrollment of Black and Latino/a students at a number of UC campuses, particularly at the UC's most selective campuses, still have not returned to the levels that existed before California imposed its ban. *Id.*[8]

Given the significant impact that affirmative action bans have on Black and Latino/a university enrollment, it is undeniable that adoption of appropriate race-conscious policies would inure primarily to the benefit of racial minorities, notwithstanding their contribution to the rest of society, as well. While we may wish to deny it, "race unfortunately still matters." *Grutter,* 539 U.S. at 333; see also *id.* at 345 (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals."). Although diversity refers to a number of social, political, and cultural factors, including "class, national origin, sexual orientation, geographic region,

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[8] A recent study of the 468 most selective schools in the country, as determined by the aggregation of the three top tiers of Barron's Admissions Competitiveness, found that Whites were even more overrepresented in 2009 than they were in 1995 at these schools. Carnevale & Strohl, *supra*, at 10, 49-50 (App. B). In 1995, Whites made up 68% of the population aged 18 to 24, and 77% of freshman enrollment at the most selective colleges and universities. *Id.* By 2009, their percentage of 18 to 24-year-olds had fallen to 62% but their percentage of the enrollment at the most selective schools had decreased only to 75%. *Id.* Thus, in 1995, Whites were 9% overrepresented, but by 2009 they were 13% overrepresented. *Id.*

political affiliation, religion, ability/disability and age," race, like gender, has "a distinct, significant and foundational role in shaping experiences in the U.S." Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum,* 29 Chicano-Latino L. Rev. 1, 3 (2010) (footnote omitted).

Section 26 is not, therefore, insulated from review under the *Hunter-Seattle* doctrine simply because non-minorities may both support and benefit from race-conscious policies that make public universities more diverse. To the contrary, the obstacles it erects in the path of those wishing to implement constitutionally-permissible race-conscious admissions policies "burden minority interests" (*Hunter,* 393 U.S. 393) by making it more difficult to adopt policies of particular benefit to Black, Latino/a, and Native American students.

CONCLUSION

For the reasons stated above, Amici States respectfully urge this Court to affirm the en banc decision of the Sixth Circuit below.

Dated: August 30, 2013

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-682

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In the

Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CALIFORNIA ASSOCIATION OF SCHOLARS, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit both discrimination and preferential treatment on the basis of race or sex in public-university admissions decisions.

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INTEREST OF AMICI CURIAE[1]

An affiliate of the National Association of Scholars, the California Association of Scholars ("CAS") is an organization devoted to higher education reform. It is committed to rational discourse as the foundation of academic life in a free and democratic society.

Many CAS members have been active in the various campaigns to pass voter initiatives that prohibit state-sponsored discrimination on the basis of race, color, sex, ethnicity or national origin—especially in the original campaign for the California Civil Rights Initiative (known as "CCRI" or "Proposition 209"), codified at Cal. Const. Art. I, § 31. Indeed, it would not be an exaggeration to say that CAS was the soil from which the idea for CCRI and its progeny sprang.

The Michigan Civil Rights Initiative, Mich. Const. Art. I, § 26 ("MCRI"), which is the subject of this lawsuit, is among CCRI's progeny. The texts of both initiatives are nearly identical. Both prohibit their respective states from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin ...." Among other

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

things, they prohibit state colleges and universities from engaging in race-preferential admissions.

The experience of CAS's members puts it in a useful position to inform the Court about the legal issue presented in this case, which has been raised and resolved in CCRI's favor by both the U.S. Court of Appeals for the Ninth Circuit and the Supreme Court of California. See *infra* at Section IA.

Moreover, CAS is in an especially useful position to inform the Court about the importance of this case. As a result of the *en banc* decision of the U.S. Court of Appeals for the Sixth Circuit, the movement to pass voter initiatives that prohibit state-sponsored discrimination of this kind has come to a near standstill. Already-existing initiatives have been placed in legal jeopardy.

This threatens to put the cause of higher education reform back several decades. There is now considerable evidence of the positive effects these initiatives have on the education of affirmative action's so-called beneficiaries. See *infra* at Section II. CCRI in particular has been the subject of significant empirical research since its passage in 1996; CAS is in an excellent position to bring this research to the Court's attention. This evidence is crucial to understanding how, for good or ill, the Court's decision in this case will strongly affect the future of American higher education and of the academic success of minority students in particular.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to advocate for

the principles of the American founding. The CCJ advances that mission through participation in the litigation of cases of constitutional significance, including cases such as this in which the core principle of individual equality is at stake.

Reason Foundation ("Reason") is a nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

The Individual Rights Foundation ("IRF") was founded in 1993. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

SUMMARY OF ARGUMENT

Amici believe that the Petitioner's argument is in keeping with the legal profession's admirable traditions of restraint and civility. Yet, the decision below is a travesty of justice, and the task of calling it just that must fall to someone. Your ordinarily mild-mannered and forbearing *Amici* are not noted for a tendency toward hyperbole. When we call something a travesty of justice, as we do here, it is because we view it as exactly that.

In 2006, a strong majority of Michigan voters elected to adopt MCRI. These voters took to heart MCRI's core provisions concerning the need for

state and local governments, including state colleges and universities, to refrain from preferential treatment on the basis of race, sex, color, ethnicity, or national origin.

The Sixth Circuit's conclusion that a provision that bans race discrimination is unconstitutionally racially discriminatory is profoundly counter-intuitive. When the same argument was made with respect to CCRI, California's then-Attorney General Dan Lungren called it "Alice in Wonderland." George Skelton, *Making a Case that the People Have Spoken*, Los Angeles Times (December 16, 1996). And indeed, it has been rejected twice in California. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997); *Coral Construction, Inc. v. City of San Francisco*, 235 P.3d 947 (Cal. 2010).

But that is only one among many problems with the Sixth Circuit's decision. For reasons *Amici* will elaborate upon at greater length below, the principal case upon which majority relies—*Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) ("*Seattle School District*")—in fact provides, by its own admission, no support at all. See *infra* at Section IA. In this summary, it is enough to point out that *Seattle School District* was a 5-to-4 decision and that the one and only thing that all nine members agreed upon was that the argument adopted by the Sixth Circuit should be rejected.

In his dissent, Justice Powell expressed fear that the logic of the majority's decision could lead to absurd results. Significantly, the absurd result that he envisioned is precisely what the Sixth Circuit has now embraced:

> [I]f the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that higher authority traditionally dictated admissions policies .... If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder whether—under the equal protection components of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.

Seattle School District, 458 U.S. at 499 n.14 (Powell, J. dissenting, joined by three other Justices).

The majority denied Justice Powell's assertion and made it clear that their intent was emphatically not to cover laws like MCRI: "These statements evidence a basic misunderstanding of our decision .... It is evident ... *that the horribles paraded by the dissent* ... are entirely unrelated to this case." *Id.* at 480 n.23 (specifically referencing Justice Powell's note 14, emphasis added).

Note Justice Powell's hypothetical: It is precisely what happened in this case. The "affirmative action plan" of a "state law school" "came under fire." When this Court declined to take action in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a "higher authority"—the people of Michigan—intervened. Note also that the majority rejected Powell's concerns as a "parade[ ]" of "horribles" that were "entirely unrelated to this case." No one would claim that the

limiting principle behind *Seattle School District* is easy to discern from the majority opinion. But the one thing that all Justices agreed on is that it would be absurd to outlaw measures like MCRI.

What should be clear is that neither *Seattle School District* nor *Hunter v. Erickson*, 393 U.S. 385, 391 (1969), the case upon which it was based, was intended to apply to laws that *forbid* race discrimination (as opposed to *facilitate* race discrimination). See *infra* at Section IA. Significantly, if the political re-structuring logic employed in those cases were applied to laws that forbid race discrimination, it would likely find them all unconstitutional. See *infra* at Section IB. The Sixth Circuit's notion that decisions regarding racial preference must be made at low governmental levels rather than in state constitutions is unsupported by law and insupportable under our legal traditions. See *infra* at Section IC.

It would be especially unfortunate if the Sixth Circuit's decision were allowed to stand given the considerable evidence that initiatives like MCRI work to improve the academic performance and graduation rates of minority college students. They also increase the number of minority students who major in science and engineering and who go on to advanced degrees in graduate and professional school. See *infra* at Section II. This is not just the wishful thinking of theoreticians. All of this happened in California following CCRI's passage. The Sixth Circuit's decision has put a cloud over one of the few bright spots in education today. *Amici* hope the cloud will be lifted as swiftly and unequivocally as possible.

ARGUMENT

I. The Sixth Circuit Erred in Holding MCRI To Be a Constitutional Violation.

Anyone who argues that the Equal Protection Clause of the U.S. Constitution actually forbids voters from prohibiting their state from engaging in discrimination based on race faces an uphill battle. The "'central purpose'" of the Equal Protection Clause "'is the prevention of official conduct discriminating on the basis of race.'" *Seattle School District*, 458 U.S. at 484 (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)); *see also Hunter*, 393 U.S. at 391 ("[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinction based on race."); *Loving v. Virginia*, 388 U.S. 1, 10 (1967); *Ex Parte Virginia*, 100 U.S. 339, 344-45 (1879); *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879); *The Slaughter-House Cases*, 83 U.S. 36, 71 (1872). This purpose is born out of both the racial equality ideal and a recognition of the destructive effect of its rejection. *See Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) ("the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society").

Indeed, at least four members of this Court over the past several decades—Justices Douglas, Stewart, Scalia, and Thomas—have taken the position

that the Equal Protection Clause is a flat ban on race discrimination. *See Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment); *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting); *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting). For the Sixth Circuit to be right, these justices would have to be not just wrong, but very wrong. The Constitution would have to protect specially the very thing that they believed it prohibited.

Two courts have already rejected precisely the argument the Sixth Circuit now embraces. See *Coalition for Economic Equity*, 122 F.3d at 692; *Coral Construction*, 235 P.3d at 947.[2] Judge O'Scannlain put the point well in *Coalition for Economic Equity*: "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." 122 F.3d at 709. "A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender." *Id.* at 702. As this Court has previously recognized, "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982).

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[2] In addition, the same argument was rejected by a Sixth Circuit panel when this case came up at the preliminary injunction stage. See *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006).

A. The Logic of *Hunter* and *Seattle School District* Can Be Applied Only to Laws That Promote Discrimination, Not Laws That Forbid It.

The core of the Sixth Circuit's decision to the contrary appears to be this: By enshrining a policy against race discrimination in a state constitution, that state is discriminating against racial minorities who might wish to lobby the state legislature, a state agency or a local government for preferential treatment based on race. Other interest groups—veterans, public employees, etc.—can lobby a governmental entity for special treatment without restraint. But a racial group can do so only if it first successfully lobbies to repeal the state constitutional provision. Such a "political restructuring" is unconstitutional race discrimination—or so the Sixth Circuit held.

In arriving at its decision, the Sixth Circuit relied on the so-called "political re-structuring" cases—*Hunter* and *Seattle School District*. Attempting to apply those cases to MCRI, it held that individual state colleges and universities are the traditional decision-makers on matters of admissions policy. Because MCRI makes it impossible for racial minorities, but not tennis players, to lobby these schools for preferential treatment based on race, its adoption constitutes unconstitutional race discrimination.

This reflects a fundamental misunderstanding of the Constitution and MCRI. MCRI does not discriminate against racial minorities. It discriminates against *race discrimination*—just like the doctrine of strict scrutiny discriminates against

race discrimination. Members of racial minorities are as free as anyone (including members of racial majorities) to lobby for preferential treatment. They just can't lobby for it based on their race. Nor can they be disadvantaged on those bases. MCRI is a two-way street.[3]

Hunter provides no support for the Sixth Circuit's holding, since the initiative at issue there did not prohibit state discrimination, but rather encouraged private race discrimination among private citizens. By repealing a local fair housing ordinance and making its re-promulgation difficult, the

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[3] The Sixth Circuit apparently believes that racial minority members are already protected against discrimination in college and university admissions and hence MCRI has only downside potential for them. As Asian American applicants know only too well, this is untrue. See Thomas Espenshade & Alexandria Walton Radford, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (2009) (noting large disparities between the academic credentials of Asian Americans who are offered admission to elite schools and other such applicants). Indeed, diversity admissions policies have potential downsides for all groups, including African Americans and Hispanics. Under *Grutter*, a college or university may discriminate on the basis of race in order to reap whatever educational benefits racial diversity may have for its students. A state institution that is largely African American (as historically black colleges and universities frequently are) is thus presumably free to discriminate in *favor* of whites and *against* African Americans. MCRI on the other hand would prevent that. Interestingly, in the area of sex, non-traditional affirmative action preferences for men have become common. See Gail Heriot & Alison Somin, *Affirmative Action for Men?: Strange Silences and Strange Bedfellows in the Public Debate over Discrimination Against Women in College Admissions*, 12 Engage 14 (2011). MCRI would protect against that too—as well as against other shifts in political and constitutional fashion.

charter amendment at issue in *Hunter* thwarted the city of Akron's efforts to discourage racial discrimination by private citizens, thereby lending aid and encouragement to those private discriminators.

Seen in this light, *Hunter* resembles a less controversial case, *Anderson v. Martin*, 375 U.S. 399 (1964). In *Anderson*, this Court struck down a Louisiana law requiring that election ballots specify each candidate's race. Like the charter amendment in *Hunter*, the Louisiana statute was facially neutral, although it explicitly dealt with race. Like *Hunter*, the Louisiana statute's purpose appeared to be sinister: It appeared to be intended to facilitate voters' private racial animosity and thereby reduce the number of African Americans elected to office. In both cases, the Court's decision is best viewed as an attempt to prevent states from affirmatively encouraging its citizens to engage in racial discrimination.

Seattle School District, too, involved a voter initiative that attempted to facilitate private discrimination rather than end public discrimination. The school board in that case had adopted mandatory school busing in order to alleviate the problem of racial isolation brought on by decades of private housing discrimination. The initiative in that case prohibited school districts from assigning students to a school that is not the closest (or next closest) to the student's home unless exceptional reasons applied. The exceptional reasons did not include a desire to integrate the schools or to reduce the incentives for individuals to discriminate in the sale and rental of homes. Like the initiative in *Hunter*, *Seattle School District's initiative* was not a prohi-

bition on race discrimination. To the contrary, it was intended to shore up Seattle's segregated housing patterns and thus to facilitate private discrimination and allow its effect to continue long into the future.

MCRI is in no way intended to encourage either public or private race discrimination; nor will it encourage such. Instead, it is a strong ban on state-sponsored discrimination. Neither *Hunter* nor *Seattle School District* has any application, therefore. It should be noted that no one seriously claims that the kind of race discrimination MCRI prohibits is constitutionally justified as a remedy for past discrimination. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of University of California v. Bakke*, 438 U.S. 265, 307-10 (1978) (Opinion of Powell, J.) (rejecting societal discrimination as a permissible justification for race-preferential admissions policies).

B. All Laws Work a "Political Re-Structuring" of the Kind the Sixth Circuit Condemns; That May Be Among the Reasons This Court Has Quietly Declined To Follow *Hunter* Even in Cases in Which It Arguably Could Be Applied.

If MCRI works a "political re-structuring," then all laws do, no matter what level at which they are promulgated. Take, for example, the Equal Credit Opportunity Act, Pub. L. 94-239, 90 Stat. 251 (1974). Under its provisions, 15 U.S.C. sec. 1691 *et seq.*, it is illegal to discriminate on the basis of race in the provision of credit. When Congress passed that law in 1974, it effectively pre-empted the

Michigan legislature from passing legislation that might have required banks to give African Americans credit at preferential rates. If African Americans in Michigan had wanted such a statute, they would have been required to first lobby to repeal the federal legislation that mandates equality.

That would not end the matter. In turn, if the Michigan legislature had enacted a mandatory one-point preferential rate, it would have pre-empted a state agency from adopting regulations requiring lenders to give African Americans a two-point preferential rate. Again, repeal would be necessary to secure the greater advantage. Indeed, since lenders traditionally set their own rates, this argument could continue to still lower levels of government. See also Gail Heriot, *California's Proposition 209 and the United States Constitution*, 43 Loy. L. Rev. 613 (1998) (making this same argument using fair housing laws as the example); Gail Heriot, *The University of California Under Proposition 209*, 6 Nexus 163 (2001) (symposium issue) (same).

In the end, one would be hard-pressed to come up with a single enactment concerning race relations that would not violate the Sixth Circuit's interpretation of *Hunter* and *Seattle School District*. Even the doctrine of strict scrutiny itself is unconstitutional under it.

It is thus no wonder that this Court has shied away from such a broad application of *Hunter*. In the most recent case that potentially concerned the issue, *Romer v. Evans*, 517 U.S. 620 (1996), this Court conspicuously avoided reliance on *Hunter*. *Romer* concerned Colorado's Amendment 2, which repealed ordinances that prohibit discrimination

based on "homosexual, lesbian or bisexual orientation" and prohibited future legislation designed to ban discrimination on that basis. In contrast to the case at bar, therefore, *Romer*'s facts were reasonably analogous to *Hunter*'s. A Colorado trial court issued a preliminary injunction against the enforcement of Amendment 2 and the Colorado Supreme Court affirmed relying on *Hunter* and *Seattle School District*. In affirming those courts, this Court explicitly stated that it was relying "on a rationale *different* from that adopted by the State Supreme Court" and cited the two cases only in describing the decisions below. *Romer*, 517 U.S. at 624 (emphasis added). Justice Kennedy, writing for the majority, instead relied upon the conclusion that "the amendment seems inexplicable by anything other than animus." *Id.* at 632.

Justice Scalia explained in his dissent why the "political landscape alteration" rationale in *Hunter* would be an unsuitable foundation for the Court's decision:

> [I]t seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e. by that state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors ....

> Once such a law is passed, the group composed of relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection ....
>
> The same 'rational basis' (avoidance of corruption) which renders constitutional the substantive discrimination against relatives ... also automatically suffices to sustain what might be called the electoral-procedural discrimination against them .... [A] law that is valid in its substance is automatically valid in its level of enactment.

Romer, 517 U.S. at 630-31 (Scalia, J., dissenting).

The majority in *Romer* evidently took Justice Scalia's criticisms to heart, since the majority opinion relied on an animus theory rather than on *Hunter*. *Romer* thus has no application to this case. Even the originators of the political re-structuring argument against CCRI, law professors Evan Caminker and Vikram Amar, concede that an argument against the initiative based on racial animus would be inappropriate.[4]

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[4] See Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019, 1023 (1996) ("Such a showing of invidious intent or motive behind ... CCRI would, we feel, be very hard to make"). The authors cite several non-invidious reasons that could motivate a voter to support CCRI from notions of fundamental fairness to concerns for economic efficiency to a desire to avoid stigmatizing affirmative action beneficiaries.

C. The Sixth Circuit's Notion That Questions of Preferential Treatment for Racial Minorities Must Be Left At a Low Level of Government Is Contrary to Law and the Political Theory of the Nation's Founders.

The Sixth Circuit's decision takes the novel position that since admissions policy-making is generally entrusted to individual state colleges and universities, the discretion to grant *Grutter*-style preferential treatment must also reside with them—and not with the state constitution. Of course, MCRI also bans preferential treatment in public contracting and public employment. Since municipalities generally have the authority to grant municipal contracts and sanitation districts generally hire staff, presumably the same conclu-

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No fair-minded CCRI opponent argues that it was motivated primarily or even substantially by malice. While no statewide election has ever been conducted anywhere in which no voter was motivated by malice, those who supported CCRI overwhelmingly did so conscientiously. Presidential candidate Robert Dole, Governor Pete Wilson, and a host of other officeholders endorsed it, as did newspapers like the San Diego Union Tribune, the Orange County Register, UCSD's Daily Guardian, and San Diego State University's Daily Aztec. It is difficult to imagine that they were all simply spewing hatred. Indeed, CCRI could not have passed without millions of votes from women and minorities—the very persons that its opponents argued would be victimized by it. Also among the newspapers that endorsed CCRI was UC-Berkeley's Daily Californian—although few Berkeley students heard about it. In the early hours of the morning on Election Day, CCRI opponents collected the papers from the various campus locations where they are made available for pick up and threw them out. *Daily Cal Stolen Off Racks–Prop. 209 Cited*, San Francisco Chronicle at B2 (Nov. 6, 1996).

sion would have to hold: The discretion to grant any constitutionally-permissible racial preferences would have to reside with them, not with the state constitution.

This would be an unusual argument even if race were not involved. How Michigan chooses to allocate policy-making authority among its subdivisions is ordinarily a matter for Michigan law. It is rare to suggest the Constitution has anything to say about it. Indeed, the Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively or to the people." U.S. Const., Amend X. Nowhere in the Constitution are powers reserved to state universities, municipalities or sanitation districts.

To apply the Sixth Circuit's sub-State/local approach in the context of race is, however, entirely misguided and ahistorical. While Pitchfork Ben Tillman and Bull Connor might be appreciative, the nation has generally adopted a different path. See U.S. Const. Amend XIV. Indeed, the local or agency level is often the worst place to let racial issues be decided. *See, e.g., Croson*, 488 U.S. 469; *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

For almost 150 years, it has been the policy of the American people that the primary legal authority on issues of state-sponsored race discrimination is the Fourteenth Amendment's Equal Protection Clause—part of the highest law of the land, not the lowest. It is because of the Equal Protection Clause that Jim Crow policies adopted by States, state

agencies and local governments are now consigned to the dustbin of history.

The Sixth Circuit apparently takes the position that because the Equal Protection Clause has been held not to forbid *Grutter*-style race discrimination, race-based admissions policies must now be given the "hands off" treatment by state constitutions. What a slim majority viewed as barely (and only temporarily) constitutional, and what four justices of this Court viewed as entirely unconstitutional, is thus elevated to protected status.

Under the Sixth Circuit's logic, when this Court decides that the Equal Protection Clause does *not* prohibit some racially discriminatory activity of a state subdivision, that decision effectively preempts the field at all levels except the lowest. Among the many faults of such an approach is the likelihood that it will chill the victims of race discrimination by state subdivisions from asserting their constitutional rights in court. If they lose, they may lose their right to seek redress of their grievance at a higher state level.

The Sixth Circuit's approach is particularly troubling when viewed alongside Madison's Federalist No. 10—perhaps the most significant essay on political theory in American history. In it, Madison famously explained that one of the advantages of a larger polity over a smaller one is its ability to overcome special interests (or as he called them "factions"). Madison wrote:

> Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed

> than its tendency to break and control the violence of faction.

Federalist No. 10 at 77 (Madison) (Rossiter ed. 1961).

"By a faction," Madison wrote, "I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* For example, at various points in Madison's own lifetime, rice planters may have virtually owned the South Carolina low country, mercantile interests may have ruled the roost in Boston, and various religious denominations may have dominated one region, state or locality or another. But no such "faction" could dominate at the national level—at least not for long. In Madison's view, only through the creation of fragile coalitions of special interests could activities manifestly contrary to the public interest be undertaken at the national level.

Madison was no political naïf. He knew that special interests could do some serious damage to the public interest at the national level too. But doing so would take a great deal of effort. Back at the local level, it might be accomplished all too easily.

Federalist No. 10 did not specifically address race or ethnicity. Nevertheless, they are perhaps the most noxious forms of special interest—not just in this country but around the world. It is thus fortunate that they are a special concern of the Equal Protection Clause. *Cf. Strauder*, 100 U.S. at 307-08

(stating that race is the special concern of the Fourteenth Amendment).

Too often in American history political bosses have been able to operate a racial and ethnic spoils system at the local level and sometimes at higher levels too. See Steven P. Erie, RAINBOW'S END: IRISH AMERICANS AND THE DILEMMAS OF URBAN MACHINE POLITICS, 1840-1985 (1990). The Equal Protection Clause, at least as it was interpreted then, was often insufficient to put them under control. Instead, reforms of these urban political machines were often imposed from the state level. See, e.g., Michael H. Ebner & Eugene M. Tobin, eds., THE AGE OF URBAN REFORM: NEW PERSPECTIVES ON THE PROGRESSIVE ERA (1977). MCRI fits into this tradition.

Michigan is surely a large polity within the meaning of Federalist No. 10; the University of Michigan is a small one. It is worth pointing out that Michigan has roughly twice the population today that the United States had in 1790. Special interests can dominate in Michigan's numerous city councils, faculty senates, county boards and administrative agencies, but they cannot dominate the initiative process except with great effort—greater than that necessary to dominate the legislature. As a result, the process has functioned for a century as a useful counterweight to the considerable power of elected and appointed public officials.

One of the virtues of the process is the fact it cannot be easily or quickly employed, and hence is difficult to enlist in the cause of passion or parochial interest. According to the Initiative and Referendum Institute at the University of Southern Cali-

fornia, between the years 1914 and 2000, only 60 statewide initiatives were placed on the Michigan ballot, and only 20 passed.[5] The state constitution prescribes the formula for determining how many signatures are necessary for constitutional amendments as "10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected." Mich. Const. Art. XII, sec. 2. Signatures must be collected in person by signature gatherers, submitted at least 120 days prior to the election and verified by the appropriate state agency. *Id.* All in all, the process has been a vehicle for sober and dispassionate reform.[6] *Amici* regard its record as better

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[5] See Initiative and Referendum Inst., Statewide Initiative Usage [Mich. 1914-2000], available at http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/Michigan.pdf.

[6] This is not to say that MCRI's opposition was always sober and dispassionate. See, e.g. Editorial, *From the Daily: Embarrassment*, The Michigan Daily (October 31, 2006) (condemning the tactics of Respondent Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by Any Means Necessary as "alienating and inflammatory," including "pull[ing] more than 1,000 middle and high school students out of class to bus them in for the rally," some of whom engaged in "spitting and yelling" at opponents); Associated Press, *Election Board Fails to Put Affirmative Action Issue on Ballot*, The Michigan Daily (Dec. 14, 2005) (describing out-of-control crowd of 250 high school students, brought in by Respondent Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by Any Means Necessary, who overturned a table at a public meeting of the Board of State Canvassers while surging towards the board members and chanting "'They say Jim Crow, we say hell no!'"). But these tactics were not

than that of the Michigan legislature—and it is difficult to argue that it is not at least as good.

II. Voter Initiatives Like MCRI Hold the Key to Improving the Academic Success of Under-Represented Minority Students.

For years, colleges and universities operated under the assumption that when they engaged in affirmative-action preferences in admissions, minority students were receiving a valuable benefit. The evidence indicates, however, that this is error. The recipients of preferences must often struggle to succeed at institutions where their entering academic credentials put them well below that institution's median. Many are worse off.

How can this be? No one should be surprised to learn that affirmative action beneficiaries tend to earn low grades at the colleges and universities that recruit them. While some students will outperform their entering academic credentials just as some students will under-perform theirs, most students perform in the general range that their entering credentials suggest. See, e.g., Gail Heriot, *The Sad Irony of Affirmative Action*, 14 National Affairs 78 (Winter 2013); Richard H. Sander & Stuart Taylor, Jr., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012) ("MISMATCH"). Even affirmative action advocates concede that minority student grades are "startlingly low." See Ian

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unique to the initiative context. See Jordan Schrader, *BAMN Defends Purpose*, The Michigan Daily (Feb. 11, 2002) (reporting tactics in connection with *Grutter* and *Gratz* litigation).

Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1807 (2005) (referring to first-year law-school grades).

What some do find surprising is that students who attend a more prestigious school on a preference (and who hence earn low grades) have been repeatedly shown to be less successful than students with precisely the same entering academic credentials who attend a school where those entering credentials put them at or somewhat above the median (and who hence earn higher grades). The so-called "beneficiaries" of affirmative action are less likely to graduate than their academic peers attending somewhat less prestigious schools. MISMATCH at 106-08. They are less likely to graduate with a degree in science and engineering. *See, e.g.*, Rogers Elliott, *et al.*, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Ed. 681, 692-93 (1996). In law schools, they are less likely to graduate and pass the bar. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004). They are less likely to aspire to become college professors. *See* Stephen Cole & Elinor Barber, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH ACHIEVING MINORITY STUDENTS (2003).

Nevertheless, all is not lost—not yet anyway. While CCRI has been consistently opposed by university administrators, it has been a shining example of how these problems can be turned around. To begin with, CCRI greatly increased the academic performance of under-represented minority stu-

dents—*i.e.* it has increased the rate at which they earn honors and decreased the rate at which they wind up in academic jeopardy.

Take, for example, the case of the University of California at San Diego ("UCSD")—a highly selective institution, but not quite as selective as the UC's Berkeley campus. *Amici* have firm data on UCSD. In 1997, only one African-American student at UCSD had a freshman-year GPA of 3.5 or better—a single African-American honor student in a freshman class of 3,268. In contrast, 20 percent of the white students had such a GPA. Failure rates were similarly skewed. Fully 15 percent of African-American students and 17 percent of American Indian students at UCSD were in academic jeopardy (defined as a GPA of less than 2.0), while only 4 percent of white students were. Other under-represented minority students hovered close to the line.[7] *See* Gail Heriot, *The Politics of Admissions in California*, 14 Academic Questions 29 (2001).

This was not because there were no other African-American students capable of doing honors work at UCSD. The problem was that such students were often at Stanford or Berkeley, where often they were not receiving honors. Similarly, white students were not magically immune from failure. But those who were at high risk for it had not been admitted in the first place. Instead, they

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[7] Since UCSD didn't keep separate statistics for those minority students who needed a preference in order to be admitted and those who would have been admitted regardless, it is impossible to say exactly how high the failure rate was for preference beneficiaries in particular.

were at less competitive schools where their performance was more likely to be acceptable. *Id.*

Then came CCRI. CCRI went into effect in time to affect the undergraduate admissions decisions for the entering class of 1998, causing Berkeley's offers of admission to African Americans, Hispanics and American Indians to go from 23.1 percent of the total offers to 10.4 percent. *Id.*

Of course, the minority students who would have attended Berkeley in the past had not simply vanished. They had been accepted to somewhat less highly ranked campuses–often UCLA and UCSD–based on their own academic record rather than race. In turn, students who previously would have been admitted to UCLA or UCSD on a preference had usually been admitted to somewhat less competitive UC campuses. UC-Riverside and UC-Santa Cruz both posted impressive gains in minority admissions. At Riverside, for example, Black and Latino student admissions shot up by 42 percent and 31 percent respectively. UCSD reported mixed results. Black enrollment there was down 19 percent, but Filipino and Latino enrollment was up by 10 percent and 23 percent. *Id.*

At UCSD, the performance of Black students improved dramatically. No longer were African-American honor students a rarity. Instead, a full 20 percent of the African-American freshmen were able to boast a freshman-year GPA of 3.5 or better. That was higher than the rate for Asians (16 percent) and extremely close to that for whites that year (22 percent). Suddenly African-American students found themselves on a campus where achiev-

ing academic success was not just a "white thing" or an "Asian thing." *Id.*

The sudden collapse in minority failure rate was even more impressive. Once racial preferences were eliminated, the difference between racial groups all but evaporated at UCSD, with Black and American Indian rate falling to 6 percent. Consequently, average GPAs converged. UCSD's internal academic performance report announced that while overall performance has remained static, "underrepresented students admitted to UCSD in 1998 substantially outperformed their 1997 counterparts" and "the majority/majority performance gap observed in past studies was narrowed considerably." *Id.*

"Narrowed" was an understatement. The report found that for the first time "no substantial GPA differences based on race/ethnicity." A discreet footnote makes it clear that the report's author knew exactly how this happened: 1998 was the first year of color-blind admissions. *Id.*

Granted, UCSD had twelve fewer African-American freshmen in the first year of CCRI's implementation, forced as it was to reject students who did not meet its regular academic standards. But it also had seven fewer African-American students with a failing GPA at the end of that year. Meanwhile, those twelve students probably attended a school where their chances of success were greater. *Id.*

Some argued that CCRI would discourage qualified minorities from even applying to the UC system. But the evidence shows just the opposite. Af-

rican-American and Hispanic students with competitive academic credentials were actually *more* likely to apply to the UC once CCRI went into effect. *See* David Card & Alan Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 416 Indus. Lab. Rel. Rev. 58 (2005); *see also* MISMATCH at 131-42 (arguing that Card & Krueger's methodology may have *understated* CCRI's "warming effect" on applications by competitive minority students).

CCRI's critics have been loath to admit it, but the big news following CCRI's implementation was skyrocketing minority graduation rates. As Sander & Taylor reported:

> Minority graduation rates rose rapidly in the years after [CCRI], and on-time (four-year) graduation rates rose even faster. For the six classes of black freshman who entered UC schools in the years before race-neutrality (i.e., the freshman classes of 1992 through 1997), the overall four-year graduation rate was 22 percent. For the six years after [CCRI's] implementation the black four-year graduation rate was 38 percent. Thus, even though the number of black freshman in the UC system fell almost 20 percent from 1997 to 1998, the number of black freshman who obtained their degrees in four years barely dipped for this class,[8] and the en-

[8] Note that the black students who didn't attend the UC once race preferences were eliminated almost certainly attended another college or university. Their numbers should be added to the total, which would bring the number of total black graduates higher.

> tering class of 2000, four years later, a record number of blacks graduating on time.

MISMATCH at 146.

Not all of this astonishing increase is provably traceable to CCRI. But Duke University researchers have found that about 20% of the overall increases in graduation rates of UC minority students is. And if CCRI had been implemented with greater rigor, it would have contributed even more. *See* Peter Arcidiacono, *et al.*, *Affirmative Action and University Fit: Evidence from Proposition 209*, Nat'l Bur. of Econ. Res. Working Paper No. 18523 (November 1, 2012). In a world in which steps forward in education, when they occur at all, are rare and incremental, that is a stunning victory.

And it is not just grade-point averages and graduation rates. Between 1997 and 2003, the number of African-American and Hispanic students graduating with a degree in science or engineering rose by about 50%. Not unrelatedly, the number of African-American and Hispanic students majoring in ethnic studies and communications fell by 20%. MISMATCH at 150-54. Academic self-confidence was growing among minority students.

Note the Triple Crown: (1) Grade-point averages of under-represented minority students and (2) graduation rates of such students were improving at the same time that (3) they were increasingly majoring in science and engineering. Ordinarily, these three goals would be difficult to achieve at the same time. For example, grading curves are traditionally lower in science and engineering departments than they are in the rest of the universi-

ty, so it is remarkable that grade-point averages would be going up alongside increases in the number of science and engineering majors. Combine those victories with an increase in graduation rates. When graduation rates increase it is generally because some weaker students, who might have dropped out in an earlier time, are managing to make it to the end. One would thus expect increasing graduation rates to have a depressive effect on grade-point averages and/or on the proportion of students majoring in science and engineering. But instead improvements were made in all three areas. It is as if Ford had come up with a new automobile that was both more luxurious and better on gasoline mileage—and cheaper too.

Why is all this evidence being ignored by affirmative action advocates? Perhaps Leo Tolstoy has some wisdom to impart on this subject:

> I know that most men, including those at ease with problems of the greatest complexity, can seldom accept even the simplest and most obvious truth if it be such as would oblige them to admit the falsity of conclusions which they have delighted in explaining to colleagues, which they have proudly taught to others, and which they have woven, thread by thread, into the fabric of their lives.

MISMATCH at x (quoting Leo Tolstoy).

To be sure, over the years since then, the UC has developed techniques that allow it to circumvent CCRI in part while still enabling it to argue publicly that it is in compliance. As a result, its

benefits have been diluted somewhat. But it has not eliminated them. As long as CCRI remains the law, there is reason for optimism. Students in Michigan should not be denied the same opportunities that MCRI offers to them.

CONCLUSION

The "parade[ ]" of "horribles" scoffed at by the majority in *Seattle School District* is alive and well and marching over the rights of Michigan voters. *Id.* at 480 n.23. At a time that nearly all Americans earnestly wish to increase the likelihood that students from under-represented racial minorities will be academically successful, this ugly and ill-informed parade is reducing that likelihood. *Amici* urge this Court to reverse.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF CALIFORNIA SOCIAL SCIENCE RESEARCHERS AND ADMISSIONS EXPERTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

The undersigned social scientists and scholars submit this brief as *amici curiae* in support of respondents.[1] *Amici curiae* are social scientists and scholars who have extensively studied issues related to access, diversity and race relations in K-12 and postsecondary institutions.[2] Several *amici* have served on, or are currently serving on, undergraduate and graduate admissions committees and have worked on research and policy directly related to the issues addressed in this brief. Michigan's Ballot Proposal 2 – like California's Proposition 209 before it[3] – amended the state constitution to ban the use of race-conscious admissions at state universities. *Amici*

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The written consents of the parties to the filing of this brief have been filed with the Clerk. Work on this brief was coordinated at the Ralph J. Bunche Center for African American Studies at UCLA.

[2] Each of the foregoing parties is an individual and not a corporation. None of the foregoing parties has any financial interest in this matter. Each of the foregoing parties is appearing in an individual capacity and does not speak for or represent the views of the university that employs him or her.

[3] California Proposition 209 was passed by voter initiative (54 percent in favor, 46 percent opposed) in 1996. But white voters carried the initiative, with 59 percent voting in favor. Only 42 percent of Asian Americans, 37 percent of Latinos, and 18 percent of African Americans supported it.

have an interest in presenting to the Court the 16 years of empirical data that documents the detrimental effects California Proposition 209 has had on underrepresented minorities[4] (URMs) in the state who seek access to the University of California (UC).

Although Proposition 209 also has constrained the access of underrepresented minorities to the UC's transfer student,[5] graduate,[6] and faculty[7] ranks, this

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[4] For the purposes of this brief, "underrepresented minorities" include African Americans, Chicana/os/Latina/os, and Native Americans/American Indians.

[5] Underrepresented minorities accounted for 27 percent of all transfer students admitted to the UC system in 2012. University of California Office of the President, "Final Summary of Transfer Applications, Admissions, and Enrollment, Fall 1989-2012," *available at* http://www.ucop.edu/news/factsheets/2012/flow-trans-ca-12.pdf (last modified Mar. 2013).

[6] In fall 2008, only 9 percent of all graduate academic students were underrepresented minorities in the UC system. University of California Regents, *University of California Diversity Annual Accountability Sub-Report* at 12 (Sept. 2010), *available at* http://data.universityofcalifornia.edu/faculty-staff/diversity/white-papers/Diversity-Accountability-Report-2010.pdf. *See also* University of California Regents, *Report of the Work Team on Graduate and Professional School Diversity: A Subcommittee of the University of California Regents Study Group on University Diversity*, at iii, 2, 3 (Sept. 2007), *available at* http://www.universityofcalifornia.edu/diversity/documents/Grad-ProfWorkTeam.pdf.

[7] Underrepresented minorities accounted for only 8.6 percent of all UC ladder- and equivalent-rank faculty in fall 2011. University of California Office of the President, *Annual Accountability Sub-Report on Diversity at the University of California*, at 2, 4 (Jan. 2013), *available at* http://regents.universityofcalifornia.edu/regmeet/jan13/e1.pdf.

brief focuses primarily on the negative effect on freshman admissions. It pays particular attention to the case of African American students in California, since blacks constitute the largest minority group in Michigan burdened by Proposal 2. The empirical evidence in this brief is relevant to the Court's determination of whether Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, U.S. Const. amend. XIV, § 1. The evidence, which pertains to admissions at the two most selective UC campuses, is also relevant to admissions outcomes at the flagship institutions in Michigan because of similarities in the admissions processes in the two systems and because of the educational inequality prevalent in both states.

SUMMARY OF ARGUMENT

Prior to the University of California Regents' adoption of a ban on race-conscious admissions in 1995, called SP-1,* the University of California campuses embraced a variety of traditional affirmative action programs. These programs were designed to achieve the UC's mission of producing future state leaders by enrolling excellent student bodies that reflected the state's increasingly diverse population.

* Standing Policy 1 (SP-1) and Standing Policy 2 (SP-2) eliminated race-conscious policies in the University of California admissions and hiring, respectively.

They also were effective policy tools for furthering the interests of qualified underrepresented minorities who – because of virulent K-12 inequities and the extreme segregation of schools by race and poverty in California – would have been otherwise undervalued by admissions schemes that emphasized small, and often insignificant, differences in grade point averages and standardized test scores.

Following the passage of Proposition 209,[9] however, URM access to the most selective and desirable campuses immediately plummeted and has remained suppressed.[10] This is significant because attending more prestigious institutions provides graduates with significantly increased opportunities for future success.[11] The UC Regents, who had reaffirmed the

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[9] The fall 1998 freshman class at the University of California was the first to reflect the ban on affirmative action established by SP-1, SP-2, and Proposition 209.

[10] In contrast to Petitioner's brief, which focuses primarily on URM enrollment system-wide, this brief focuses on access and enrollment to the most selective UC campuses. That is, the most pronounced effect of Proposition 209 has been to redistribute URMs throughout the UC system, such that URMs have been underrepresented much more dramatically at the two most prestigious campuses since implementation of the ban on race-conscious admissions. *See* Ralph J. Bunche Center for African American Studies at UCLA, "Gaming the System: Inflation, Privilege, and the Under-Representation of African American Students at the University Of California," *Bunche Research Report*, vol. 4, no. 1 Jan. 2008.

[11] *See* Mark Hoekstra, "The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach," 91 *Review of Econ. & Statistics* 717, 717-24 (2009); Ann L. Mullen,

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university's commitment to diversity,[12] rescinded their own ban on race-conscious admissions in 2001, but were powerless to do anything about Proposition 209.

Contrary to Petitioner's claims of a "warming effect,"[13] subsequent reforms of UC admissions policy have been constrained by Proposition 209 and thus have failed to reverse a pattern in which URMs are being disproportionately denied access to the top UC campuses. Nonetheless, Proposition 209 advocates have challenged these facially race-neutral reforms at every turn, creating a "*chilling effect*" that has limited administrators' ability to experiment with alternative admissions schemes that might produce excellent

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Kimberly Goyette, & Joseph A. Soares, "Who Goes to Graduate School? Social and Academic Correlates of Educational Continuation after College," 76 *Sociology of Educ.* 143, 143-69 (2003).

[12] In 2001, the UC Regents reaffirmed the university's commitment to diversity with the following mission statement: "[T]he University shall seek out and enroll, on each of its campuses, a student body that demonstrates high academic achievement or exceptional personal talent, and that encompasses the broad diversity of backgrounds characteristic of California." University of California Regents, "Regents Policy 4401: Policy on Future Admissions, Employment, and Contracting (Resolution Rescinding SP-1 and SP-2), Approved May 16, 2001," *available at* http://www.universityofcalifornia.edu/regents/policies/4401.html (last modified Feb. 4, 2010).

[13] For a further challenge to Petitioner's claims, *see* William C. Kidder, "Misshaping the River: Proposition 209 and Lessons for the *Fisher* Case," 39 *J. of College & University Law* 53, 53-126 (2013).

freshman classes *without* placing a special burden on underrepresented minorities.

ARGUMENT

I. THE MYTH OF MERITOCRACY: WHY "THE NUMBERS" FAIL AS OBJECTIVE MEASURES OF "MERIT."

When viewed in the context of rampant racial inequities in K-12 education, traditional measures of academic "merit," such as standardized test scores and grade point average (GPAs), may be more accurately understood as measures of racial and economic privilege in America than as objective measures of "merit." Racial inequalities run rampant in K-12 education,[14] confounding what many consider unbiased and objective measures of academic "merit" with the continuing effects of racial and socioeconomic inequality in America. Public schools in California today are racially segregated and unequal. On average, schools with majority white and Asian American populations have better resources, more-qualified teachers, and more college preparatory and honors courses than majority African American and Latina/o

[14] *See* UCLA Institute for Democracy, Education, and Access and University of California All Campus Consortium on Research for Diversity, *California Educational Opportunity Report: The Racial Opportunity Gap* (2007), *available at* http://idea.gseis.ucla.edu/publications/eor-07/StateEOR2007.pdf.

schools.[15] Segregated and unequal schooling conditions prevent a large number of African Americans and Latina/os in California from accessing college, particularly the most elite campuses like those in the University of California. These inequities make it virtually impossible for many underrepresented minorities to compete on equal footing in the "college admissions game" with their white and Asian American counterparts, students who typically enjoy better schooling conditions and greater resources.

For these reasons, underrepresented minority applicants to the UC system, who present marginally lower GPAs and test scores than their majority counterparts, have not necessarily devoted less effort towards their studies, they do not necessarily have less academic potential, nor are they necessarily less intelligent. More often than not, these underrepresented students are trapped in relatively disadvantaged contexts and are achieving as much as their environments will allow. Traditional indicators of academic "merit" like SAT and GPA scores, considered in

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[15] *See* Ralph J. Bunche Center for African American Studies at UCLA, "Gaming the System," *supra* note 10; Isaac Martin, Jerome Karabel, & Sean W. Jaquez, "High School Segregation and Access to the University of California," 19 *Educ. Policy* 308, 308-30 (2005); Robert Teranishi, Walter Allen, & Daniel Solórzano, "Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California," 106 *Teachers College Record* 2224, 2224-45 (2004); The Tomás Rivera Policy Institute, *Equity in Offering Advanced Placement Courses in California High Schools, 1997-2003: Gaining or Losing Ground?* (2006), *available at* http://www.trpi.org/PDFs/ap_2006.pdf.

isolation, mask these realities and thus conflate excellence with privilege. Moreover, they only measure a narrow range of the attributes many colleges and universities claim to value. That is, these measures often fail to capture critical thinking skills, creativity, tenacity, leadership skills, and other attributes essential to student success in college and, more importantly, to their efforts to make a mark on the world after graduation.

To be sure, underrepresented minority applicants to the UC system present stellar GPAs as a group, despite the challenges that many of these students have had to overcome in their K-12 schooling contexts. In fact, the average GPAs of URM applicants to UC Berkeley and UCLA in 2009 were 3.79 and 3.77, respectively (compared to 3.93 and 3.91, respectively, for white applicants).[16] While thousands of URM applicants to UC are admitted to prestigious private universities throughout America each year,[17] thousands more are denied admission to the top UC

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[16] University of California Office of the President, UC StatFinder, http://statfinder.ucop.edu (last accessed Oct. 24, 2011). Note: UC StatFinder is no longer operational.

[17] *See* Ralph J. Bunche Center for African American Studies at UCLA, "Merit Matters: Race, Myth & UCLA Admissions: 2006 CAPAA Findings," *Bunche Research Report*, vol. 3, no. 3, Sept. 2006; Susan A. Wilbur, "Investigating the College Destinations of University of California Freshman Admits," in *Equal Opportunity in Higher Education: The Past and Future of California's Proposition 209* at 63-82 (Eric Grodsky & Michal Kurlaender, eds. 2010).

campuses,[18] largely because of the University's inability to consider race as one factor in admissions, which results in an over-reliance on standardized test scores as a measure of merit.

Yet, standardized test scores are a function of racial and ethnic disparities. Currently (and historically), a national test-score gap exists, with African Americans and Latina/os presenting lower scores on average than their white and Asian American counterparts.[19] SAT I scores are strongly correlated with school "Academic Performance Index" (API),[20] parent education, family income, and the segregation and poverty levels of schools. In other words, SAT I scores are related to both the characteristics of a student's high school, and his or her socioeconomic status.[21]

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[18] Of the nearly 13,000 URMs who applied to UCLA in 2009, for example, almost 100 percent were UC eligible but only 1,999 were admitted to the campus. University of California Office of the President, UC StatFinder, http://statfinder.ucop.edu (last accessed Oct. 24, 2011).

[19] William G. Bowen & Derek Bok, *The Shape of the River* (1998); Christopher Jencks & Meredith Phillips, eds., *The Black-White Test Score Gap* (1998).

[20] API rankings range from 1 (low) to 10 (high), and show how California schools measure up against one another based on test performance. Schools with low API scores often have non-white and non-Asian majority student populations and are under-resourced.

[21] *See* Saul Geiser & Maria Santelices, "Validity of High School Grades in Predicting Student Success Beyond the Freshman Year: High School Records vs. Standardized Tests as Indicators of Four-Year College Outcomes," *Research & Occasional*

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Because African Americans and Latina/os are more likely than their white and Asian American counterparts to attend low API schools and reside in the lower socioeconomic strata of society,[22] it should come as no surprise that these groups score lower on this traditional measure of a student's potential for academic achievement.

Another reason the SAT I fails as a valid measure of academic ability is that it measures skills that are not directly influenced by innate abilities or school curriculum.[23] Indeed, the standardized exam does a poor job of predicting how students will actually perform after they are admitted to college. An influential study by the UC Office of the President found that the SAT I predicts only 13 percent of the variance in UC freshmen GPA.[24] This means that 87 percent of the variance in UC first-year college grades is *not* explained by how students performed on the

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Paper Series: CSHE, no. 6 (2007), *available at* http://cshe.berkeley.edu/publications/docs/ROPS.GEISER._SAT_6.13.07.pdf.

[22] UCLA Institute for Democracy, Education, and Access and University of California All Campus Consortium on Research for Diversity, *California Educational Opportunity Report*.

[23] *See* Claude Steele, University of Admissions Lawsuits, "The Compelling Need for Diversity in Higher Education," expert reports prepared for *Gratz, et al. v. Bollinger, et al.*, No. 97-75231 (E.D. Mich.) and *Grutter, et al. v. Bollinger, et al.*, No. 97-75928 (E.D. Mich.), Jan. 1999, *available at* http://www.vpcomm.umich.edu/admissions/research/.

[24] Saul Geiser & Roger Studley, "UC and the SAT: Predictive Validity and Differential Impact of the SAT I and SAT II at the University of California," 8 *Educ. Assessment* 1, 1-26 (2002).

SAT I. Nationally, according to one study, the SAT I alone predicts only about 18 percent of the variation in freshman GPA,[25] which suggests that those with higher SAT I scores will not necessarily perform better in college than those with lower SAT I scores.

In fact, the study found that a score difference as large as 300 points makes very little difference in student performance as measured by first-year college GPA. Another study found that a 100-point increase in an SAT I score might only raise a student's predicted GPA by one-tenth of a grade point.[26] Thus it cannot be assumed that African Americans and Latina/os who have lower test scores, largely due to the disadvantages they face in the K-12 context, will necessarily perform worse in college than their majority counterparts who attain higher SAT I scores. Yet, in the absence of race-conscious admissions, these underrepresented minorities continue to be disproportionately denied admission to the most selective UC campuses, largely due to the weight placed on standardized test scores.

The SAT I is an even poorer predictor of college performance for African Americans than it is for the general population. For African American freshmen

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[25] Steele, "The Compelling Need," *supra* note 23.

[26] Fredrick E. Vars & William G. Bowen, "Scholastic Aptitude Test Scores, Race and Academic Performance in Selective Colleges and Universities," in *The Black-White Test Score Gap* 457-79 (Christopher Jencks & Meredith Phillips, eds., 1998).

in the UC system, the SAT I only predicts 10 percent of the variation in their GPAs.[27] Thus, a whopping 90 percent of the variation in how well African Americans perform during their first year of college on a UC campus is left unexplained by their performance on the SAT I. Not only is the SAT I a weak measure in terms of gauging student academic potential, but its conflation of achievement and privilege (or the lack thereof) actually works to reproduce inequality when it is used to exclude otherwise deserving URMs.

Moreover, African American students are particularly vulnerable to being underestimated and mislabeled by standardized tests like the SAT. Research shows that African Americans often earn lower SAT scores due to "stereotype-threat,"[28] the anxiety or stress triggered by the fear that one might fulfill or be associated with a relevant stereotype. Research has found that African Americans taking standardized exams such as the SAT often experience anxiety or fear that their performance on the exam will confirm the virulent American stereotype that African Americans are intellectually inferior. This anxiety

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[27] *See* Geiser & Studley, "UC and the SAT."

[28] *See* Claude Steele, "Race and Schooling of Black Americans," *The Atlantic Monthly* vol., 269, no. 4, 1992, at 68-78; Claude Steele, "A Threat in the Air, How Stereotypes Shape Intellectual Identity and Performance," 52 *Am. Psychologist* 613, 613-29 (1997); Claude Steele & Joshua Aronson, "Stereotype Threat and the Test Performance of Academically Successful African Americans," in *The Black-White Test Score Gap* 401-27 (Christopher Jencks & Meredith Phillips, eds., 1998).

and fear, like a self-fulfilling prophecy, makes it more likely that these students will falter on exams by interfering with their concentration, which in turn often results in depressed test scores.

Racial inequalities in K-12 education also work to diminish the utility of GPA as an objective measure of "merit." At the University of California's top campuses, a major factor in the admissions decision is the number of Advanced Placement (AP) courses an applicant has completed. Students who successfully complete AP courses are awarded an additional grade point, which means that a 'B' grade in an AP course, for example, would be recorded as an 'A' grade, and so on. This treatment of AP courses explains why many students who take them are able to earn GPAs in excess of 4.0. In fact, the *average* GPA of students admitted to UC Berkeley and UCLA has far exceeded 4.0 in recent years.

Yet, there is a great disparity in access to AP courses in California public high schools that runs along racial lines. A recent study found that of the state's top 50 high schools ranked by AP course offerings, whites made up 49 percent of the student population at these schools, Asian Americans made up 29 percent, Latina/os made up just 16 percent, and African Americans only 5 percent[29] – despite the fact

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[29] Daniel Solórzano & Armida Ornelas, "A Critical Race Analysis of Advance Placement Classes and Selective Admissions," *High School Journal*, vol. 87, 2004, at 15-26.

that these two latter groups have accounted for nearly half of all California high school graduates in recent years. In other words, whites and Asian Americans are significantly overrepresented at these AP-rich public high schools in California, while African Americans and Latina/os are woefully underrepresented. The racial disparities only increase when we consider what private high schools have to offer and the degree to which URMs are less likely to gain access to these schools. In this sense, the "AP bump" rewarded in UC admissions schemes functions like affirmative action for white and Asian American applicants, as these applicants are much more likely than their URM counterparts to attend high schools featuring a rich menu of the courses.

II. PROPOSITION 209's BAN ON AFFIRMATIVE ACTION HAS WORKED TO SEVERELY DECREASE THE PRESENCE OF UNDER-REPRESENTED MINORITIES AT UC BERKELEY, UCLA, AND IN GRADUATE SCHOOLS.

Students become *eligible* for University of California admission by meeting the established minimum requirements for coursework, GPA, and standardized test scores.[30] These minimum requirements comprise

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[30] For the 2013 class, minimum eligibility requirements for California residents included a GPA of 3.0; completion of 15 college-preparatory high school "a-g" courses, a) history/social science (2 years required); b) English (4 years required); c) math

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a demanding set of criteria, as the state's Master Plan for Higher Education specifies that the UC eligibility pool shall contain only the top one-eighth (12.5 percent) of graduating seniors. It is important to note that most of the growth in the eligibility pool in recent years can be attributed to underrepresented minorities.[31] Underrepresented minority applicants to UC are thus highly qualified, *not* students unprepared for the demands of work at top universities.

But while eligibility guarantees admission to the UC *system*, it does not guarantee admission to any of the eight campuses that currently use *selectivity* measures. Selectivity refers to an additional set of criteria that competitive campuses use to choose students for admission amongst all applicants who meet minimum UC eligibility requirements. In practice, these additional criteria specify the types of inflated

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(3 years required); d) laboratory science (2 years required); e) foreign language (2 years required); f) visual and performing arts (1 year required); and g) college preparatory electives (1 year required). In addition, students must submit scores from the ACT Plus Writing *or* SAT Reasoning Test.

[31] The California Postsecondary Education Commission reported that in 2007 the UC eligibility pool was becoming more URM heavy. That is, while white numbers in the UC eligibility pool were down 13 percent and Asian American up only 1 percent since the 2003 report, Latina/o numbers were up 18 percent and black numbers 7 percent. The California Postsecondary Education Commission, *College-Going and University Eligibility: Differences between Racial/Ethnic Groups*, Mar. 2009, *available at* http://www.cpec.ca.gov/completereports/2009reports/09-11.pdf.

numbers (*i.e.*, GPAs and standardized test scores) that, as we argued above, K-12 inequities typically prevent URMs from amassing.

Although the UC system officially has no "flagship" campus, UC Berkeley and UCLA are generally regarded as the two most prestigious campuses, each perennially ranked in the top five of all U.S. public universities.[32] The majority of all UC applicants (who may apply to more than one UC campus) apply to UC Berkeley and/or UCLA because of their global reputations and the doors that degrees from either campus are likely to open.[33] Despite the fact that most applicants to UCLA and UC Berkeley are UC eligible, the campuses each admitted only 20 to 21 percent of their total applicants in 2013.[34]

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[32] In 2013, *U.S. News and World Report* ranked UC Berkeley as the top public university in America, followed by UCLA and the University of Virginia, which were tied for the number 2 position. *U.S. News and World Report*, "2013 Best Colleges Ranking: Top Public Schools," *available at* http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/top-public (accessed Aug. 18, 2013).

[33] *See, e.g.*, Ronald Ehrenberg, "Method or Madness? Inside the *USNWR* College Rankings," *CHERI Working Papers*, Paper 42, 2003, *available at* http://digitalcommons.ilr.cornell.edu/workingpapers/42.

[34] University of California Office of the President, "Table 2: University of California New Freshman Admit Rates by Campus and Residency, Fall 2011, 2012, and 2013," *available at* http://www.ucop.edu/news/factsheets/2013/fall_2013_admissions_table2.pdf (last modified Apr. 1, 2013). In addition, data from the UC Office of the President show that UC-eligible black students

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Figure 1 charts the admit rates[35] for underrepresented minorities at UC Berkeley and UCLA, between 1994 and 2012. The most notable feature of the chart is the abrupt drop in admit rates for URMs at the two top-tier UC campuses between 1997 and 1998, coinciding with the implementation of the ban on race-conscious admissions.[36] At UC Berkeley, for example, the URM admit rate plummeted by more than half, from 46.8 percent in 1997 to 20.6 percent in 1998, while the overall admit rate declined only minimally between the years, from 33 percent to 29.9 percent. Although the corresponding drop in the URM admit rate at UCLA was less pronounced – from 40.5 percent in 1997 to 24.3 percent in 1998 – it was nonetheless severe, particularly when viewed in relation to the smaller decline in the overall campus admit rate between the two years (from 37 percent in 1997 to 33.4 percent in 1998).

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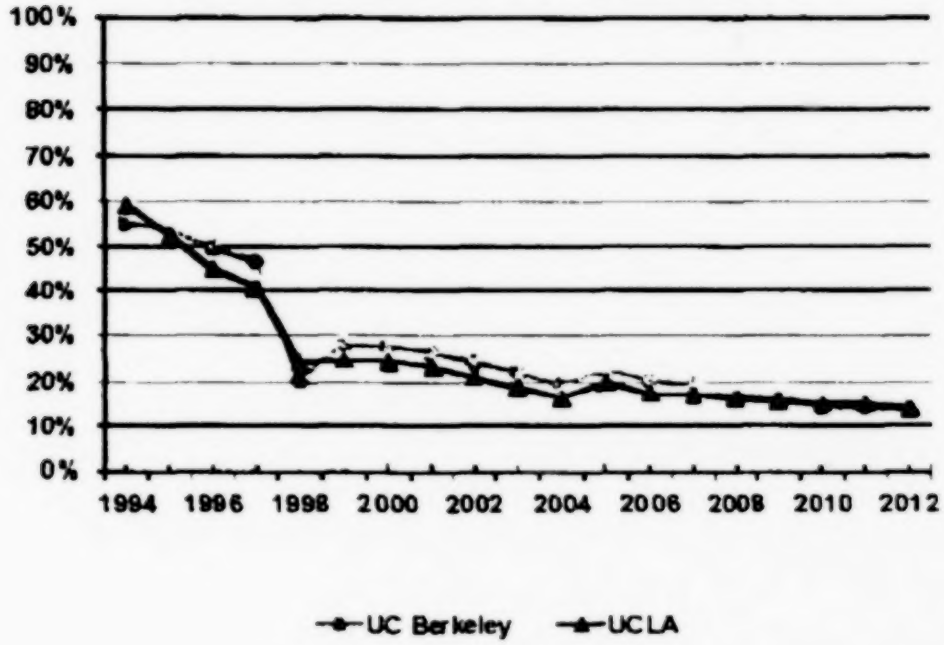
denied admission to UCLA or UC Berkeley are particularly likely to leave the state altogether for elite private institutions. Wilbur, "College Destinations."

[35] The admit rate for any group is defined as the total number of applicants in the group, divided by the number of applicants from the group that are admitted. Unless otherwise stated, statistics refer to in-state applicants.

[36] Admit rates actually began to drop prior to the full implementation of the ban in 1998 due to the "chilling effect" of the UC Regents' adoption of SP-1 in 1995 (*see* Argument, Part III, *infra*).

Figure 1. Admit Rate for Underrepresented Minorities to UC Berkeley and UCLA, 1994-2012



Note: Data represent all full-time freshman applicants who are California residents entering the fall quarter.

Source: University of California Office of the President, "Final Summary of Freshman Applications, Admissions, and Enrollment, Fall 1989-2012," *available at* http://www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf (last modified Mar. 2013).

The decline in URM presence at UC Berkeley and UCLA that coincides with the ban on race-conscious admissions is particularly troubling because of the negative impact on the graduate school pipeline. Attending institutions with the global reputations

of UC Berkeley or UCLA confer significant advantages on those seeking admission to top graduate programs.[37] However, due to the ban on affirmative action, fewer URM students are graduating from selective public universities.[38] According to one report, URMs accounted for just 20.9 percent of all graduate and professional students throughout the UC system in fall 2008.[39] Another report also found that "African American/black graduate students at UC are represented at proportions lower than those at our comparable institutions." Focusing on UC professional schools, the report concluded that "[e]nrollments of URMs in UC professional school programs substantially declined following SP-1 and Proposition 209."[40]

In fact, between 1996 and 1997, the African American share of enrollment at UC Berkeley's law school plummeted from 7.6 percent to just 0.4 percent, while the Latina/o share was halved, from 10.6 percent to 5.2 percent. The declines for UCLA's law

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[37] Mullen, Goyette, & Soares, "Who Goes to Graduate School?," *supra* note 11.

[38] *See* Ben Backes, "Do Affirmative Action Bans Lower Minority College Enrollment and Attainment?: Evidence from Statewide Bans," 47 *Journal of Human Resources* 435, 435-55 (2012); Peter Hinrichs, "Affirmative Action Bans and College Graduation Rates," Nov. 12, 2012, *available at* http://www9.georgetown.edu/faculty/plh24/affactionbans-collegegradrates_112112.pdf.

[39] University of California Regents, *University of California Diversity Annual Accountability*, *supra* note 6.

[40] University of California Regents, *Report of the Work Team*, *supra* note 6.

school, while not as severe, were significant: the African American share declined from 6.2 percent in 1996 to just 2.6 percent in 1997, and the Latina/o share declined from 14.7 percent to 10.2 percent.[41] The enrollment share of URMs at UCLA's law school has not recovered since 1997. By fall 2011, the total URM enrollment share was just 13.9 percent[42] and only 10.7 percent for new registrants.[43] Of all the professional degree programs, however, UC business schools have the lowest percentage (5 percent) and number of enrolled URM students.[44]

Clearly, racial disparities in access to UC graduate and professional programs are exacerbated by restricting freshmen URM access to the system's top-tier campuses. The implications associated with these disparities reverberate throughout the academic pipeline and beyond. Indeed, recent studies document how the ban on affirmative action not only limits the

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[41] William C. Kidder, "The Struggle for Access from *Sweatt* to *Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000," *Harvard BlackLetter Law Journal*, vol. 19, Spring, 2003, at 1-42.

[42] UCLA Graduate Division, *UCLA Graduate Programs Admissions & Enrollment Report, 2011-2012, available at* http://www.gdnet.ucla.edu/asis/report/aer1112.pdf (last accessed Aug. 20, 2013).

[43] By fall 2011, the admit rate for URMs at UCLA's law school had fallen to only 11.9 percent, compared to 22.2 percent for all applicants. UCLA Graduate Division, *UCLA Graduate Programs Admissions*.

[44] University of California Regents, *University of California Diversity Annual Accountability*, *supra* note 6.

opportunities for talented and qualified URMs to attend the most selective public professional schools,[45] but it also limits the UC's ability to produce diverse leaders who have acquired the intercultural and specialized technical skills necessary for competing successfully in the global marketplace and advancing science and technology.[46]

III. PROPOSITION 209's BAN ON AFFIRMATIVE ACTION HAS CREATED A "CHILLING EFFECT" ON THE IMPLEMENTATION OF REFORMS THAT MIGHT FURTHER THE INTERESTS OF UNDERREPRESENTED MINORITIES.

In the aftermath of Proposition 209, UC administrators have been under constant surveillance by supporters of the ban on race-conscious admissions. Consequently, reforms that have resulted in only minor improvements to URM access were met immediately with charges that administrators had illegally used race in admissions decisions, which often discouraged administrators from experimenting with other reforms that might produce excellent freshman classes *without* placing a unique burden on URMs.

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[45] Liliana M. Garces, "Racial Diversity, Legitimacy, and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment," 36 *Review of Higher Educ.* 93, 93-132 (2012).

[46] Kidder, "Misshaping the River," *supra* note 13; Liliana M. Garces, "Understanding the Impact of Affirmative Action Bans in Different Graduate Fields of Study," 50 *Am. Educ. Research J.* 251, 251-84 (2013).

In 2002, for example, the UC implemented "comprehensive review" "to improve the quality and fairness of admissions decisions at the University of California."[47] These new systemwide admissions guidelines, which are still in effect, were designed to consider a full range of student accomplishments (*e.g.*, leadership, community service, and artistic, musical, or athletic talent), while also considering a student's experiences and personal circumstances. In other words, though traditional indicators of academic achievement continue to drive UC admissions decisions, students are no longer admitted to UC *solely* on the basis of grades and standardized test scores, as was standard practice at some campuses[48] and for a subset of applicants (typically those with the very highest GPAs and test scores).

As per Proposition 209's mandate, comprehensive review *does not* consider an applicant's race as a factor in admissions. While this reform of UC admissions

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[47] University of California Office of Strategic Communications, "News Release: Facts about the University of California: Comprehensive Review Progress Report," Oct. 2003, *available at* http://www.ucop.edu/news/factsheets/2002/compr_review.pdf.

[48] The UC Regents have delegated to the faculty the authority to establish UC admissions standards and policies. Each UC campus sends a representative to the Board on Admissions and Relations with Schools (BOARS), the system-wide body that sets these overarching admissions principles. In turn, each campus has a corresponding faculty committee that sets campus-specific admissions policies and practices that must adhere to the overarching principles established by BOARS, such as comprehensive review.

policy addressed some of the shortcomings associated with using traditional indicators of merit in isolation (described above) and moderately decreased the rate at which URMs were being turned away from the top UC campuses following the ban, it did *not* return URM access to pre-Proposition 209 numbers due to the severity of race-based K-12 inequities in the state. But there *were* relatively small fluctuations in URM admissions to UC Berkeley and UCLA between 2002 and 2012, and any increases were immediately challenged by Proposition 209 advocates as evidence that either the campuses were lowering their standards (despite the fact that the mean GPAs and standardized test scores of admitted students continued to increase)[49] or illegally practicing race-conscious admissions.

In 2004, for example, UC Regent John Moores charged that UC Berkeley was "admitting 'underrepresented minorities' with very low SAT scores while rejecting many applicants with high SAT scores."[50] This charge refocused attention on a single measure of merit in UC admissions, standardized test scores, despite the fact that, as we show above, these

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[49] At UCLA, these means for admitted students increased between 2002 and 2010. University of California Office of the President, UC StatFinder, http://statfinder.ucop.edu (last accessed Oct. 24, 2011).

[50] John Moores, "On My Mind: College Capers," *Forbes*, Mar. 29, 2004, *available at* http://www.forbes.com/forbes/2004/0329/040.html.

tests both disadvantage URM applicants and do a relatively poor job of predicting college performance. The charge also cautioned administrators against further experimenting with other reforms that might address some of the problems associated with the system's continued, heavy reliance on traditional indicators of merit.

The elimination of race-conscious admissions has been particularly harmful for African American applicants to the top campuses. In 2006, for example, a front-page *Los Angeles Times* article reported the "startling statistic" that less than 100 African Americans were expected to enroll in a 2006 UCLA freshman class of about 5,000 students – a low not seen since *at least* 1973.[51] When African American scholarship athletes were subtracted from that number, less than 25 members of the state's largest freshman class[52] were projected to be African American males. That year, only 11.9 percent of African American applicants to UCLA were presented with admissions offers – a rate that was less than half the campus's overall admit rate of 25.8 percent.

Subsequently, UCLA implemented "holistic review" for the fall 2007 freshmen class, a reform of its prior comprehensive review admissions process, which

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[51] Reliable racial statistics do not exist for UCLA prior to 1973.

[52] UCLA also has the most applicants of any California college campus, public or private.

emphasized evaluating student academic achievement more explicitly within the context of individual opportunities and challenges. Modeled after the admissions scheme already in place at UC Berkeley, the new process at UCLA was more labor intensive and costly than the one it replaced, as multiple readers were each now required to review every aspect of an applicant's file – academic records, personal essays, records of personal achievement, and high school contextual information – in order to rate the applicant's merit with a single "holistic" score.[53]

But because UCLA's new admissions scheme contributed to a 100 percent increase in the number of black freshmen enrolling in 2007 (over the 33-year low of less than 100 black freshmen in 2006), critics immediately cried foul. "One of three things must be happening," quipped former UC Regent Ward Connerly and Proposition 209 promoter. "Black kids have either gotten extremely smart or extremely competitive in a way they weren't five or six years ago, or there's been a deliberate, carefully orchestrated effort by a lot of admissions people to conspire to increase those numbers, or they've found a proxy for race."[54] Meanwhile, UCLA political science professor

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[53] While UCLA's prior admissions model involved multiple readers per file, it divided up each file into parts that were read in assembly line fashion. That is, no one reader had access to an entire file, and high school contextual variables played a smaller role in the assessment of merit.

[54] Rebecca Trounson & Richard Paddock, "UCLA Sees an Increase in Black Student Admissions," *Los Angeles Times*, Apr.

(Continued on following page)

Tim Groseclose speculated that URMs might be gaining an unfair advantage by signaling their ethnicity in the personal essay portion of the application.[55]

These incendiary public accusations stigmatized incoming black freshmen[56] – who had posted a stellar mean GPA of 3.97 – and prompted UCLA to commission an independent audit of its reformed admissions process with only two years of data. Although the conclusions released in May 2012 showed "no evidence of bias"[57] and confirmed that the UCLA admissions process "honors academic achievement and prioritizes acceptance to applicants of exceptional academic accomplishment,"[58] one critic, UCLA law professor Richard Sander, continued to attack the credibility of

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6, 2007, *available at* http://articles.latimes.com/2007/apr/06/local/me-admit6.

[55] Seema Mehta, "UCLA Accused of Illegal Admitting Practices," *Los Angeles Times*, Aug. 30, 2008, *available at* http://articles.latimes.com/2008/aug/30/local/me-ucla30.

[56] Support group meetings were held throughout the fall of 2007 for African American students who wondered if they had made the right decision by choosing UCLA over the many other selective institutions that had offered them admission.

[57] Ricardo Vazquez, "Independent Report Confirms UCLA Admissions Process Working as Intended by Faculty," UCLA Newsroom, May 17, 2012, *available at* http://newsroom.ucla.edu/portal/ucla/independent-report-confirms-ucla-234132.aspx.

[58] UCLA Academic Senate, Committee on Undergraduate Admissions and Relations with Schools (CUARS), "Statement on the Mare Analysis of Undergraduate Admissions," May 17, 2012, *available at* http://www.senate.ucla.edu/committees/cuars/documents/CUARSStatementonMareReport_Final.pdf.

the UCLA admissions process with a paper he posted online titled "The Consideration of Race in UCLA Undergraduate Admissions." Although his methodology and conclusions were later disputed by two independent reviewers,[59] Sander's accusations had already been publicized by the UCLA student paper, the *Daily Bruin*.[60] The campus publicity led to a rally by hundreds of URM students on campus who felt stigmatized by Sander's claims that they did not merit admission to UCLA.[61]

Incidents like this have not only exacerbated the "chilling effect" already in place, but they also have severely damaged the racial climate on UC campuses, particularly the top-tier campuses, since the implementation of Proposition 209. Indeed, recent survey data on UC students' perceptions of campus life reveal that African American and Latina/o students feel

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[59] Ricardo Vazquez, "External Reviews Cast Doubt on UCLA Professor's Analysis of Campus Admissions Practices," UCLA Newsroom, Feb. 25, 2013, *available at* http://newsroom.ucla.edu/portal/ucla/two-external-reviews-cast-doubt-243753.aspx.

[60] Alexia Boyarsky, "Findings by Law Professor Suggest that UCLA Admissions May Be Violating Prop 209," *Daily Bruin*, Oct. 23, 2012, *available at* http://dailybruin.com/2012/10/23/findings-by-law-professor-suggest-that-ucla-admissions-may-be-violating-prop-209/.

[61] Ryan Nelson & Zachary Lemos, "Students Protest Claims that Race May Factor into Admissions Decisions," *Daily Bruin*, Oct. 30, 2012, *available at* http://dailybruin.com/2012/10/30/students-protest-claims-that-race-may-factor-into-admissions-decisions/.

they are less respected than their counterparts at the University of Texas, Austin and two other peer institutions.[62] Thus, it should not be surprising that since Prop 209 passed, URM students "more so for those with the strongest credentials, and especially for African Americans" have been more likely to reject an offer from UC at a rate that continues to increase compared to whites and Asian Americans.[63]

Despite the huge controversy surrounding UC admissions reforms following the ban on affirmative action, the overall effect of these reforms on URM access has been modest at best. In fact, **Figure 1** above shows that URM admit rates for California freshman continued to decline at UCLA and UC Berkeley throughout the first decade of the 2000s, reaching lows of 13.6 percent and 13.3 percent, respectively, in 2012. By contrast, overall admit rates for UCLA and UC Berkeley were much larger in 2012 – 18.8 percent and 18 percent, respectively. Again, the impact was most severe for African American applicants. In 2012, the admit rate for African American applicants to UCLA was the lowest among all ethnic groups, 12 percent. Only 367 of the 3,071 African American applicants to UCLA were admitted that year, and just 169 enrolled. The corresponding figures for UC Berkeley were similarly low. The campus's

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[62] Kidder, "Misshaping the River," *supra* note 13.

[63] *Id.* at 56.

African American admit rate of 12.5 percent translated into just 302 African American admits and 129 enrollees in 2012. The system's most prestigious campus had welcomed about twice as many black freshmen in 1997, the last year of affirmative action. To put this in perspective, there were 2.38 million college-aged URMs in California in 2012, constituting 55.5 percent of the state's college-aged population.[64] In other words, the data from California neither support Petitioner's claim of a "warming effect"[65] nor

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[64] College-aged population is defined as individuals who are 18-24 years old. The California Postsecondary Education Commission, "Ethnicity Snapshots – Ethnicity, Population – Graphs," *available at* http://www.cpec.ca.gov/StudentData/EthSnapshotMenu.asp (last accessed Aug. 22, 2013).

[65] The data does not support Petitioner's claim of a "warming effect." Sander and colleagues' research cited by Petitioner has been challenged as "over-relying on yield rate data for underrepresented minority students with the lowest entry credentials" (Kidder, "Misshaping the River," 75). In addition, Petitioner claims that heavily recruiting low-income students "inevitably" leads to increased URM enrollment. However, UCLA and UC Berkeley are the top two universities in the nation for enrolling the most students (39 percent and 38 percent of undergraduates, respectively) who receive Pell grants (aid for low-income students). The next school on the list has 9 percent less students who receive Pell grants. Even with such a remarkable percentage of Pell grant recipients and a clear effort to recruit low-income students, UCLA and UC Berkeley still enroll an appallingly low percentage of California URM freshmen. *U.S. News and World Report*, "2013 Economic Diversity among the Top 25 Ranked Schools," *available at* http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/economic-diversity-among-top-ranked-schools (last accessed Aug. 18, 2013).

do they bode well for the economic future of a state that is increasingly majority minority. In short, the ban on race-conscious admissions – in addition to eliminating policy tools that would *directly* provide underrepresented minorities greater access to the state's most prestigious public institutions – has created a "chilling effect" on the reform efforts of university administrators, who might otherwise implement admissions reforms based on more inclusive notions of "merit."

CONCLUSION

California Proposition 209 – which is identical in content and intent to Michigan Proposal 2 – clearly has a "racial focus, targeting a program that 'inures primarily to the benefit of the minority.'" Sixteen years of empirical evidence concerning minority access to the University of California documents the substantial burden that the ban on race-conscious admissions has placed on racial minorities. There has been a significant drop in the admission of qualified African American, Latino and Native American students to the top UC campuses and the ban has removed any recourse these students had for directly remedying the situation. Contrary to Petitioner's claim that the ban on affirmative action has led to a "warming effect" on URM yield rate, UC data reveal the ban has actually created a "chilling effect" on the experimentation with admissions reforms, further

hardening the undue burden placed on URMs seeking access to top-tier campuses.

Respectfully submitted,

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Dated: August 30, 2013

APPENDIX: LIST OF *AMICI CURIAE*

- **Charles Alexander** is Director of the Academic Advancement Program (AAP) at University of California, Los Angeles (UCLA). AAP supports students from educationally disadvantaged backgrounds, including first-generation college students and students from low-income families and underrepresented populations. At UCLA, Alexander is also Associate Vice Provost for Student Diversity in the Division of Undergraduate Education, and Associate Adjunct Professor in the Division of Public Health, School of Dentistry. Dr. Alexander oversees AAP programs, including academic advising, peer learning, mentoring, research opportunities and scholarships. Previously, Alexander was the associate dean for student affairs in the School of Dentistry at University of California, San Francisco (UCSF). He founded UCSF's Dental Careers Program, which offered the nation's first dental post-baccalaureate program. Prior to that, Alexander created and ran student diversity programs at Marquette University and Brandeis University. A past president of the National Association of Medical Minority Educators, Dr. Alexander received UCSF's Martin Luther King, Jr. Award for leadership and inspiration in advancing social and economic justice goals. He also has served as chair of the Robert Wood Johnson Foundation's Dental Pipeline Project II Advisory Committee. He received a 2011 Champions of Health Professions Diversity Award from The California Wellness Foundation in recognition of his commitment to increasing California's healthcare workforce and its diversity. He is a member of many organizations, including the American

Association of Blacks in Higher Education and the National Association of Diversity Officers in Higher Education.

- **Angela P. Harris** is Professor of Law at UC Davis. She began her career at the UC Berkeley School of Law in 1989, and has been a visiting professor at the law schools of Stanford, Yale, and Georgetown. In 2010-2011, at the State University of New York-University of Buffalo School of Law, she served as the vice dean of research and faculty development. She writes widely in the field of critical legal theory, examining how law sometimes reinforces and sometimes challenges subordination on the basis of race, gender, sexuality, class, and other dimensions of power and identity. Most recently, she has begun to apply these insights to the fields of environmental and food justice. She is also interested in the role of contemplative practices, such as mindfulness meditation, in the teaching and practices of law. Her writings have been widely anthologized and have been translated into many languages, from Portuguese to Korean. Harris is the author of a number of widely reprinted and influential articles and essays in critical legal theory. She is also a prolific co-author of casebooks, including *Criminal Law: Cases and Materials*, *Race and Races: Cases and Materials for a Diverse America*, *Gender and Law*, and *Economic Justice*. Harris is the recipient of the Rutter Award for Teaching Distinction from Berkeley Law, the 2003 Matthew O. Tobriner Public Service Award, and the Clyde Ferguson Award from the Association of American Law Schools Minority Section.

- **Tyrone Howard** is Professor of Urban Schooling in the Graduate School of Education & Information Studies at UCLA. Professor Howard is the former Chair of the UCLA Committee on Undergraduate Admissions and Relations with Schools (CUARS). He also is the Faculty Director of Center X, the Founder and Executive Director of the Black Male Institute, and an appointed member of the Faculty Advisory Committee of the Bunche Center for African American Studies at UCLA. Dr. Howard is also the past Faculty Associate Director for the Academic Advancement Program at UCLA, which is the nation's premier student retention program for underrepresented students. Formerly, Professor Howard was an Assistant Professor in the College of Education at The Ohio State University. Dr. Howard is the author of the 2010 book, *Why Race and Culture Matters in Schools: Closing the Achievement Gap in America's Classrooms*, published by Teachers College Press. He has authored more than 50 peer-reviewed journal articles, book chapters, and other academic publications and reports. He has published his research in *The Journal of Higher Education*, *Teachers College Record*, *Theory & Research in Social Education*, *The Journal of Negro Education*, *Urban Education*, and several other well-regarded academic journals. Additionally, Professor Howard has delivered over 75 keynote addresses and presented more than 150 research papers, workshops, and symposia at national higher education, education research, teacher education, and social studies conferences. Best known for his scholarship on race, culture, and education, Dr. Howard is one of the most

renowned scholars on educational equity, the African American educational experience, Black males, and urban schools. In 2007, Professor Howard received an Early Career Scholar award from the American Education Research Association, the nation's premier educational research association. He has received more than $5 million in research grants from the National Board for Professional Teaching Standards, the Department of Education, and other sources to fund his research. In 2007, Professor Howard received the UCLA GSE&IS Distinguished Teaching Award. Dr. Howard has been a guest on National Public Radio, has been featured in Diverse Issues in Higher Education, has been recognized in Who's Who in Black Los Angeles, and is a regular urban education contributor to the *New York Times*.

- **Darnell Hunt** is Director of the Ralph J. Bunche Center for African American Studies and Professor of Sociology at UCLA. Dr. Hunt has written extensively on race, media, and access to higher education, including numerous scholarly journal articles, research reports, and popular magazine articles. He also has published four books related to these issues: *Screening the Los Angeles "Riots": Race, Seeing, and Resistance* (Cambridge University Press, 1997), *O.J. Simpson Facts and Fictions: News Rituals in the Construction of Reality* (Cambridge University Press, 1999), *Channeling Blackness: Studies on Television and Race in America* (Oxford University Press, 2005), and (with Ana-Christina Ramon) *Black Los Angeles: American Dreams and Racial Realities* (NYU Press, 2010). He was principal investigator on a major Bunche Center study funded by the Ford

Foundation (2002-2008) that analyzed African American access to the University of California in the aftermath of California Proposition 209. Professor Hunt is a former chair of UCLA's Committee on Undergraduate Admissions and Relations with Schools, the Academic Senate committee that sets admissions policy at UCLA. He also served as UCLA's representative to the Board of Admissions and Relations with Schools, the University of California faculty body to whom the UC Regents have delegated authority to establish systemwide admissions policy. Prior to his positions at UCLA, Professor Hunt chaired the Department of Sociology at the University of Southern California. Over the past two decades, he also has worked on several projects exploring the issues of access and diversity in the Hollywood industry. He authored the last three installments of the *Hollywood Writers Report*, released by the Writers Guild of America (WGA) in 2005, 2007, and 2009. He was principal investigator of *The African American Television Report*, released by the Screen Actors Guild (SAG) in June of 2000. He also worked as a media researcher for the U.S. Commission on Civil Rights' 1993 hearings on diversity in Hollywood.

- **Sylvia Hurtado** is Professor of Higher Education and Organizational Change in Graduate School of Education & Information Studies at UCLA and Director of the Higher Education Research Institute at UCLA. Professor Hurtado is also the former Chair of the University of California Board of Admissions & Relations with Schools (BOARS) and a former member of the UCLA Committee on Undergraduate Admissions and Relations with

Schools (CUARS). Just prior to coming to UCLA, she served as Director of the Center for the Study of Higher and Postsecondary Education at the University of Michigan. Professor Hurtado has published numerous articles and books related to her primary interest in student educational outcomes, campus climates, college impact on student development, and diversity in higher education. She has served on numerous editorial boards for journals in education and served on the boards for the American Association of Higher Education (AAHE), the Higher Learning Commission, and is past-President of the Association for the Study of Higher Education (ASHE). *Black Issues In Higher Education* named her among the top 15 influential faculty whose work has had an impact on the academy. Professor Hurtado has coordinated several national research projects, including a U.S. Department of Education-sponsored project on how colleges are preparing students to achieve the cognitive, social, and democratic skills to participate in a diverse democracy. She is heading a National Institutes of Health project on the preparation of underrepresented students for biomedical and behavioral science research careers. She has also studied assessment, reform, and innovation in undergraduate education on a project through the National Center for Postsecondary Improvement.

- **Bob Laird** is the former director of undergraduate admission at UC Berkeley. After spending 22 years in admissions and outreach, he retired in 1999. During his retirement ceremony, the University awarded him the Berkeley Citation, its highest honor for staff. While at UC Berkeley, he

was a frequent presenter at national admissions conferences and he served on the Guidance and Admission Assembly Council of the College Board from 1997-00 and on the College Board's Overseas Schools Project Advisory Committee (East Asia) in 2000-01. Since his retirement from Berkeley, Laird has been an independent consultant on higher education admissions policy and has written extensively on admissions and equity issues, including *The Case for Affirmative Action in University Admissions*, published in 2005 by Bay Tree Publishing. As a consultant, his clients have included the University of Florida, West Virginia University, Herricks Unified Free School District (New Hyde Park, New York), John Cabot University in Rome, and Standards for Success (a joint project of The Pew Charitable Trusts and the American Association of Universities). His most recent articles are "Regents, President Betray Students," which appeared in the *San Francisco Chronicle* (December 20, 2009) and "The Trouble with Transferring: It Shouldn't be So Difficult," which appeared in the March 27, 2009, issue of *The Chronicle of Higher Education*. His work has also appeared in the *Sacramento Bee* and *National CrossTalk*, among other places.

- **Claudia Mitchell-Kernan** is a Professor in the Departments of Anthropology and Psychiatry and Bio-Behavioral Sciences and former Dean of the Graduate Division and Vice Chancellor of Graduate Studies Emeritus at UCLA. For 22 years, Professor Mitchell-Kernan was responsible for graduate admissions, student academic affairs, student support, and diversity at UCLA. She also served as Acting Vice Chancellor for Student

Affairs for a period of 18 months, an assignment that included oversight of undergraduate admissions as well. Before coming to UCLA in 1973, she was a member of the faculty at Harvard University. Professor Mitchell-Kernan is widely known for her early work in linguistic anthropology, and her classic sociolinguistic studies of African Americans continue to be widely cited. Her most recent book, *The Decline in Marriage Among African Americans*, co-edited with M. Belinda Tucker, was published in 1995 by the Russell Sage Foundation. Throughout her career, Professor Mitchell-Kernan has maintained an active record of service nationally to federal agencies that sponsor research. President Clinton appointed her to a six-year term on the National Science Board (1994-2000), which provides advice to the President and Congress on issues affecting science and technology and governs the National Science Foundation. At the national level, she has served on the Board of Directors of the Consortium of Social Science Associations, and the Government Relations Advisory Committee of the Council of Graduate Schools. Other recent service includes: the Board of Directors of the Council of Graduate Schools; Chair of the CGS Advisory Committee on Minorities in Graduate Education; Chair of the Board of Directors of the Graduate Record Examination; Board of Higher Education and Workforce of the National Research Council; and the Advisory Board of the National Security Education Program.

- **Chon Noriega** is Professor in the Department of Film, Television, and Digital Media, and Director of the Chicano Studies Research Center (CSRC)

at UCLA. As Director of the CSRC, Professor Noriega has hosted each year since 2006 an Education Summit that brings together scholars, educators, community representatives, policy makers, and students to discuss the critical issues that Latina/o students face at each segment of the education pipeline. Recent Summits have focused on research related to Chicano/Latino access to the University of California in the aftermath of Proposition 209. Professor Noriega is author of *Shot in America: Television, the State, and the Rise of Chicano Cinema* (Minnesota, 2000) and editor of nine books dealing with Latino media, performance and visual art. He has produced two documentaries, most recently "Casa Libre/Freedom House" (2008), about a homeless shelter for undocumented, unaccompanied minors. For the past decade, Noriega has been active in media policy and professional development, for which Hispanic Business named him as one of the Top 100 Most Influential Hispanics. He is co-founder of the 400-member National Association of Latino Independent Producers (NALIP, established in 1999) and served two terms on the Board of Directors of the Independent Television Service (ITVS), the largest source of independent project funding within public television. In addition to his work in media, Noriega has curated numerous arts projects, including the current traveling exhibition *Phantom Sightings: Art After the Chicano Movement*. Professor Noriega's awards include the Getty Postdoctoral Fellowship in the History of Art (for art history) and the Rockefeller Foundation

Film/Video/Multimedia Fellowship (for documentary production).

- **Jody Priselac** is Adjunct Professor and Associate Dean for Community Programs in the Graduate School of Education and Information Studies and Executive Director of Center X at UCLA. In her role as the head of Center X, she coordinates work to transform public schooling in order to create a more just and equitable society. The Center's day-to-day work focuses on aiding with teacher and administrator professional development in urban schools. Professor Priselac's current research focuses on understanding how to bring about change in teacher practice in teaching mathematics in urban schools. She is specifically interested in examining what facilitates change, how change occurs, and the role of professional development in change. Select writings include: J. Priselac (2003), "Providing High Quality Professional Development," Presentation at the Council of Chief State School Officers, The No Child Left Behind Act Teacher Quality Braintrust Meeting, Washington, D.C.; J. Priselac, Powell, Peitzman, Montagna (April 2003), "Making Connections: Antiracist Pedagogy and Social Justice Teacher Education," Paper presented at the annual meeting of the American Education Research Association, Chicago, Illinois; J. Priselac (2003), "Take the Challenge: Teach Mathematics Differently," Invited Keynote Address at the annual conference of the Los Angeles City Teachers of Mathematics Association, Los Angeles, California.

- **Daniel Solorzano** is a Professor of Social Science and Comparative Education in the Graduate School of Education and Information Studies at the University of California, Los Angeles (UCLA). He also has a joint appointment as Professor in the Chicana and Chicano Studies Department and is an affiliated Professor in the Women's Studies Department. He is the Director of the University of California All Campus Consortium on Research for Diversity (UC/ACCORD), an interdisciplinary, multi-campus research center devoted to a more equitable distribution of educational resources and opportunities in California's public schools and universities. His teaching and research interests include critical race and gender studies in education, racial marginality and microagressions in education, and race/ethnic, gender, and class relations with a special emphasis on the educational access, persistence, and graduation of underrepresented undergraduate and graduate students of color in the United States. Dr. Solorzano has authored over sixty research articles and book chapters on issues of educational access and equity for underrepresented minority populations in the United States. Over his 38-year career in higher education, Solorzano has taught in the California Community College (East Los Angeles College; Santa Monica College), California State University (California State University Northridge; California State University Bakersfield), and University of California (UCLA) Systems. In 2006, Professor Solorzano received the UCLA Education Department Distinguished Teacher Award and in 2007 he was awarded the UCLA-wide Distinguished

Teacher Award. In 2010, Solorzano also received the UCLA Ronald McNair Scholars Program Mentor of the Year Award. In 2011, Solorzano was given the American Education Research Association (AERA) Multicultural/Multiethnic Education Special Interest Group's Carlos J. Vallejo Memorial Award for Lifetime Scholarship.

- **Chris Tilly** is Director of UCLA's Institute for Research on Labor and Employment and Professor in the Urban Planning Department. Professor Tilly studies labor markets, inequality, urban development, and public policies directed toward better jobs. He is particularly interested in understanding how combinations of institutions and markets generate unequal labor outcomes, and in how public policy and collective action can successfully be directed toward improving and equalizing such outcomes. Within this framework, Professor Tilly has examined part-time and contingent work, gender and racial disparities, job mobility, and other issues. Although most of his research has been focused on the United States, he has traveled frequently to Latin America and the Caribbean over the past 30 years, and has written about development issues and social movements in Argentina, Brazil, Cuba, Haiti, Mexico, and Central America. He has recently broadened his research agenda to include a new emphasis on jobs in Mexico, as well as undertaking comparative analyses with European colleagues. In addition to conducting scholarly research, he served for 20 years (1986-2006) as editor of *Dollars and Sense*, a popular economics magazine, and frequently conducts research for advocacy groups, community organizations, and

labor unions. He served on the Program Committee and later the Board of Directors of Grassroots International from 1991-2003, ending that time as the Chair of the Board. Before becoming an academic, he spent eight years doing community and labor organizing.

- **M. Belinda Tucker** is a social psychologist and Professor of Psychiatry and Biobehavioral Sciences at UCLA, a former Associate Dean in the Graduate Division, and currently the Vice Provost of the Institute for American Cultures at UCLA. Professor Tucker is also a Faculty Associate of the Bunche Center for African American Studies, for which she served as Interim Director from 1989-1991. She also served as Associate Dean in the Graduate Division at UCLA from 2007-2011. For 30 years and largely with NIH funding, Professor Tucker has examined and published extensively on the nature of close, personal relationships in a sociocultural context, using a variety of research methods. Her 1995 book, *The Decline in Marriage Among African Americans*, co-edited by Claudia Mitchell-Kernan, is still widely used in university classrooms around the nation and elsewhere. She has conducted a number of major national studies, including the landmark National Survey of Black Americans, as well as the 21-city Survey of Families and Relationships (SFR). Her studies also include work on inter-ethnic relations, the transition to adulthood among urban black youth from distinct cultural groupings, social adaptation of developmentally delayed adults over the life-course, and the impact of incarceration on family members and close ties. Tucker is the recipient of both a

Research Scientist Development Award and an Independent Scientist Award from the National Institute of Mental Health (NIMH). From 2003-2009, Tucker directed the Family Research Consortium IV, a national collaborative network and training program for scholars interested in family mental health, as well as its affiliated postdoctoral fellowship program, both funded by NIMH and the Robert Wood Johnson Foundation. She has served on numerous panels for the NIH and other agencies and universities and has been cited twice by the Department of Psychiatry for outstanding teaching and mentoring.

- **Abel Valenzuela Jr.** is the current chair of the César E. Chávez Department for Chicana/o Studies and holds joint appointment in the Department of Urban Planning. Professor Valenzuela is the past Vice Chair of the UCLA Committee on Undergraduate Admissions and Relations with Schools (CUARS) and former UCLA representative to the University of California Board of Admissions & Relations with Schools (BOARS). His research is primarily concerned with the issues faced by minorities and immigrants in the U.S. His work focuses on three key interrelated areas: 1) immigration and labor markets, 2) poverty and inequality, and 3) immigrant settlement patterns. His work combines ethnographic, in-depth interviews, participant observation, and quantitative methods to document and explain the processes that govern the incorporation of immigrants to the U.S. Professor Valenzuela is currently working on further publishing articles and completing a manuscript on day labor in a national context. His groundbreaking work on day labor continues

to drive his primary research agenda. In addition, Professor Valenzuela is undertaking research on non-union supermarket janitors (subcontractors), immigrant-serving community based organizations, and the organizing campaigns of security guards and car wash attendants. At UCLA, Professor Valenzuela directs the Center for the Study of Urban Poverty, teaches courses on labor and employment, immigration and U.S. society, urban poverty and public policy, and planning issues in minority communities. He is also the Chair of the University of California Committee on Latino Research.

- **Howard Winant** is Professor of Sociology at the University of California, Santa Barbara, where he is also affiliated with the Black Studies and Chicana/o Studies departments. He is the Founder and Director of the University of California Center for New Racial Studies, a MultiCampus Research Program that operates on all ten UC campuses (http://www.uccnrs.ucsb.edu). Professor Winant's research and writing focuses on racial theory and social theory, and the comparative historical sociology, political sociology, and cultural sociology of race, both in the US and globally. Professor Winant is most well known for developing the theory of racial formation along with Michael Omi. He is the author of *The New Politics of Race: Globalism, Difference, Justice* (UMinnPress, 2004), *The World Is a Ghetto: Race and Democracy Since World War II* (Basic, 2001), *Racial Conditions: Politics, Theory, Comparisons* (UMinnPress, 1994); *Racial Formation in the United States: From the 1960s to the 1990s* (co-authored with Michael Omi – Routledge, 1986

and 1994); and *Stalemate: Political Economic Origins of Supply-Side Policy* (Praeger, 1988).

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AMICUS CURIAE BRIEF

No. 12-682

AUG 3 [illegible] 2013

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,

AND

CHASE CANTRELL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS CHASE CANTRELL ET AL.

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the Civil Rights Project/Proyecto Derechos Civiles at the University of California, Los Angeles ("the CRP"), submits this brief as *amicus curiae* in support of Respondents.[1]

The CRP is a university research center that works with scholars from across the United States to enhance understanding of matters relating to racial equality and civil rights. Since its founding in 1996, the CRP has had a special interest in equal access to higher education, and it has commissioned studies and produced books that extensively document patterns of racial inequality and barriers to access to higher education. The CRP has an interest in the accurate presentation of research relevant to the questions of law in this case. The CRP is also particularly concerned about the possible misapplication of research findings in this case and that the Court might be influenced by claims made by Petitioner and supporting *amici curiae* that are strongly contradicted by social science evidence. Therefore, the CRP

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[1] All parties have filed with the Court their blanket consent for the filing of *amicus curiae* briefs in these cases. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

seeks to aid the Court by summarizing reliable research relevant to the questions of law in this case.

Since its founding, the CRP has worked to communicate to courts and other legal actors research findings that reflect the consensus of the social science community on educational practices and policies that affect, or are likely to affect, racial and ethnic inequities in education. One example: the Court's 2012-2013 term included an *amicus curiae* brief that the CRP facilitated in *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013). The brief was filed by 444 American social scientists in support of the University of Texas, at Austin. Some information provided in this brief is drawn from that *amicus* brief in response to social science based claims by Petitioner and supporting *amici* that seek to re-litigate the constitutional issues raised in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher*. Neither the CRP nor its affiliated academics saw fit to burden the Court by filing the full array of social science *amicus* briefs that were filed in *Fisher*. Where relevant, *amicus* references the social science briefs filed in *Fisher*, should the Court wish to review the research and arguments in more depth.

SUMMARY OF ARGUMENT

In this brief, the CRP does not address how social science research relates to the constitutionality of race-conscious higher education admissions policies, as the Court has already made its determination in

Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Instead, through the evidence provided in this brief, *amicus* seeks to ensure the constitutional guarantee of a fair political process under the Equal Protection Clause of the Fourteenth Amendment. Michigan's Ballot Proposal 06-02 (Proposal 2) violates constitutional principles of equal protection by the way it selectively imposes burdens on advocates of constitutionally permissible race-conscious policies, while leaving to the ordinary political process advocacy on behalf of policies that consider any and all other factors.

Race-conscious policies not only promote better learning environments and outcomes for all students by enhancing diversity, they also benefit racial minorities in particular by offsetting existing severe structural racial inequities in education and promoting access to educational programs that are the first step along a critical pathway to business, academic, civic, and political leadership in the United States and throughout the world. Research has consistently demonstrated that racially focused constraints on admissions, like Proposal 2, have, among other consequences, reduced the admission and enrollment of racial minorities at selective public undergraduate institutions, in graduate programs, and in training programs for the professions of medicine, law, and business. These substantial drops have occurred despite the best efforts of colleges and universities to recruit students through extensive outreach and the

consideration of race-neutral characteristics in admissions decisions, such as socioeconomic disadvantage.

Petitioner's claims that Proposal 2 does not harm racial minorities ignores the real-world consequences that a decline in campus racial diversity has for students of color, including how racially isolating environments can undermine learning and persistence. The claims by Petitioner and his supporting *amici curiae* that Proposal 2 in fact benefits racial minorities by preventing them from being admitted to selective institutions where they are academically "mismatched" and cannot compete are strongly refuted by the weight of scientific evidence. Reliable social science research consistently shows that racial minority students admitted to the most selective universities under race-conscious policies have higher completion rates than similar students enrolled in less selective institutions. Furthermore, minority students attending selective institutions are more likely than their fellow white students to be leaders in their chosen professions and in activities that aid communities of color and contribute to the well-being of the larger society. Bans on race-conscious admissions therefore harm the long-term community interests of minorities and undermine the nation's interest in reducing inequality and in preparing its citizens for life in an increasingly diverse world.

ARGUMENT

I. Race-Conscious Admissions Policies Offset Severe Racial Inequities in Education and Promote Opportunity for Racial Minority Students.

The Sixth Circuit was appropriately animated by the concern that "[s]afeguarding the guarantee 'that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.'" *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 474 (6th Cir. 2012). Minority communities and advocates of racial equality have sought to secure policies that promote the inclusion of students historically excluded and underrepresented in selective colleges and universities. These policies include the consideration of race as one of many factors in admissions at public institutions of higher education.[2] Race-conscious

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[2] Only 14% of Michigan African American voters approved Proposal 2, while 64% of white voters voted in favor. *See Michigan Proposition 2 Exit Poll*, CNN (2006), http://www.cnn.com/ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html. These data indicate that racial minorities overwhelmingly approve of race-conscious policies in admissions, but they also show that racial minorities are not all of one mind. Just as not all lesbians and gays approve of same-sex marriage (*see, e.g.*, Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law* (2009)), not all people of color view race-conscious admissions the same way. In neither instance, however, does a diversity of views negate the equal protection concern.

policies that meet constitutional requirements allow postsecondary institutions to offset the severe structural racial inequality in K-12 public schools and promote opportunity for racial and ethnic minorities, thereby enabling institutions to promote the educational benefits of diversity for all students.

Racial minorities disproportionately suffer from inequalities in K-12 education that close off access to selective colleges and universities.[3] For example, minority students who attend minority segregated schools typically have less experienced teachers, are more likely to drop out than similar students in integrated schools, and are denied equal opportunity in many other ways.[4] Racial minority students also

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[3] *See, e.g.*, Nat'l Acad. of Education, *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases* 18, 31-32 (Robert L. Linn & Kevin G. Welner eds., 2007), *available at* http://www.naeducation.org/xpedio/groups/naedsite/documents/webpage/NAED_080863.pdf; *see also* Julie Renee Posselt et al., *Access Without Equity: Longitudinal Analyses of Institutional Stratification by Race and Ethnicity*, 49 Am. Educ. Res. J. 1074, 1101-03 (2012) (finding that although African American and Latino students have made strides in academic preparation, odds of selective college enrollment have declined due to racial stratification in K-12 education system).

[4] *See* Nat'l Acad. of Education, *supra* note 3, at 16, 18, 20, 31-32 (reviewing all of the social science literature submitted to this Court in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) and finding reliable evidence proving that racial tracking, inexperienced teachers, and racially segregated minority schools substantially and negatively impact the academic achievement of minority students, particularly African American students).

lack equal access to rigorous college-preparatory work, such as advanced placement courses, which play an increasingly important role in selective college admissions.[5]

Race-conscious admissions policies allow institutions to address these unequal educational opportunities and consider the wide array of factors necessary for individualized assessment, such as demonstrated capacity to overcome hardships. These contextual determinations are especially important in Michigan, where African American students attend K-12 schools that are among the most segregated in the nation.[6] In Michigan, 34% of African American K-12 students attend schools where fewer than 1% of the student body is white (second worst in the U.S.), and 53% of

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[5] College Board, *The 8th Annual AP Report to the Nation*, 16, 18-19 (2012) (finding that academically prepared underserved minority and low-income students remain underrepresented in advanced placement classrooms nationally and in Michigan); Nat'l Acad. of Education, *supra* note 3, at 16 (discussing how minority students are tracked out of college preparatory courses); Karen Miksch, *Widening the River: Challenging Unequal Schools in Order to Contest Proposition 209*, 27 Chicano-Latino L. Rev. 111, 113-114, 121, 125-129 (2008) (documenting the unequal access to advanced placement (AP) courses along racial lines and the use of AP in selective admissions, including at the University of Michigan).

[6] Gary Orfield et al., *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, Civ. Rts. Project 42, 44-45 (2012), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus . . . separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf.

African American children attend schools where fewer than 10% of the student body is white (third worst in the U.S.).[7] Most notably, Michigan has the lowest "Equity and Excellence Scores" in the U.S. for African American students, a measure of how well a state enables all of its students to succeed in advanced placement courses.[8]

The consequences of Michigan's Proposal 2 must be understood in the context of these racial inequities in public schools and the related ways constitutionally permissible race-conscious policies partially offset them and give racial and ethnic minorities more equal access to selective colleges and universities.[9]

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[7] *Id.* at 46 tbl.18.

[8] College Board, *8th Annual AP Report to the Nation*, *supra* note 5, at 16-18. In 2012, white students in Michigan scored 109.0 on the scale, Latinos scored 77.7, Native Americans scored 57.1, and African American students scored only 16.9 on the Equity and Excellence measure. College Board, *Appendix D: Equity in Participation and Success Among Traditionally Underserved Graduates: 2002-2012*, *The 9th Annual Report to the Nation* (2013), *available at* http://media.collegeboard.com/digitalServices/pdf/ap/rtn/9th-annual/9th-annual-ap-report-appendix-d.pdf; *see also* College Board, *AP Report to the Nation: Michigan Supplement* 6 (2013), *available at* http://media.collegeboard.com/digitalServices/pdf/ap/rtn/9th-annual/9th-annual-ap-report-state-supplement-michigan.pdf.

[9] When properly understood in this context, and contrary to Petitioner's claim that Proposal 2 prevents preferential treatment (Pet'r Br. 17), Proposal 2 effectively creates racial preferences because it eliminates only race-conscious admissions, leaving undisturbed the host of structures and policies that generally favor whites but disadvantage African Americans,

(Continued on following page)

II. Racially Focused Constraints on Admissions Decisions, like Proposal 2, Dramatically Reduce the Inclusion of Well-Qualified Racial Minorities Across a Number of Educational Programs.

Proposal 2 is a racially focused measure, as it selectively carves out race in admissions from other admissions criteria set through the ordinary political process, consequently reducing the enrollment of racial minorities across a number of educational programs.[10] Since they were first implemented, bans on race-conscious admissions have caused a decline in the number of students of color at selective colleges and universities, in fields of graduate study, and in training programs for the professions of medicine, law, and business – all despite myriad race-neutral efforts to maintain racial and ethnic diversity. The resulting decrease in minority student populations undermines the educational experience of all students while increasing the isolation of those minority students who do gain admission. The long-term

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Native Americans, and Latinos. *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 Cal. L. Rev. 1139, 1200-03 (2008).

[10] Cantrell et al. Resp'ts Br. 8-10, 31-33; *see also* Regents of University of Michigan et al. Resp'ts Br. 11-18 (detailing how admissions are part of the political process in Michigan); Brief for Amicus Curiae Political Scientists in Support of Respondents (documenting the serious political obstacles in Michigan, and nationally, that racial and ethnic minorities face in the initiative process versus the ordinary political process).

community interests of minorities and whites are also threatened by these bans, as selective public universities are the most important training ground for the nation's future professionals and leaders. The comprehensive body of research documenting the educational benefits for all students of a racially and ethnically diverse student body – and the degree to which society is harmed by the precipitous decline in minority enrollment across educational sectors following the enactment of bans on race-conscious admissions – is exhaustively documented in *amicus curiae* briefs filed in support of the Respondents in *Fisher v. Univ. of Tex.*[11] Rather than reiterate that body of research, this brief focuses on social science literature that examines the impact of racially focused constraints on admission decisions, like Proposal 2.

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[11] *See, e.g.*, Brief of American Educational Research Association et al. as Amici Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* http://www.utexas.edu/vp/irla/Fisher-V-Texas.html (summarizing extensive empirical evidence of the educational benefits of a diverse student body); *see also* Brief of the American Psychological Association as Amicus Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* http://www.utexas.edu/vp/irla/Fisher-V-Texas.html (grounded in 79 peer-reviewed studies documenting the benefits of diversity and the harms to students and society in general when there are declines in diversity).

A. Prohibitions on Race-Conscious Policies Have Substantially Decreased the Enrollment of Racial and Ethnic Minorities at Selective Undergraduate Institutions.

Declines in racial and ethnic diversity at selective colleges were first seen in California after Proposition 209 passed (between 1997 and 1998) and enrollments of African American freshmen at the University of California, Berkeley (UC Berkeley) declined by 53% and the proportion of Latino enrollees fell by 45%.[12] In the same period, African American enrollments at the University of California, Los Angeles (UCLA) dropped by 38%, while Latino enrollments declined by 30%.[13] Although there has

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[12] Univ. of Cal. Office of the President, *University of California Application, Admissions and Enrollment of California Resident Freshman For Fall 1989 Through 2010* 1, 2, 5 (2011), *available at* http://www.ucop.edu/news/factsheets/flowfrc_10.pdf. African American enrollment dropped from 7%, or 252 in a freshman class of 3,215 students, to 3.7%, or 122 African American students in a class of 3,333 students. Latino and Chicano student enrollment dropped from 14.6%, or 469 in a class of 3,215 students, to 7.9%, 266 in a student body of 3,333 students. *Id.*

[13] *Id.* The enrolled African American students declined from 5.6% to 3.5% and enrolled Latino and Chicano students declined from 15.8% to 11%. *See also* Brief of the President and Chancellors of the University of California as Amicus Curiae Supporting Respondents at 17-19, *Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* http://www.utexas.edu/vp/irla/Documents/ACR%20The%20President%20and%20Chancellors%20of%20the%20University%20of%20California-c.pdf (extensively documenting the drop in

(Continued on following page)

been a modest recovery in absolute numbers since that time, neither campus has regained the diversity it had in 1995, and admissions and enrollments for African American and Latino students continue to be low at both campuses, despite myriad race-neutral efforts and the substantial growth in the proportion of Latinos among California's public high school graduates.[14]

In recent years, studies have moved from demonstrating correlations between bans on race-conscious admissions policies and lower minority enrollments to assessing the magnitude of the change that can be attributed to the bans. Researchers report that the bans in states like California (Proposition 209), Florida (One Florida Executive Order), Texas (while *Hopwood v. Univ. of Tex.*, 78 F.3d 932 (5th Cir. 1996)

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racial and ethnic diversity at selective college campuses across the University of California system).

[14] Petitioner's claim that African American and Latino student enrollment increased after Proposition 209 in California is misleading (Pet'r Br. 31). The same data source Petitioner cites to support a "40% higher" African American freshman enrollment at the University of California after Proposition 209 indicates that the University of California's overall freshman class grew 45% between 1995 and 2010 (from 21,999 to 31,897). *See* Univ. of Cal. Office of the President, *University of California Application, Admissions and Enrollment of California Resident Freshman For Fall 1989 Through 2012* (2013), *available at* http://www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf. The increase in African American and Latino enrollment during this period therefore cannot be attributed to Proposition 209, as the overall size of the freshman class also increased during this time.

was in effect), and Washington (Initiative 200) have led to a drop of about 33% in the enrollment of African American students at these states' most selective colleges and universities, and a drop of about 20% in the enrollment of Latino students.[15] These selective schools are most likely to send students to the top professional and graduate school programs, meaning that the loss in minority scholars is compounded further down the educational pipeline because there are fewer highly qualified minorities who can apply to graduate programs, which also have been compelled to abandon race-conscious admissions.

Descriptive studies show that, as is true of selective colleges in other states, the University of Michigan, Ann Arbor, despite its best efforts to maintain racial diversity, experienced a sharp decline in the enrollment of students of color after Proposal 2 took

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[15] Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. Hum. Resources 435, 440-47 (2012) (finding a 1.6 percentage point drop (from 5.6% to 4%) in African American student enrollment and a 2.9 percentage point drop (from 14.2% to 11.3%) for Latino student enrollment at the most selective institutions); *see also* Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 Rev. of Econ. & Stat. 712, 717 (2012) (finding a 1.74 percentage point decline in the enrollment of African American students and a 2.03 percentage point decline in the enrollment of Latino students at the most selective institutions in the nation – large drops, 30% and 27.5%, respectively, given the already low levels of African American (5.79%) and Latino (7.38%) students enrolled at the most selective institutions).

effect. From 2006 (the year before Proposal 2 could have affected enrollment) to 2012, the proportion of African American undergraduate students enrolled decreased by 33% and the proportion of Latino students fell by 12%, even when overall enrollment grew by 10% during that period.[16] Thus, it is not surprising that, by 2012, African American baccalaureate degree attainment at the University of Michigan, Ann Arbor, had declined by more than one-third from previous decades. In the first decade of the 2000s, before post-Proposal 2 cohorts started graduating in meaningful numbers, African Americans were on average 6.9% of the bachelor's degree recipients at the University of Michigan, Ann Arbor. By 2012, African Americans represented only 4.4% of the Ann Arbor campus bachelor's degree recipients.[17]

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[16] Univ. of Mich. Office of the Registrar, *Enrollment Reports for 2010 and 2012* (the Summary in these two reports covers the 2006-2012 span), *available at* http://deepblue.lib.umich.edu/handle/2027.42/96814. Total African American enrollment dropped from 7% to just 4.7% and Latino student enrollment declined from 4.9% to 4.3%. Even when including all of the new "two or more underrepresented minority" category (added since 2010), there was an 18% reduction in the proportion of underrepresented minority undergraduates at the University of Michigan, Ann Arbor, between 2006 and 2012. *Id.*

[17] Univ. of Mich. Office of the Registrar, *Degree Reports* (file series #892), *available at* http://deepblue.lib.umich.edu/handle/2027.42/96801.

B. The Enrollment of Racial and Ethnic Minorities Has Dropped Significantly Across Graduate Fields of Study as a Result of Bans on Race-Conscious Admissions.

Declines in racial and ethnic diversity after the prohibition of race-conscious policies have also affected graduate education, the gateway to the professoriate and many other leadership roles in U.S. society. These declines have long-term effects on faculty diversity in these fields, as doctoral training and graduate degree acquisition lead to faculty positions. The declines also have a deleterious effect on the research enterprise, as the perspectives of people from diverse backgrounds fuel the creativity and innovation needed to find answers to the nation's most persistent puzzles.[18]

Bans on race-conscious policies in Texas, California, Florida, and Washington have led to a 12.2% decline in the graduate enrollment of African American, Latino, and Native American students across all areas of study.[19] The drop in racial diversity has been greatest in the sciences, an area within an already low number of students of color and one where

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[18] *See, e.g.*, Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (2008).

[19] *See* Liliana M. Garces, *Racial Diversity, Legitimacy, and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment*, 36 Rev. of Higher Educ. 93, 122 (2012).

maintaining global competitiveness requires growing (not reducing) a strong, talented, and diverse workforce.[20] The bans in these states have led to a 26% drop in the percentage of engineering graduate students who are Latino, African American, or Native American (from 6.2% to 4.6%); a 19% decline of these populations in the natural sciences (from 7.8% to 6.3%); and a 15.7% drop in the social sciences (from 12.1% to 10.2%). In the humanities, the bans have contributed to an 11.8% decline (from 10.2% to 9%).[21]

Since Proposal 2, graduate schools at the University of Michigan, Ann Arbor, have experienced similar declines. In 2012, African American graduates earned 3.9% (22 of 568) of the doctoral degrees awarded at the university, the lowest percentage of doctoral degrees awarded to minorities since 1992-1993. These numbers represent a 50% decline from the previous decade (2002-2011), when 7.9% of domestic doctoral degree recipients were African Americans.[22]

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[20] *See, e.g.*, Nat'l Acad. of Sci. et al., *Expanding Underrepresented Minority Participation: America's Science and Technology Talent at the Crossroads* 20 (2011), *available at* http://www.nap.edu/catalog.php?record_id=12984.

[21] Liliana M. Garces, *Understanding the Impact of Affirmative Action Bans in Different Graduate Fields of Studies*, 50 Am. Educ. Res. J. 251, 274-75 (2013).

[22] Univ. of Mich. Office of the Registrar, *supra* note 17.

C. The Enrollment of Racial and Ethnic Minorities Has Dropped Substantially in Professional Schools of Medicine, Law, and Business.

The enrollment of racial minorities also has dropped significantly at schools of medicine, law, and business since the imposition of bans on race-conscious policies. A decline in racial and ethnic diversity in these professions creates serious barriers to addressing the health needs of underserved communities and communities of color,[23] blocks the critical pathways to leadership that are essential for the nation's legal and political systems,[24] and compromises

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[23] *See, e.g.*, Brief for Association of American Medical Colleges et al. as Amici Curiae Supporting Respondents at 7-11, *Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_resp_amcu_aamc.authcheckdam.pdf (summarizing research demonstrating that racial diversity in medical schools has been shown to produce more culturally competent physicians, and to enhance the learning and cross-cultural competencies of white and other doctors, and that minority physicians are more likely than their non-minority peers to work in underserved minority populations).

[24] *See, e.g.*, Brief of the American Bar Association as Amicus Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* http://www.utexas.edu/vp/irla/Documents/11-345%20bsac%20The%20American%20Bar%20Association%20%282%29.pdf (demonstrating that diverse law schools are critical to democracy and ethical professional practice).

the interests of the U.S. workforce, including major and small businesses alike.[25]

Medicine. In the wake of Proposal 2, there has been a dramatic decline in the number of African Americans earning medical degrees in the state of Michigan. From 2004 to 2010, African Americans earned 10.3% of the MD degrees awarded in Michigan, but in 2012, this dropped to 4.8%, a decline of more than 50%. In 2010 and 2011, Wayne State ranked third in the nation in the number of MD degrees awarded to African Americans (32 and 39, respectively), but in 2012, after Proposal 2 took full effect, these numbers dropped to 13. At the University of Michigan Medical School, the percentage of African American graduates declined in 2012 by over two-thirds from the period 2004 to 2010 (from 8.7% to 2.7%).[26]

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[25] *See, e.g.*, Brief for Fortune-100 Businesses et al. as Amici Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* http://www.utexas.edu/vp/irla/Documents/ACR%20Fortune%20100%20and%20Other%20Leading%20American%20Businesses.pdf (demonstrating that skills acquired through interaction with racially diverse peers have a lasting effect on individuals' preparation for employment in an increasingly diverse and global workforce).

[26] Ass'n of Am. Med. Coll., *Table 30: Total Graduates by U.S. Medical School and Race and Ethnicity* (2013), *available at* https://www.aamc.org/download/321538/data/2012factstable30.pdf. *See also* Univ. of Mich. Office of the Registrar, *Degree Reports* (file series #894), *available at* http://deepblue.lib.umich.edu/handle/2027.42/96801.

These declines track similar drops that have taken place at public medical schools in California since Proposition 209, where the percentage of entering underrepresented minorities dropped from 23.1% in 1993 to 14.3% in 1997.[27] The average in the decade since (16.4%) is still considerably below pre-Proposition 209 levels, even as the state's non-white population soars. Myriad race-neutral efforts in California have not reversed these trends.[28]

Similar declines were seen in Texas from 1996 to 2003, when the Fifth Circuit's decision in *Hopwood v. Univ. of Tex.* banned state universities from considering race as a factor in admissions. 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003). In 1995, underrepresented minorities were 21.4% of first-year medical school enrollees in Texas, but this percentage dropped by one-fifth from 1997 to 2002, to an average of 17.2%.[29]

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[27] *See* Ann Steinecke & Charles Terrell, *After Affirmative Action: Diversity at California Medical Schools*, 8 Ass'n of Am. Med. C. Analysis in Brief 1 (2008), *available at* https://www.aamc.org/download/102358/data/aibvol8no6.pdf; *see also* Jordan J. Cohen, *The Consequences of Premature Abandonment of Affirmative Action in Medical School Admissions*, 289 J. Am. Med. Ass'n 1143, 1146-47 (2003).

[28] Steinecke & Terrell, *supra* note 27, at 2 (explaining that efforts included "automatic admissions for top high school students, outreach, academic enrichment, and financial aid").

[29] Mex. Am. Legal Defense & Educ. Fund et al., *Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After* Grutter *and* Gratz, 8 Harv. Latino L. Rev. 33, 36 (2005).

Law School. In the University of Michigan Law School's post-Proposal 2 graduating classes of 2011 and 2012, African Americans were only 2.8% of graduates. This constitutes a 60% decline since the 1990s-2000s; in fact, the late 1960s was the last time there were two consecutive years with so few African American graduates at the University of Michigan Law School.[30] At Wayne State University Law School, only 2.6% of full-time law students were African American by 2011, compared to 8.2%-9.0% from 2003 to 2006.[31] By 2010 and 2011, African American law students were more likely to be enrolled in Wayne State's part-time program, where students are far less likely to receive grants and scholarships.[32]

Similarly, in the period that it has been without a *Grutter*-like admissions policy (1997-2011), the UC Berkeley School of Law enrolled an average of 12.5 African American students annually, only half what the annual enrollment had been (25.7) when the law school was able to consider race in its holistic

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[30] J.A. 102-3 (1970-1999 data, with 1998 data corrected); Univ. Mich. Office of Registrar, *Degree Reports* (2000-2012 data).

[31] Am. Bar Ass'n & Law Sch. Admission Council, *ABA-LSAC Official Guide to ABA-Approved Law Schools* (2005-2008, 2013). The data trails the edition date by two years in this series. *See also* Wayne St. Univ. Office of Budget, Planning, and Analysis, *Wayne St. Univ. Fact Book* (2008-2013), *available at* http://www.wayne.edu/facts/index.php.

[32] Am. Bar Ass'n & Law Sch. Admission Council, *supra* note 31.

admissions plan (1970-1996).[33] A similar three-fifths drop occurred at the UCLA School of Law, despite intense recruitment efforts. A majority of the classes entering post-Proposition 209 at UCLA had fewer African American law students than *every* pre-Proposition 209 year dating back to 1967.[34]

Business. Comparing two years (1995-1996) when the six public business schools in the University of California system could consider race in admissions to the post-Proposition 209 years (2000-2011) when they were banned from doing so, the average percentage of entering African American students dropped by 58% (a decline from 3.6% to 1.5%). Moreover, between 2000 and 2011, many of the University of California business schools had not one single African American or Native American student in their entering classes.[35]

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[33] William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & Univ. L. 53, 122-23 (2013).

[34] *Id.* at 122-23 (classes in 1997 to 2001, 2005, 2007 and 2011 had between 3 and 12 African American students).

[35] *Id.* at 118-19.

D. These Declines in Racial Diversity Have Taken Place Despite Myriad Race-Neutral Efforts to Maintain Diversity.

Petitioner's contention (Pet'r Br. 30, 34) that there are workable alternatives to race-conscious policies is unsupported by the evidence and the extensive experience of selective public universities in Michigan (Univ. Resp'ts Br. 18-25) and other states with bans like Proposal 2. Selective universities in states that bar race-conscious admissions have dedicated substantial resources, including time and money, to admitting classes that are sufficiently diverse with respect to race and ethnicity to avoid the isolation of minorities, and to enrich every student's education so that all are better prepared for success in the diverse global marketplace. Their myriad aggressive efforts have failed to produce campuses sufficiently diverse to meet these educational goals.

The Brief of *Amicus Curiae* of the President and Chancellors of the University of California in Support of Respondents in *Fisher*[36] document California's experience, which establishes that race-neutral admissions policies – including the consideration of socioeconomic status as a factor in admissions and targeted outreach to low-income students – have not made up for declines in racial diversity at the most selective institutions in the state since considering

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[36] Brief for Univ. of Cal., *supra* note 13.

race as a factor in admissions was banned. The experience of the University of California's most selective institutions is supported by numerous studies, which find that considering parental income or social background without also considering race has led to or would lead to the enrollment of substantially fewer students of color in selective schools than does the consideration of race among the many factors that make for a strong student body.[37]

The results of California's experience are further supported by statistical analyses that simulate the impact of replacing race-conscious admissions policies with other efforts to attract more minority students, such as greater attention to wealth and income and

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[37] *See, e.g.*, Anthony P. Carnevale & Jeff Strohl, *Separate and Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege* 37 (2013), *available at* http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Separate&Unequal.FR.pdf ("While politically attractive, the direct substitution of class for race-based preferences does not yield the same numbers of African-American and Hispanic candidates as a more direct reliance on race-based admissions."); *see also* Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?*, 25 J. of Pol'y Analysis & Mgmt. 463, 476 (2006) ("the presence of minorities among all low-income students in the United States, and especially among those graduating from high school with sufficient grades and test scores to be admitted to college, would be too small to generate a level of minority representation anywhere close to its current level"); Alan Krueger et al., *Race, Income and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 Am. Law & Econ. Rev. 282, 309 (2006) ("The correlation between race and family income, while strong, is not strong enough to permit the latter to function as a useful proxy for race in the pursuit of diversity.").

increased recruitment and support programs. The studies find that even the most effective recruitment and retention policies fail to restore the number of students of color at the most selective four-year institutions to the level that would be achieved by the holistic consideration of race in admissions.[38]

III. Race-Conscious Admissions Policies Prevent the Isolation of Racial Minorities at Selective Colleges and Universities and Increase Their Prospects for Success.

Petitioner erroneously argues (Pet'r Br. 32, 35) that bans on race-conscious policies do not harm minorities. This argument ignores the real-world consequences that a decline in campus racial diversity has for students of color admitted to selective universities, including feelings of social isolation and perceptions of a hostile racial climate, both of which can undermine their learning and persistence.[39]

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[38] Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. of Lab. Econ. 113, 152-54 (2010).

[39] *See, e.g.*, Brief of American Educational Research Association, *supra* note 11, at 18-24 (summarizing evidence demonstrating harms associated with tokenism, racial isolation, and stereotyping, with particular attention to the harms in the science, technology, engineering, and mathematics fields); *see also* Brief of Social and Organizational Psychologists as Amici Curiae Supporting Respondents at 9-12, *Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_resp_amcu_

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Research reveals that banning race-conscious policies can create more racially hostile environments and increase stigmatization of the minorities on campus, even though they will have been admitted on the same basis as their majority peers.[40] For example, an African American student from the UCLA School of Law – one of fifteen in a post-Proposition 209 class of about 300 students – described the law school environment as stigmatizing, racially isolating, and alienating, and reported that she constantly had to fight racial stereotypes and counter the view that she was unqualified, even though she was admitted after California's ban on race-conscious admissions.[41]

Too often the effect of increased racial isolation on campus and associated perceptions and tensions is

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sop.authcheckdam.pdf (summarizing evidence that solo status, isolation, and poor racial climate can undermine academic performance and persistence); Brief of Experimental Psychologists as Amici Curiae Supporting Respondents at 21-25, *Fisher*, *available at* http://www.utexas.edu/vp/irla/Documents/ACR%20Experimental%20Psychologists.pdf (explaining that isolation exacerbates stereotype threat and leads to underperformance by minority students).

[40] *See* Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1199, 1220-25 (2010).

[41] Kendra Fox-Davis, *A Badge of Inferiority: One Law Student's Story of a Racially Hostile Educational Environment*, 23 Nat'l Black L.J. 98, 99, 114-16 (2010) (describing the experience of being one of fifteen African American students out of 300 in her first-year class and one of four African American students in a property law class taught by a professor who advocated the mismatch hypothesis, as creating an environment in which she felt her "race was on trial").

manifested in a person failing to perform up to his or her academic potential. We see this, for example, in the science, technology, engineering, and mathematics (STEM) fields.[42] We also see it in the effects racial isolation has on learning and graduation rates. Studies show that students of color who experience racial isolation do worse academically, have lower self-esteem, and have poorer career prospects, partly as a result of the stress of being a minority in a racially isolating environment.[43]

Furthermore, survey data from 31 institutions across the country show that when diversity is low, racial stereotypes are reinforced and discrimination increases.[44] Minority students are also likely to feel

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[42] *See, e.g.*, Mitchell J. Chang et al., *Considering the Impact of Racial Stigmas and Science Identity: Persistence Among Biomedical and Behavioral Science Aspirants*, 82 J. Higher Educ. 564 (2011).

[43] *See* Sylvia Hurtado et al., *A Model for Diverse Learning Environments: The Scholarship on Creating and Assessing Conditions for Student Success*, *in* 27 *Higher Education: Handbook of Theory and Research* 41, 57, 102 (John C. Smart & Michael B. Paulsen eds., 2012) (synthesizing research linking campus climate and retention); *see also* Maria Ong et al., *Inside the Double Bind: A Synthesis of Empirical Research on Undergraduate and Graduate Women of Color in Science, Technology, Engineering, and Mathematics*, 81 Harv. Educ. Rev. 172 (2011) (demonstrating that racially isolated settings are a leading barrier for women of color in STEM fields to persist to graduation).

[44] Sylvia Hurtado & Adriana Ruiz, UCLA Higher Education Research Inst., *The Climate for Underrepresented Groups and Diversity on Campus* (2012), *available at* http://www.heri.ucla.edu/

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excluded from campus events and activities. *See infra,* App. Figure A. Although African American students are not the predominant minority on any of the campuses studied, the data indicate that they feel more included where there is a diverse campus environment. Higher percentages of African American and Latino students on campus also significantly reduce Latino students' feelings of isolation. *Id.*

Similar surveys at leading American research universities show that African Americans perceive campus racial climates to be less welcoming at institutions that are prohibited from considering race in their admissions policies and have low levels of diversity as a result. Survey data for the years 2008-2012 at the University of California show that fewer than two-thirds of the school's African American students reported feeling respected, and the figures are even lower at UC Berkeley and UCLA.[45] The results for the University of Michigan, Ann Arbor, after Proposal 2 (66%) are almost the same as in California, despite the university's substantial efforts to improve the racial climate on campus. *See infra,* App. Figure B. By contrast, at the University of Texas

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briefs/urmbriefreport.pdf (studying climate survey data, including 490 African American students and 3,488 Latino students).

[45] Univ. of Cal., *2013 Accountability Report* (2013), http://accountability.universityofcalifornia.edu/index/8.3.1. Among the African American students surveyed at UC Berkeley in 2008, 2010, and 2012, only 57%, 55%, and 49% felt respected over the three survey years, while at UCLA the figures were 56%, 62%, and 55% for the three administrations. *Id.*

at Austin and other Association of American Universities institutions with race-conscious admissions policies and/or higher proportions of African Americans in the student body, about three-quarters of African Americans feel that students of their race are respected.[46]

A recent study found that minority students at the University of Michigan Law School experienced detrimental consequences after Proposal 2. A survey of 505 students (47% of the Michigan Law School student body), the vast majority of whom entered the law school after Proposal 2 was in effect, indicates that almost half of African American students (47%) do not perceive the campus as one that is supportive of diversity, whereas almost all white students (84%) do.[47]

These studies, and a number of other studies summarized in *amicus curiae* briefs filed in support of the Respondents in *Fisher*,[48] contradict claims by

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[46] Kidder, *supra* note 33, at 61-64; Univ. of Cal., *2013 Accountability report*, *supra* note 45; University of Michigan, Ann Arbor, data provided upon request. Each of these institutions used the same survey, called "UCUES" at the University of California and "SERU" at the other institutions. The two unnamed Association of American Universities institutions include one public and one private university, neither of which is in Michigan.

[47] Meera E. Deo, *Empirically-Derived Compelling State Interests in Affirmative Action Jurisprudence*, Soc. Sci. Res. Network, No. 2315787 at 31-33 (2013), http://ssrn.com/abstract=2315787.

[48] *See, e.g.*, Brief for National Black Law Students Association as Amicus Curiae Supporting Respondents at 20-23, *Fisher*,

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Petitioner's *amici* that minorities would feel more welcome on campuses that do not practice race-conscious admissions. In fact, studies have shown that policies banning the consideration of race in admissions can have a "discouragement effect" on minority students, creating the perception that students of color are not welcome or valued at the institution.[49] For instance, the most accomplished African American and Latino students admitted to the University of California are more likely to spurn offers from UC Berkeley or UCLA in favor of highly selective private universities where race-conscious policies are permissible.[50]

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133 S. Ct. 2411 (No. 11-345), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_resp_amcu_nblsa.authcheckdam.pdf (summarizing additional studies showing that the consideration of race in admissions helps reduce racial stigma, not produce it).

[49] *See* Susan K. Brown & Charles Hirschman, *The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College*, 79 Soc. Educ. 106, 108, 119 (2006).

[50] Eric Grodsky & Michal Kurlaender, *The Demography of Higher Education in the Wake of Affirmative Action*, *in Equal Opportunity in Higher Education: The Past and Future of California's Proposition 209*, at 33, 48 (Eric Grodsky & Michal Kurlaender eds., 2010) (finding that African American freshmen shifted from the University of California to private universities after Proposition 209). Other studies further contradict Petitioner's claim of a "warming effect" after a ban on race-conscious affirmative action (Pet'r Br. 35). *See* Kidder, *supra* note 33, at 71-85; Saul Geiser & Kyra Caspary, *"No Show" Study: College Destinations of University of California Applicants and Admits Who Did Not Enroll, 1997-2002*, 19 Educ. Pol'y 396 (2005)

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IV. Bans on Race-Conscious Policies in Admissions Undermine Equal Opportunity and Fair Access to Pathways to High Achievement.

Significant benefits of race-conscious admissions policies are lost by bans like the one enacted by Proposal 2. These include ensuring equal opportunity and fair access to the host of benefits associated with attending highly selective institutions, including pathways to high achievement. Petitioner's claim that race-conscious policies produce more harm than benefits for racial minorities ignore this evidence and rely instead on claims that run counter to the weight of the scientific evidence.

A. An Extensive Body of Social Science Research Repudiates the "Mismatch" Hypothesis.

Petitioner's argument that race-conscious policies result in an academic "mismatch" (Pet'r Br. 32) – that is, depression of the graduation rates and academic achievement of students of color because they attend schools where most other students have stronger credentials – is contradicted by the social science evidence. Moreover, the few studies that purport to provide empirical evidence in support of mismatch

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(finding that African American and/or underrepresented minorities disproportionally chose to enroll at highly selective private universities after Proposition 209).

claims have been rejected by eminent methodologists for flaws in their designs and analysis.[51] A broad array of scholars and the overwhelming bulk of the relevant research present findings inconsistent with the mismatch hypothesis. This literature includes peer-reviewed studies and well-received books by eminent social scientists that look broadly at selective public and private universities or nationally representative samples and employ a range of empirical methods, including those that control for unmeasured variables. The take-away message from numerous scholars echoes the conclusion of Alon and Tienda that "the mismatch hypothesis is empirically groundless for black and Hispanic" students.[52] The research consistently finds that when minority students are enrolled at selective colleges they have a higher probability of attaining a bachelor's degree,[53] and that institutional selectivity increases the probability of

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[51] The methodological flaws in the studies cited by Petitioner and supporting *amici* are extensively addressed in Brief of Empirical Scholars as Amici Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* http://www.utexas.edu/vp/irla/Documents/ACR%20Empirical%20Scholars.pdf.

[52] Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 Soc. Educ. 294, 309 (2005) (explaining that "affirmative action practices both broaden educational opportunities for minority students and enable minority students to realize their full potential").

[53] Tatiana Melguizo, *Quality Matters: Assessing the Impact of Attending More Selective Institutions on College Completion Rates of Minorities*, 49 Res. Higher Educ. 214, 232 (2008).

graduation for African American students in particular.[54]

Bowen, Chingos, and McPherson, for example, in *Crossing the Finish Line*, analyzed the freshman class entering in 1999 at 21 public flagship universities, including the University of Michigan, plus the public university systems in four states.[55] The authors found that African American and Latino students with the same high school grade point average or SAT scores graduated at higher rates if they attended more selective institutions.[56] They found that Latinos tend to "undermatch" by disproportionately enrolling in less selective schools than they are eligible to attend,[57] which depresses their graduation rates and future economic prospects. This massive study

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[54] Mario L. Small & Christopher Winship, *Black Students' Graduation from Elite Colleges: Institutional Characteristics and Between-Institution Differences*, 36 Soc. Sci. Res. 1257, 1272 (2007); *see also* Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 Soc. Sci. Res. 531, 544 (2007) (examining freshmen at 28 selective colleges and universities and finding that estimates provided no evidence for the mismatch hypothesis); *see also* Douglas S. Massey & Margarita Mooney, *The Effects of America's Three Affirmative Action Programs on Academic Performance*, 54 Soc. Probs. 99, 111, 113 (2007) (finding no empirical evidence supporting the mismatch hypothesis and that for minority students race-conscious admission does not appear to impact grades but does appear to lower the odds of dropping out).

[55] William Bowen et al., *Crossing the Finish Line: Completing College at America's Public Universities*, xvii, 12-16 (2009).

[56] *Id.* at 106-08, 208-16, 313-14 n.7.

[57] *Id.* at 106-08, 208-16.

concluded that there was "no support whatsoever for [the mismatch] hypothesis" and that students "are generally well advised to enroll at one of the most challenging universities that will accept them."[58]

A second group of studies looks at what happened in California after Proposition 209 and in Texas when the Fifth Circuit's ruling in *Hopwood* was in effect, and they too find no support for the mismatch hypothesis. A particularly revealing study took advantage of a rare "natural experiment" created by an unfortunate budget situation at the University of California in 2004. Researchers examined how a group of students who initially were denied admission to University of California campuses but were later admitted ended up, over the next four years, performing as well as their peers who had been preferred admits because they had better academic credentials.[59] The authors found "that mismatch has

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[58] *Id.* at 227-28.

[59] Michal Kurlaender & Eric Grodsky, *Mismatch and the Paternalistic Justification for Selective College Admissions*, 86 Soc. Educ. ___ (forthcoming 2013), *available at* http://www.ssc.wisc.edu/cde/cdewp/2013-06.pdf. Initially, budget cuts caused the University of California system to scale back admissions to a group of eligible, but less academically competitive students, who were made the promise of later admission after two years at a community college. When funding was partly restored in the summer of 2004, this group of "guaranteed transfer offer" students at UC Berkeley, UCLA and UC San Diego were offered automatic admission. The authors considered this group to be "mismatched" in that they were the most marginal students admitted to the University of California and had been originally

(Continued on following page)

no reliable or substantively notable bearing on grades, rates of credit accumulation, or persistence."[60]

Another study of graduation rates at the University of California in the years before and after Proposition 209 (entering freshmen from 1994 to 2003) found little evidence that underrepresented minority graduation rates at the University of California improved, all things considered, once race-conscious policies were banned.[61]

In addition, the predictions of the mismatch theory have not held up. If the theory were accurate, one would expect that, after race-conscious admissions policies were banned in Texas due to the *Hopwood* ruling, graduation rates for minority students would increase because they would be "better matched" to other students at less competitive

---

denied admission. The authors assessed the outcomes that would be expected of "mismatched" students had they not been admitted to these competitive schools but instead attended less competitive University of California campuses.

[60] *Id.* at 24.

[61] Tongshan Chang & Heather Rose, *A Portrait of Underrepresented Minorities at the University of California, 1994-2008, in Equal Opportunity in Higher Education: The Past and Future of California's Proposition 209*, at 83, 99 (Eric Grodsky & Michal Kurlaender eds., 2010); *see also* Kidder, *supra* note 33, at 106-08 (reviewing the same data).

institutions. However, the data show that graduation rates for minorities decreased rather than increased.[62]

B. Petitioner Ignores the Educational and Career Benefits Associated with Access to Selective Colleges and Universities, like the University of Michigan, and the Particular Returns They Offer Racial Minorities.

Petitioner and supporting *amici* dismiss the benefits to minorities of being able to enroll in larger numbers at highly selective institutions like the University of Michigan, Ann Arbor, which is associated with a host of long-term benefits – for all students but for African American and Latino students in particular. These benefits include higher rates of degree completion,[63] increased attendance and likelihood of success in graduate and professional schools,[64]

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[62] Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan*, 29 Econ. Educ. Rev. 1110 (2010).

[63] *See, e.g.*, Alon & Tienda, *supra* note 52, at 296 (demonstrating persistence to degree and graduation rates); Mark C. Long, *College Quality and Early Adult Outcomes*, 27 Econ. of Educ. Rev. 588, 597-98 (2008) (reporting increases in bachelor's degree attainment).

[64] William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 160-73 (1998); Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 257-62 (2009).

entry into leadership positions,[65] and higher earnings.[66] Moreover, some of these benefits appear to be exclusive to minority students.[67]

Addressing the value of attending the state's leading law school in *Sweatt v. Painter*, the Court unanimously stated that the impact on applicants was unquestionable:

> [T]he University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.

339 U.S. 629, 634 (1950). Today, the insight underlying the Court's observation in *Sweatt* endures. In the National Research Council's respected data-driven

---

[65] Bowen & Bok, *supra* note 64, at 155-66, 257-58.

[66] *See, e.g.*, Stacy B. Dale & Alan B. Krueger, *Estimating the Effects of College Characteristics over the Career Using Administrative Earnings Data*, 29 (2) J. Human Resources __ (forthcoming 2014), *available at* http://www.nber.org/papers/w17159; Mark Hoekstra, *The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach*, 91 Rev. of Econ. & Stat. 717, 718 (2009).

[67] Dale & Krueger, *supra* note 66, at 25 (examining post-graduation outcomes and finding that, for minorities but not for whites, higher earnings resulted from attendance at more selective institutions).

assessment of graduate programs, *A Data-Based Assessment of Research-Doctorate Programs in the United States* (2011), the University of Michigan had a total of 66 ranked programs, more than even Harvard, Yale, and UC Berkeley.

Race-conscious policies in admissions help ensure access to these programs precisely where it matters the most, as the most selective colleges and universities have a very disproportionate impact on preparing students for the professions. The University of Michigan was ranked the number-one "elite" university in the U.S. (and third overall) in terms of the number of STEM doctorate degrees it awarded to African Americans in 2006-2010,[68] which corresponds to the cohorts admitted before Proposal 2. Similarly, in the legal profession, the University of Michigan, Ann Arbor, produced nearly as many applicants to U.S. law schools (3,672) in the past five years as the combined total (3,750) for the four other Michigan public universities included in America's top 240 law school feeder institutions.[69] By closing off pathways of opportunity for racial minorities to attend selective institutions like the University of Michigan, Proposal

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[68] Nat'l Sci. Foundation (NSF), *Top 20 Academic Institutions Awarding S&E Doctoral Degrees, By Race/Ethnicity: 2006-10* tbls.7-16 (2013), *available at* http://www.nsf.gov/statistics/wmpd/2013/pdf/tab7-16.pdf. The same NSF table for 2004-08 indicates that the University of Michigan ranked second in the U.S. in STEM doctorates awarded to African Americans.

[69] Law Sch. Admission Council, *Top 240 ABA Applicant Feeder Schools for Fall Applicants* (2013), *available at* http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/top-240-feeder-schools.pdf.

2 imposes a particular harm on the long-term community interests of minorities and undermines the nation's interest in reducing inequality and in training its citizens for life in an increasingly multiracial society.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals judgment striking down Proposal 2 as unconstitutional.

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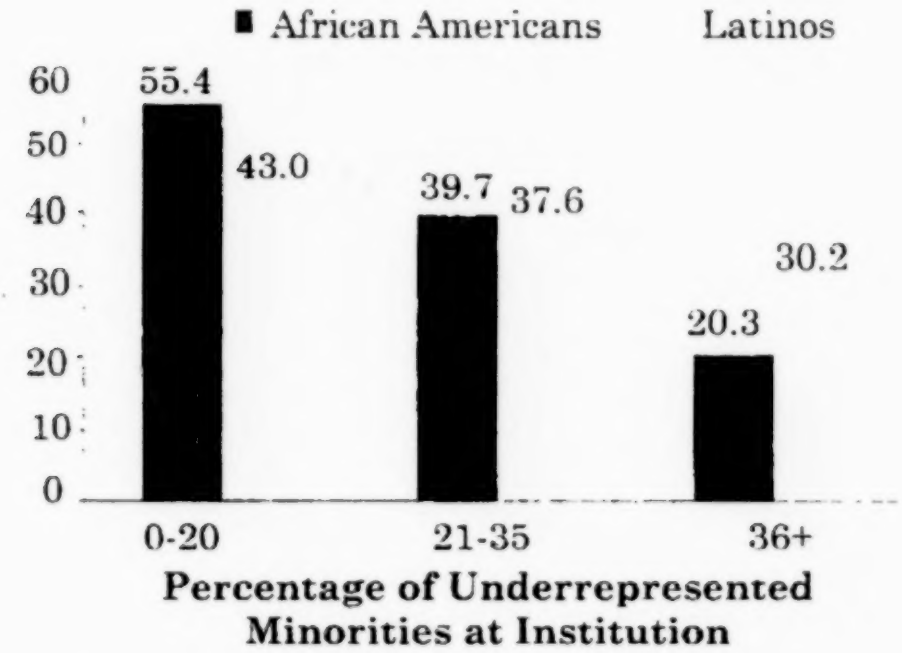
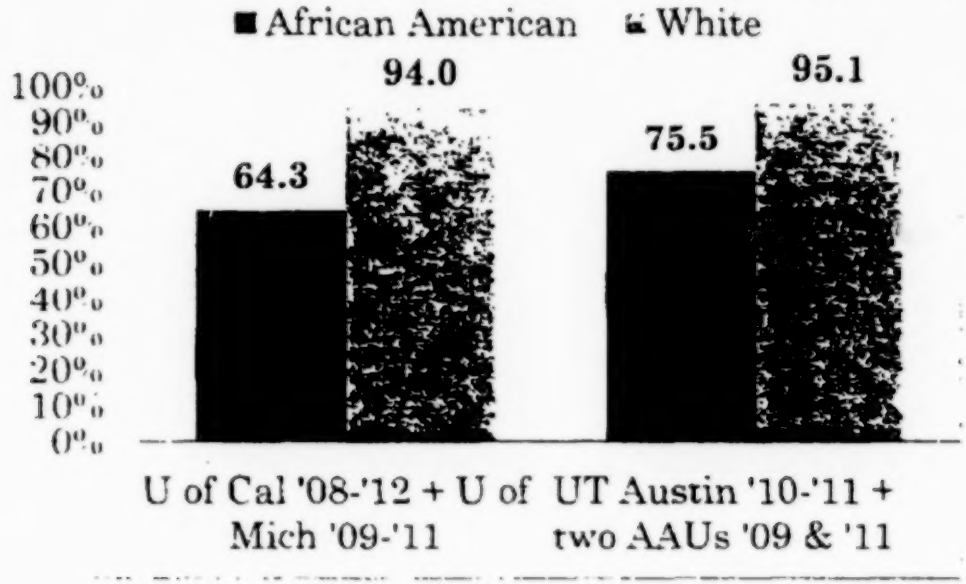
August 30, 2013

Figure A. **Percentage of Latino and African American Students Responding "Yes" to "Exclusion" as the Type of Discrimination Experienced.**



Data source: Diverse Learning Environment Survey. 2010 and 2011, HERI, UCLA. Based on 31 institutions across the country.

Figure B. **Percentage of African American and White Undergraduates Who Responded to Survey Question "Students of My Race/Ethnicity are Respected on this Campus" by Answering "Strongly Agree, Agree, or Somewhat Agree."**[1]



[1] For data sources, *see supra* notes 45 and 46 and accompanying text. The dark bar on the left combines results from 2,338 African American students who responded to surveys at the University of California in 2008, 2010, and 2012, and at the University of Michigan, Ann Arbor, in 2009, 2010, and 2011. The dark bar on the right combines results from 820 African American students who responded to the same survey at the University of Texas, at Austin in 2010 and 2011, and at two unnamed Association of American Universities institutions that had race-conscious policies and/or a student body that was 5% or more African American. For white students, the bar on the left reflects responses from a total of 30,976 students, and the bar on the right reflects responses from 8,037 students.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY ET AL,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Brief of Professor Carl Cohen of the University of Michigan, Professor Robert Koons of the University of Texas and the Texas Association of Scholars As Amici Curiae in Support of the Petitioner

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Interest of Amici [1]

Dr. Carl Cohen is Professor of Philosophy at the University of Michigan. He has written numerous articles opposing the University's race based admissions preferences. Dr. Robert Koons is a Professor of Philosophy at the University of Texas. The Texas Association of Scholars is an association college and university faculty who teach at institutions of higher education in Texas.

The amici believe that an academic institution of higher education must be preserved exclusively as a merit based institution. No preferential treatment should be accorded to applicants or students, directly or by subterfuge, in admissions, granting of academic scholarships, the hiring or promotion of faculty or any other matters of academic concern.

The amici disagree with the Respondents' allegations that "the reallocation of power to a more remote decision maker" is unfair and that so doing imposes an "undue burden on minorities". The amici believe that these arguments are specious. These arguments are an attempt to conceal the Respondent's desire to have a society based on

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1. Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or in part, and no counsel for a party, or party, made a monetary contribution for the preparation or submission of this brief. No entity or person, aside from the amici curiae and its counsel, made any monetary contribution for then preparation or submission of this brief. Counsel for the parties consented to the filing of this brief.

mandatory equality of results and to destroy merit as the outcome determinative factor in American life.

The amici are also concerned that the 6th Circuit impermissibly sought to amend the U.S. Constitution by making it all but impossible for the voters of Michigan to obtain the policy objective they sought: bias-free admissions to state universities. The 6th Circuit did so by requiring that the voters have no say in this decision. *The 6th Circuit ordered that this decision must be left to a board of trustees elected for staggered 8 year terms or to unelected members of the faculty or administration of the University.* That ruling unconstitutionally limited their right to self-government.

Summary of Argument

The fundamental issue underlying this case is the right of a state's citizens, acting on their own, through initiative and referenda procedures authorized by Michigan's constitution to determine state and local governmental policies. In a democracy, the people are entitled, as a matter of Constitutional right, to the broadest possible latitude in making such determinations. There is no 14th amendment mandate requiring that such decisions be reserved to unelected officials acceptable to a court. The people's determinations must to be subject to the most limited of judicial review consistent with the United State Constitution. To allow a differing result would be to authorize judges to "exercise Will instead of Judgment", James Madison, Federalist 78.

The *Schuette* decision *(Coalition to Defend Affirmative Action, et al v. Regents of the University of Michigan,* 701 F. 3d 466 (6th Cir. 2012) on appeal *sub. nom. Schuette v. Committee to Defend Affirmative Action, et al)* (hereafter *Schuette)* significantly threatens the rights of every state's citizens to make those decisions. The 6th Circuit's opinion threatens the rights of a free people to self-government. This decision, and the decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969) (hereafter "Erickson") and *Washington v. Seattle School District #1, 458 U.S. 457 (1982)* (hereafter "Seattle") pose the identical threat.

The *Schuette* decision is tantamount to 8 judges amending the United States constitution. The

Schuette decision makes it all but impossible, as a practical matter, for the voters, or for the Michigan legislature, to outlaw racial preferences. So doing, according to the 6th Circuit, would "impermissibly burden" a minority group's alleged "right" to pressure university officials and life-tenured faculty into doing something that the voters want stopped: racial discrimination in university admissions.

The second critical, but unspoken, issue is the continuing effort, by the Respondents and their ideological allies, to undermine merit as the outcome determining factor of success in American life. Starting in the mid-13th century a feudal caste system existed in Europe and in many parts of Asia. Ancestry determined destiny.

America was founded on the opposite principle. The preservation of America's merit based society is a critical issue in this case. America is supposed to be an aristocracy based on merit and not a caste society based on race.

Fairness, let alone civil rights policy, does not demand equality of result. The 14th amendment requires only equality of opportunity. Race based preferential treatment denigrates the accomplishments of those who have actually achieved something based on merit. It discounts their accomplishments by some metric based on that person not belonging to a politically protected minority group. Racial preferences reward others who accomplishments were not of the same caliber merely because they are members of a politically

protected ethnic or racial minority. Moreover, not all minority groups are beneficiaries of this "benign" discrimination. Asian-Americans are denied these "benefits" and are, in fact, the acknowledged victims of it, along with all white applicants, to Michigan's many state universities.

The people of Michigan chose to outlaw this unfair practice only to have the Court of Appeals for the 6th Circuit eradicate their rights and impose its own policy preferences. Therefore, prior decisions of this Court in the *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District #1*, 458 U.S. 457 (1982), must be overruled and the 6th Circuit's opinion in *Coalition to Defend Affirmative Action, etc. v. Regents of the University of Michigan*, 701 F. 3d 466 (6th Cir. 2012) must be reversed.

Argument

I. The Courts Must Declare the Sense of the Law; and if They Should be Disposed to Exercise Will Instead of Judgment, the Consequence Would Equally be the Substitution of Their Pleasure for That of the Legislative Body.

A. Voters Have the Constitutional Right to Determine Public Policy. In a Democracy, Judges Do Not.

The words of James Madison, in Federalist 78, are at the heart what is constitutionally suspect in the *Schuette* opinion *(Coalition to Defend Affirmative Action, et al v. Regents of the University of Michigan*, 701 F. 3d 466 (6th Cir. 2012) on appeal *sub. nom. Schuette v. Committee to Defend Affirmative Action, et al*) (hereafter *Schuette*) and in this Court's decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969) (hereafter "*Erickson*") and *Washington v. Seattle School District #1,* 458 U.S. 457 (1982) (hereafter "*Seattle*"). At stake is the right of the people, and potentially of their elected representatives, to determine what the law is and how they shall govern themselves. The Constitution was intended to place limits on the government's authority to impose its will on the people, e.g., the free exercise and no establishment clauses of the 1st Amendment. The Constitution was not intended to expand that power to endanger the rights of a politically disfavored majority.

The Constitution was never intended to grant selected minority groups the right to a Constitutionally protected entitlement to a privileged place at the head of the line. India outlawed its skin-color based caste system in 1947. Neither the United States, nor any individual state, should be perpetuating a race-based caste system in 2013. The people of Michigan determined to stop doing so in 2006. They must not to be judicially compelled to do so again.

That others may, in generations past, have obtained unjustified "privileges" based on their ancestry, religion or race, does not entitle generations far removed from pre-1954 school segregation, to demand, let alone have unelected judges require, that they now receive a privileged place at the head of the line.

B. Judges Do Not Have the Authority to Impose a *De Facto* Amendment to the United States Constitution.

The 6th Circuit, in *Schuette*, based its overturning of Michigan's Amendment 2 on the theory that the Amendment "reallocated political power" away from elected university trustees and unelected professors and administrators and returned it to the voters. So doing, the Court held, "impermissibly burdened" minority voters. The 6th Circuit, as a practical matter, thus made it impossible for anyone in Michigan to compel the University to change its admissions policies. *That all but mandates the permanent enshrining of those voter repudiated*

policies. This constitutes a *de facto* revision of the 14th amendment by eight judges.

In her dissenting opinion, Judge Gibbons pointed out that:

> [T]he majority [in *Schuette*] seems to concede that some set of decision makers...would be able to reverse the policies that [the 6th Circuit] claims are immune from actions by the entire body politic. . . [the 6th Circuit] demands that any changes in educational...policies can only be enacted by individual actions of each university's governing authority...",701 F. 3d at 492. 'The Constitution provides that 8 member governing boards, elected to statewide office for [staggered] 8 year terms", govern each institution, 701 F. 2d, at 499...[*A*]*dmissions policies are placed within control of the boards or school authorities* (emphasis added). . .*The governing boards...delegated responsibility for establishing admissions standards to program specific administrative units which set admissions criteria through informal processes that can include a faculty vote*, 701 F. 2d at 499 (emphasis added).

In a democracy, the people are the ultimate arbiters of public policy, not faceless trustees, academic bureaucrats or life tenured members of the

faculty. The 6th Circuit opinion unconstitutionally mandates that it be otherwise.

C. There Is No Constitutional Right to Receive Preferential Treatment Based on Race or Ethnicity and There is No Constitutional Right to Bar the People - or a Legislature From Deciding to End Those Preferences.

No one has a constitutional right to a racial preference whether it is in college admissions, state government employment or in obtaining a government contract. Nothing in the 14th Amendment authorizes, let alone compels, that result. No recipient of such preferences has the right to bar the voters, acting on their own initiative, let alone a state legislature, from ending preferences that were previously granted, for whatever reason. Nothing in the 14th Amendment requires that result, either.

Minorities do not have a special constitutional right to have decisions "about which they have a special interest" made by local officials or unelected university administrators or faculty. The *Seattle* decision is an, "unprecedented intrusion into the structure of a state government...[the] 14th Amendment leaves the states equally free to decide matters of concern to the State at the state, rather than the local, level of government", *Washington v. Seattle Ind. Sch. Bd. #1*, 458 U.S. at 489 (Powell, J. dissenting).

Justice Powell continued:

> [W]e have never held....absent a federal constitutional violation that a state must treat different persons differently on account of race. In the absence of a federal constitutional violation requiring a race-specific remedy, a policy of strict racial neutrality by a State violates no federal constitutional principle". . . This Court has never held that there is an affirmative duty to integrate schools in the absence of a finding of unconstitutional segregation, 458 U.S. at 492, citing *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 24 (1971), 458 U.S. at 491.
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> * * *
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> The Constitution does not dictate to the States a particular division of authority between legislature and judiciary or between the state and local governing bodies. It does not define institutions of local government, 458 U.S. at 493 (Powell, J. dissenting).

If Justice Powell's dissent is correct, then there certainly can be no constitutional requirement that racially discriminatory admissions policies be implemented in order to increase minority enrollment in a state university.

Nevertheless, the 6th Circuit has done so. Its contrary conclusion is wrong. The right to participate in the political process is not a guarantee of success or of a "right" to preserve special privileges granted

either by an administrative agency, a university committee or a state legislature.

In *Seattle,* the Court struck down a statewide voter approved initiative that banned local school boards from imposing forced busing plans to achieve racial diversity in local schools unless the voters approved of such plans. That decision must be reversed.

There had been an earlier attempt to recall four school board members who had supported the forced busing plan, but it narrowly failed. The state-wide referendum initiative followed and was approved by a 66 percent majority of the voters. See 458 U.S. at 460 n. 1. The mandatory racial assignment plant took effect in 1978 and was overturned in the challenged referendum. Washington State's constitution expressly reserved to the voters, "the power to propose bills and laws and to enact or reject the same at the polls, independent of the legislature", Washington Constitution, Article I, Section II.

The implication of Justice Blackmun's opinion, nullifying that result, is that the statewide referendum was suspect because it was under-inclusive. It limited local school board actions based on racial considerations but not on non-race related factors such as curriculum changes, school closings or local school budgets. Either the "racial" nature of the referendum or the under-inclusive scope of it, made the referendum suspect. The 6th Circuit adopted that reasoning in *Schuette.* This is constitutionally impermissible.

There is no constitutional basis for the Respondent's, and the 6th Circuit's, assertion that if the voters want to ban a policy that has race related considerations underlying it, that they are barred from doing so, because the policy is race related. Would the 6th Circuit make the same assertion if the Michigan legislature, or the U.S. Congress, imposed such a ban?

Similarly, there is no constitutional requirement that, in order to ban one policy to which the voters object that they must, in order to meet 14th amendment requirements, ban other non-race related policies dealing with the same broad subject matter, in this case local school board policies, at the same time.

Based on Justice Blackmun's theory, and the 6th Circuit's opinion, if a city council voted to compel the payment of reparations to a racial minority through a tax increase, it would be an "impermissible reallocation of political power" for the state's voters in a referendum, or their legislature, to ban such payments by law or by amending the state's constitution. The constitutional amendment, or the new state law, would be struck down since it impermissibly shifted or reallocated political power away from minority voters in that city. This would be so because, in order to obtain reparations, the minority would now have to persuade the state legislature to change the law or all of the voters to throw out the constitutional amendment. Imposing such a requirement would "unfairly burden"

minority voters and, in Justice Blackmun's view, violate the 14th Amendment. *That is not how a government in a free country functions.*

The 9th Circuit, in *Seattle*, acknowledged that, "the issue would be different had a successor school board attempted to rescind the prior Board's plan. The 6th Circuit did not. Here, a different political entity – the vote of a statewide electorate – rescinded a policy voluntarily enacted by a locally elected school board already subject to local control", 458 U.S. at 466. This argument is constitutionally irrelevant. Minority groups do not have a protected "right to achieve beneficial legislation" let alone to achieve those goals at the level of government most convenient to them.

Nothing in Justice Blackmun's opinion indicates that he would have reached a different conclusion had the voters reallocated that power to the state legislature, or if the law had been changed by the legislature acting on its own initiative.

Justice Blackmun's theory nullifies the people's right to enact legislation if the new statute, in any manner, touches on race. This thinking underlies this Court's rejection of the ban on enacting anti-housing discrimination ordinances without voter approval in the *Erickson* case. It is unclear if the *Erickson* and *Seattle* Courts would have rejected the challenged initiatives if they had covered all aspects of school administration or all aspects of local housing policy and not just ones related to race.

The voters acted where racial criteria were involved because racial criteria were what local officials were improperly using as the basis for policy setting. Voters ought not to be penalized for exercising their constitutional rights by being required to enact over-inclusive initiatives in order to repeal a single policy of which they disapprove.

D. This Court's Equal Protection Decisions Have Always Struck Down Classifications Based on Race as Violations of the 14th Amendment's Equal Protection Requirement.

"A core purpose of the 14th amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice rather than legitimate public concerns; the race not the person, dictates the category", *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). In accord see, *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (outlawing a ban on blacks serving on juries), *Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down a law barring blacks from buying homes in white neighborhoods); *Loving v. Virginia*, 388 U.S. 1,11 (1967) (striking down a ban on interracial marriages); *Personnel Adm. of Massachusetts v. Feeney*, 442 U.S. 256, 272, (1979) (sustaining veteran's preferences in public employment as not constituting gender discrimination). "Private discrimination may be outside the reach of the law, but the law cannot directly or indirectly give them effect", *Palmore v. Sidoti*, 466 U.S. at 433. Therefore, this Court should rule the same way in *Schuette*.

These arguments must not be read as endorsing the notion that a legislative, or voter initiated, statute, requiring racial segregation in schools or housing, would be acceptable. No matter the method employed, or level of government taking the action, such legislation would be facially unconstitutional as a violation of the 14th Amendment.

II. The Strict Scrutiny Standard of Review Imposed on Suspect Racial or Religious Classifications Does Not Apply in This Case.

A. *Schuette* is Not a Suspect Classification Case. Even if the *Seattle* and *Erickson* Cases Were Correctly Decided, Which the Amici Do Not Concede, Those Decisions Do Not Control This Case.

The Plaintiffs in *the Seattle, Erickson* and *Schuette* cases assert a proposition that is not contemplated by this Court's strict scrutiny of suspect classifications jurisprudence. There is nothing in the *Seattle* or *Erickson* decisions that implies, let alone compels, treating the banning of racially preferential treatment as being a constitutionally suspect classification subject to a strict scrutiny review.

Subjecting a racial or religious minority to special burdens or classifications not imposed on all citizens, is a suspect activity. Banning the award of racially based privileges, whether to a minority or to the majority is not, and may never be, suspect.

Taking *the Erickson, Seattle* and *Schuette* decisions to their "logical" conclusion, it would constitute a violation of the 14th Amendment if the voters decided to compel the University of Michigan and Michigan State University to withdraw from Big 10 competition in football and basketball because they took that decision making authority away from the universities. According to *Erickson, Seattle* and *Schuette*, it would be a 14th Amendment violation because minority students were special beneficiaries of the athletic scholarships that they received. The decision making over the continuation of big time basketball and football would have been impermissibly reallocated away from decision makers closest to the students concerned. This example is not far-fetched. Every time the NCAA suggests tightening the academic standards for athletic eligibility and athletic scholarships, these racially based arguments are raised against doing so.

B. This Case Involves the Voters Banning Discrimination and Not Their Imposing It.

This case involves banning racial discrimination on a statewide basis. *Granting preferential treatment to minority groups based on their race or ethnicity is racial discrimination. Prohibiting it is not.* Therefore, the supposed "reallocating" of political power, and the concomitant "burden" that reallocation imposes, is not suspect and, therefore, not subject to the type of scrutiny imposed by the Supreme Court in the *Erickson* and *Seattle* cases.

That the beneficiaries of a constitutionally banned program are members of a politically favored minority group endows neither the favored group, nor the program from which they benefit, with special constitutional protection. *Minority groups have the same rights as the majority, not greater rights.* That they demand something more, in this case racial preferences in college admissions, does not endow their demand with a protected place in the political arena. In a democracy, that cannot be permitted.

Nevertheless, this Court struck down a statewide, voter approved, initiative banning the use of race in public school assignments. The implication of the *Seattle* case is that a black child has a constitutionally mandated right to attend a racially integrated school. There is no such 14th amendment right. A black child has a constitutionally protected right not to be barred from attending the same school as white children because of the black child's race. See *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Parents Involved in Community Schools v. Seattle Ind. School District #1*, 551 U.S. 710 (2007). There is a vast difference between banning segregation and mandating integration by whatever means are judicially deemed to be necessary even if the voters do not approve of it.

The *Erickson* case has the same anti-democratic implications for policy making at the local level. The City Council enacted an anti-discrimination housing ordinance. The voters, in a city-wide referendum,

repealed that law and also required that any future anti-discrimination in housing ordinances had to receive voter approval before taking effect. This Court threw out the new law on the grounds that political power had been impermissibly reallocated from the City Council to the city's voters. Desirable as an ordinance barring housing discrimination is, a court has no right to interpose itself between the voters who dislike what the City Council did and the City Council. The voters cannot constitutionally compel segregated housing or authorize a city council to do so. But they do have the right to subject legislation banning discrimination to their review.

If a court may bar that voter review, what is to stop a court from overturning voter rejection of a local school budget or an unwanted property tax increase on the grounds that minority voters might have especially benefitted from the new school budget, or the higher taxes? Once the "reallocation of power" or "special benefit to minorities" doctrines are accepted there ceases to be any realistic limit on judicial power to overturn any new governmental policy that a minority group dislikes. The theory has no rational end-point at either the local or state levels of government.

In any event, this Court's subsequent decision in *Parents Involved in Community Schools v. Seattle Ind. School District #1*, 551 U.S. 710 (2007) logically seems to overrule - or at a minimum limit - the 1982 decision in the first *Seattle* school case to the specific facts of the original *Seattle* litigation.

C. The 6th Circuit's Reasoning in *Schuette* is a Complete Departure From the 9th Circuit's Decision in a California Case Based on Facts Identical to This Case. That Case was Decided After the *Erickson* and *Seattle* Cases.

The rationale used by the *Schuette* court in striking down Michigan's state constitutional Amendment is a repudiation of prior case law in another circuit. *In Coalition for Economic Equity v. Wilson*, 122 F. 3d 692 (9th Cir. 1997), a coalition of civil rights groups, in many ways identical to the Respondents in this case, challenged the constitutionality of California's Proposition 209. That proposition was essentially identical in its scope and intent with Amendment 2, challenged here.

The 9th Circuit upheld Proposition 209's constitutionality in the face of the identical equal protection and reallocation of political power arguments asserted by the Respondents here. "A system which permits one [district court] judge to block with the stroke of a pen what 4,736,180 {California} residents voted to enact as law tests the integrity of our constitutional democracy", 122 F. 3d at 699. In fact, it destroys it.

The central purpose of the Equal Protection clause is the prevention of official conduct discriminating on the basis of race", 122 F. 3d at 701, citing *Washington v. Davis*, 426 U.S. 229, 239 (1976). Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the

doctrine of equality", *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). Racial distinctions, "threaten to stigmatize individuals by reason of their membership in a racial group...", *Shaw v. Reno,* 509 U.S. 630, 634 (1993).

"[W]henever the government treats any person unequally because of his or her race, that person suffers an injury within the spirit of the Equal Protection clause", *Adarand Constructors v. Pena,* 515 U.S. 200, 230 (1995). In accord, see *Wygant v. Jackson Board of Education,* 476 U.S. 267, 277-78 (1986). That odious differential treatment is precisely what the Respondents demand in this case and what they obtained in *Seattle* and *Erickson.*

III. The Respondent's Underlying Rationale for Overturning the Michigan Amendment is a Direct Threat to the Democratic Process. The Alleged Reallocating of Political Power Theory is an Impermissible Basis for Nullifying a Statewide Voter Approved Initiative

The voters of Michigan approved the challenged constitutional amendment by a majority of 58 percent of the vote. The 6th Circuit ignored both precedent (see *Coalition for Economic Equity v. Wilson,* 122 F. 3d 692 (9th Cir. 1992) and the essential rule that in a democracy the majority rules absent a specific and unmistakable constitutional prohibition, which is not present in this case. If the 6th Circuit were correct in its reading of this Court's decisions in the *Erickson* and *Seattle* cases then any minority group could overturn virtually any decision

of either a legislature or the voters by asserting that its "unique minority group interest" allowed it, or a court acting on its behalf, to override the democratic process.

This, in turn, creates a license for judges' intent on supplanting the power of the elected branches of the government, and from the people, to do so without any external restraint. The *Schuette* decision premised its overturning of the voters will with the absurd assertion that a, "white student could do one of four things to have the [University] adopt a legacy conscious admissions policy: she could seek to influence the schools governing board or... she could initiate a statewide campaign to alter the state's constitution" whereas, after the amendment, "a black student seeking racially preferential treatment could only seek to amend the state's constitution", *Coalition to Defend v. Regents of the Univ. of Michigan*, 701 F. 3d at 470.

The *Schuette* opinion's rationale is preposterous. (See 701 F. 3d at 470). First, the black student seeking a legacy preferential admissions policy has the same right, and the same opportunity, to seek adoption of that policy. There are thousands of black alumni of the University of Michigan. There are numerous black members of the state legislature and scores of black and white Michigan faculty members who would support her quest.

The *Schuette* opinion used a deliberately false analogy by comparing a white student seeking a legacy preferential admissions policy (lawful, even if

of dubious educational value) with the black student seeking a permanent racially preferential admissions policy. Even Justice O'Connor believed that racial preferences would disappear by 2028. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). If *Schuette* is affirmed, those racial preferences are likely to continue indefinitely.

If this Court sustains the 6th Circuit's ruling in *Schuette*, a possible next step might be for minorities to demand preferential treatment in the operation of state legislatures. That concept has already been advocated by prominent academicians. See, Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. Law Rev. 1077 (1991).

IV. Racial Preferences Harm Politically Disfavored Minority Students Particularly Asian-Americans.

A. Asian-American College Applicants are Intentionally Targeted for Discrimination.

Michigan's prejudicial admissions process does not harm only white students versus African-American or Hispanic students. Students of Asian backgrounds are equally injured and denied their 14th Amendment right to equal protection of the laws. It is no longer even an "open secret" that the University of California limited enrollment by Asian students because the more academically qualified Japanese, Korean and Chinese ancestry students were being admitted in numbers far beyond their

ethnic groups' percentage of California's overall population. This racist policy only ceased when California voters banned its use pursuant to Proposition 209.

Table 1. Asian Americans as a Percentage of Students Matriculating at Several Highly Selective Universities

Schools That Use Racial Preferences	Schools That Do Not Use Racial Preferences
Brown 11%	Cal Tech 42%
Dartmouth 14%	Cal Berkeley 42%
Chicago 16%	UCLA 33%
Yale 16%	
Cornell 17%	
Harvard 17%	
Princeton 19%	
U. of Penn. 18%	
Stanford 21%	
Columbia 22%	
MIT 25%	

Source: College Board 2012, "College Search", See, bigfuture.collegeboard.org/find-colleges.

There is substantial documented evidence proving this overt anti-Asian bias. Numerous elite academic institutions have openly stated that they use race based preferences in selecting students to be admitted. Other, equally elite institutions do not. *If this Court sustains the 6th Circuit's opinion, this racial discrimination will resume.*

Such racial discrimination is never honestly called a quota but, instead, is described as "a holistic

approach to admissions" or "a plus factor" which, nevertheless, injures disfavored minority applicants. This is not disputed.

During a meeting of the National Association for College Admissions Counseling an admissions officer at Stanford told of how seriously Asian students are damaged by that prejudice. Among applicants with the same academic and personal characteristics, whites were far more likely to be admitted than Asians; literally four times as likely at the California Institute of Technology compared to Brown and nearly three times as likely compared to Harvard, Yale, Dartmouth or Cornell. See Scott Jaschik, *Too Asian*, Inside Higher Education, October 10, 2006 where another admissions officer referred to Asian applicants as "one more AA applicant majoring in math", "they all play the violin" and "another boring Asian applicant". See: http://ered.com/news/2006/10.

This open bias against Asian-American applicants is known throughout the Asian-American community. One major company that consults with parents of Asian-American applicants stated that:

> College admissions directors will say that in addition to academic criteria, their applicants will be evaluated through "holistic" methods. *This is a code word for racial discrimination and an undocumented quota system* (emphasis added). It's no wonder that Asian applicants refer to their ethnicity as "the anti-hook" learning that it

hurts their chances for admission. See Asian American College Consultation, www.asianadvantage.net.faq.

B. Civil Rights Groups, in New York, Demanded the End to Merit Based Admissions to Specialized Academic High Schools. This Further Demonstrates Their Hostility Toward Asian-Americans.

The impact of this anti-Asian bias is further proven in an article by Kyle Spencer, in the *New York Times* on October 26, 2012. New York City's public school system operates a number of nationally recognized specialized high schools including the Bronx High School of Science and Stuyvesant High School. 15,000 students take special entrance examinations for admission to these schools, annually. "Asian students. . .win most of the seats. In 2011, 14,415 students enrolled in these specialized high schools and Asians, who comprise only 14 percent of New York City's population earned 8,549 of those seats. (See N.Y. Times, October 12, 2012 at p. 2.) "*Because of this disparity, some have begun calling for an end to the policy of using the test as the sole basis of admissions. . . Civil rights groups filed a complaint with the federal government contending that the policy discriminated against blacks and Hispanics. . .*", at p. 2. Again merit no longer counts, only membership in a politically acceptable ethnic or racial minority group

This baseless attack on using individual accomplishments, and demonstrated merit, as the

sole criterion for selecting city employees was rejected by this Court in *Ricci v. De Stefano,* 129 S. Ct. 2658 (2009). The New Haven Fire Department defended throwing out the results of an unbiased employment examination because a disproportionate number of minority applicants failed the examination. Under that odious reasoning, if 75 percent of white applicants passed a hiring or promotional examination, then 75 percent of the black and Hispanic applicants (but not the Asian applicants) must also "pass" the examination even if, based on their actual test scores, only 40 per cent actually passed. Otherwise, the examination would be deemed presumptively discriminatory.

It may be permissible to take a college applicant's family history into account when making admissions or financial aid decisions (e.g. the applicant is an orphan or was forced to work while in high school to support an ailing parent) but it is wholly inappropriate to take such non-merit factors into account in making hiring and promotion decisions in a city agency.

Nevertheless, the 6th Circuit, and the *Seattle* and *Erickson* cases, if applied to this case as the Respondents demand, would allow unelected city officials to dictate the end of merit selection and then bar the citizens of Connecticut, or the Connecticut General Assembly, from amending Connecticut's constitution, or enacting legislation, so as to ban the use of race norming.

V. Respondents Are Not Discrete and Insular Minorities Requiring Special Protection by the Courts.

A. Minority Supporters of Racially Discriminatory Preferential Treatment Received Substantial Support From Business and Labor Groups, from a Multitude of National Organizations and From Elected Officials.

The Circuit Court's stated assumption that a student seeking racial preferences is politically at a disadvantage versus opponents of such racial discrimination, even if that fact were relevant, is absurd. See 701 F. 3d at 470. A race preference seeking student has at his or her disposal the legal and financial resources of numerous national and state civil rights organizations, including the 117 civilian and military groups and individuals that filed amicus briefs supporting racial preferences in *Fisher v. University of Texas*, argued in 2012.

In *Schuette*, state and national labor unions, including multiple state chapters of the American Federation of State, Country and Municipal Employees (AFSCME), the American Civil Liberties Union and major national law firms in New York, Detroit and Washington D.C. provided *pro bono* legal services or made financial donations to their cause. (See the list of organizations and law firms enumerated at 701 F. 3d at 469-470.)

The list of the politically and economically powerful entities and individuals supporting the use of racial preferences in *Grutter v. Bollinger*, 539 U.S, 306 (2003), consumed nearly 3 pages of the United States Reports. These entities included Fortune 50 corporations, such as General Motors, Exxon Mobil and 3M, more than a score of state attorneys general, the American Bar Association, the American Psychological Association, the American Sociological Association, members of the U.S. Senate and House of Representatives of Representatives in addition to the editorial support of major newspapers.

In this context, the various Respondents and the individuals and groups that they represent, are scarcely politically powerless individuals entitled to "footnote 4" protection. See *United States v. Carolene Products Co.*, 304 U.S. 144, at n. 4, pps. 152-153 (1938).

B. Courts Lack the Constitutional Authority to Bar Voters From Reallocating Political Power or Altering a State's Constitutionally Mandated, or Statutorily Required, Decision Making Processes.

It is impermissible for any court to require that decision making relating to college admissions be reserved only to the lowest level within the University's administrative hierarchy. The 14th Amendment does not require that the Respondents must be guaranteed the best opportunity to win, by limiting decisions relating to adopting racial preferences to a committee dominated by liberal faculty members or administrators. One is hard

pressed to locate where in the Constitution this alleged right is found, save in the minds of judges who dislike majority rule.

Voters have a legitimate right to remove decision making authority over the implementation, or continuation of, racial preferences. They have an unchallengeable right to bar university faculty and administrators, who are ideologically and politically hostile to the concept of equality of opportunity from setting these policies. No court has a right to interfere with the implementation of these non-discriminatory policies chosen by the people.

Moreover, if the Respondents' assertions as to the educational value of diversity were genuine, then one ought to inquire how many conservative political science, economics, history and sociology professors are on any university faculty. Dr. Charles Murray noted, in Coming Apart: The State of White America that, "The dominance of liberal views among faculty members at elite universities is well documented", *Coming Apart: The State of White America* at page 95 (emphasis added). *It is clear that university faculties, who make their own faculty hiring and promotion decisions, are determined to impose their will on the voters for whom they work. A court cannot mandate that in a free country.*

This overwhelming partisan bias cannot help but affect faculty and administration views towards racial preferences. This was documented by Christopher Cardiff and Daniel B. Klein in Volume 17 *Critical Review* pages 237-255. Their study

determined that, in the humanities and social sciences, liberals on the faculty outnumbered conservatives by 7.4 to 1 in English, 6.2 to in history and political science 5.8 to 1 in the humanities, 4.1 to in physics and 4.0 to 1 in biology. Faculties in elite schools are even further to the left than they are in less selective schools. *See Coming Apart The State of White America*, note 25, pages 370-371.

This ideological bias was most recently demonstrated in *The Golf Shot Heard Round the Academic World*, an article written by David Feith. See the Wall Street Journal, April 6, 2013 at page A 11. A major dispute arose over the lack of intellectual diversity at Bowdoin College. A report commissioned to investigate this issue determined that "four or five out of approximately 182 full time faculty members might be described as politically conservative." A senior Bowdoin faculty member, Professor Marc Hetherington, wrote in the Bowdoin college newspaper that, "liberal professors outnumber conservative professors simply because conservatives don't place the same emphasis on the accumulation of knowledge that liberals do". See, Wall Street Journal at page A 11. These are the same professors and administrators who, at the University of Texas and, prior to the enactment of Proposition 2, at the University of Michigan, insist on using race and ethnicity as significant criteria for determining admissions because it is "essential that the student body be diverse." They offer no proof, merely their self-justifying conclusion.

VI. Diversity is Not a Permissible State Interest, Let Alone a Compelling One. "Compelling Interest" is Merely a Euphemism for "Support Our Concealed System of Racial Quotas".

A. Development of the Doctrine of a Compelling State Interest Proves That it Does Not Apply to Racial Preferences in College Admissions.

Justice Powell conceded that racially based factors were "non-objective". No one should be permitted to use non-objective criteria to establish a compelling state interest in violating someone else's Constitutional rights. Moreover, prior to *Bakke*, the only instances where the Court sustained race based discrimination was during the Second World War when it upheld the forced removal of Japanese-Americans from the west coast and their forced internment in detention centers in the interior of the United States. The reasons were "war time national security". See *Korematsu v. United States*, 323 U.S. 214 (1944) and *Hirabayashi v. United States*, 320 U.S. 81 (1943).

That race based "compelling state interest" policies were so immoral that the United States subsequently apologized for implementing that policy and paid reparations to the victims of it. "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Parents Involved in Community Schools v. Seattle School District #1*, 551 U.S. 701, 720 (2007). "At the heart of the Constitutional guarantee of equal protection lies the

command that the government must treat citizens as individuals, not simply as components of a racial, religious, sexual or national class", 551 U.S. at 730, quoting *Johnson v. Miller*, 515 U.S. 900, 911 (1995).

"The principle that racial balancing is not permitted is one of substance, not semantics. *Racial balancing is not transformed from 'patently unconstitutional' to a 'compelling state interest' simply by relabeling it 'racial diversity'* ", 551 U.S. at 762 (emphasis added). ["T]he 14th Amendment itself was framed in universal terms without reference to color, ethnic origin or condition of prior servitude....[T] 39th Congress was intent upon establishing in the federal law a broader principle than would be necessary simply to meet the particular and immediate plight of the newly freed Negro slaves", 438 U.S. at 293, quoting *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273, 296 (1976). Therefore, no racial or ethnic group may benefit from, or be disadvantaged by, racial or ethnic preferences.

B. In the Intellectual Context of This Case, Diversity Has No Societal Value and Would Have Caused Significant Harm to the United States.

The societal danger posed of academia's obsession with diversity is emphasized by American history. There was no mandatory "diversity" at Los Alamos. The scientists and engineers working on the Manhattan Project came from very similar cultural and religious backgrounds and national origins. No one asked about "diversity" in recruiting them. They

were asked only to demonstrate high levels of expertise. It did not matter that Nobel Prizes in Chemistry and Physics are not awarded on a culturally diverse basis. No one thought that anyone's life experiences mattered. Consideration of the hardships these scientists faced in being forced to emigrate to America or the fact that English was a foreign language to virtually all of these men and there were no women - would have been thought madness if used as selection criteria. It still is.

C. The Absence of Racially Based Preferences Does Not Harm Minority Students.

Students from economically or socially disadvantaged backgrounds are not injured by the absence of racially or ethnically based preferential treatment. At a Conference on The Theology of Work and the Dignity of the Worker, William, Cardinal Egan, of New York, told the Conference that:

> [I] would not agree that students today are needier and less able to learn because of poor family life than were students when my grandparents came to this nation. Read the histories of New York, Chicago and other urban centers of this nation of ours during the era of great immigration from Europe. Crime, horrendous health conditions and poverty were everywhere; and somehow, the children were taught the essentials and built this nation as a result. I believe that the problems back then were as challenging as the problems we have now".

William, Cardinal Egan, St. John University Law School, 50 *Journal of Catholic Legal Studies* 45, 69 (2011).

Moreover, these terrible problems were overcome without racial and ethnic preferences being given and without anyone's college application being "plused-up" based on their national origin.

VII. The Types of Discrimination That Existed in America, 60 or 75 Years Ago, Do Not Exist Today. "Diversity" was Invented by the Academic Community as a Concept to Rationalize the Use of Racial Preferences for Ideological Reasons.

The path to genuine equality of opportunity is not paved with racial and ethnic preferences. It is paved with genuine achievement. In 1947, John Gunther wrote, in *Inside the U.S.A*, that major Wall Street law firms were, "the last frigid citadel of Anglo-Saxon Protestantism" and that Jews were barred from being hired, even as associates, at these law firms. See *Inside the U.S.A.*, chapter entitled "New York City". Similarly, World War I hero and founder of the Office of Strategic Services, General William Donovan, was forced to found his own law firm because of similar anti-Catholic animus on Wall Street, at that time.

That world has substantially changed during the past 60 to 75 years although the *Erickson*, and *Seattle* opinions, and the 6th Circuit, refuse to recognize this fact. Wall Street law firms are heavily staffed with Jewish and Asian-American partners

and associates, not because of quotas or ethnic "plusing up" but because genuine talent and law school achievement became the criteria for hiring attorneys and not an applicant's religious affiliation or ranking in the Social Register.

The University seeks to create artificial diversity. "It is, at best, a morally neutral contrivance. But sometimes it is much worse: a set of social arrangements that are unjust and thwart our higher aspirations", Peter Wood, *Diversity: The Invention of a Concept*, at pages 39-40. Moreover, these false admissions demean the alleged beneficiaries of reverse discrimination.

To admit students in this fashion is to tell them that the college - and perhaps society at large - does not believe that they could succeed on their own abilities. It plants the idea that "equality itself is an artificial social arrangement imposed by the actions of others. . .To admit people into college even partly because of race is to hand down a life sentence of corrosive self-doubt, based on the suspicion that one could not have made it on merit alone", Wood, op. cit. at pages 40-41.

Nowhere in the Constitution, or the Declaration of Independence, does the word "diversity" appear. Nor does it appear in the 14th Amendment. "Equality" and "liberty" are discussed repeatedly. Diversity is never mentioned. "Diversity is not about fine tuning American society. . .it aims no less than transforming American society through and through", Wood, *op. cit.*, at page 15 (emphasis

added). There is no Constitutional basis for the Courts, let alone a state university, to engage in a radical restructuring of America, allocating college admissions, jobs and contracts based on race.

There is no Constitutional underpinning for Justice Powell's lone opinion in Regents of *University of California v. Bakke*, 348 U.S. 265, 305, (1974) that a state government has any interest, let alone a compelling state interest, in the diversity of the student body in its medical school. It is not protected 1st Amendment academic freedom. It became a compelling government interest only because Justice Powell said that it was.

VIII. The Imposition of State Compelled Diversity Programs Harms Society.

The diversity movement has substantially harmed America. "[It] has contributed significantly to declining academic standards (e.g. attacks on SAT testing as a method of identifying which students who have an aptitude to succeed in college...and made certain forms of racialism respectable again", Wood, *op. cit.* at 16. And so they have, for *"what proclaims itself as diversity turns out to be little more than prejudice. . . .the [civil rights] movement has appropriated the name of diversity, not to achieve a better kind of national unity, but to give license to ethnic privilege and other forms of separatism"*, Wood at page 17 (emphasis added).

As Professor Wood wrote, "Such group identities may seem real enough to politicians trolling for

votes. . .*but they are shadowy formulations and deeply at odds with our cultural imperative to treat individuals as individuals regardless of their ethnic backgrounds*", Wood, op. cit. at page 25 (emphasis added). Political expediency is not a compelling state interest to violate the civil rights of everyone in Texas who is not African-American or Hispanic, as Texan "defines" Hispanic.

Politically inspired "diversity" prevents merit based achievement from happening. As Professor Wood wrote:

> Diversity that is achieved by racial, ethnic or other quotas in college admissions; diversity that . . .consists of books included or excluded because of the race, nationality, gender or gender preference of the authors... these are, every one of them, pernicious forms of diversity. . .To admit students in this fashion is to tell them that the college – and perhaps society at large – does not believe that they could succeed on their own abilities. *It plants the idea that "equality" itself is an artificial social arrangement. . .and it negates the idea of equality as the underlying and inherent condition of all humanity.* Wood, op. cit. at pages 40-41 emphasis added.)

Professor Woods' theory is confirmed by various academic studies. In *Mismatch: How Affirmative Action Hurts Students it's Intended to Help*, Professor Richard Sander of the UCLA

School of Law and Stuart Taylor concluded that:

> [R]acial preferences will vary across racial groups with blacks preferred over Hispanics, both groups preferred over whites and whites preferred over Asians. Nationwide, the academic index of whites taking the SAT is about 140 points higher than the academic index for blacks (corresponding to a 300 point black-white gap on the current SAT I test and a 0.4 GPA gap in high school grades, and it has hovered in that range for the past 20 years. Hispanics, in contrast, have an academic index that is about 70 points lower than whites. . .and the academic index of Asians is about 30 points higher than whites. . . Something close to these differences will show up in most college applicant pools, and with racial preferences, will carry over to the college's enrolled students. *Mismatch* at page 17, citing Sander & Yakowitz, *The Secret of My Success: How Status Prestige and School Performance Shape Legal Careers* at: www.seaphe.org/pdf. and *How they Really Get In*, Inside Higher Education April 9, 2012 at www.insidehighered.com/news/2012/04/09

Historian Victor Davis Hanson summed up the damage that race based programs have caused to the United States:

> Identities. . .are sometimes put on and taken off, like clothes, as self-interest dictates-given that they are no longer ascertainable by appearance. If that sounds crass or unfair, ask Elizabeth Warren who dropped her Native American claims as soon as she received tenure and found her 1/32 Indian suddenly superfluous to the apparently similarly cynical but now mum employer Harvard [Law School]. . . [N]o one knows who qualifies as an oppressed victim... The real worry is that soon we will have so many recompense-seeking victims that we will run out of concession-granting oppressors. *Wall Street Journal,* Notable & Quotable, page A 15, May 14, 2012.

E Pluribus Unum is being replaced by "E Unum Pluribus". America is the worse for it.

Conclusion

The Opinion of the 6th Circuit in *Schuette* should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF COMMITTEE OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT COALITION

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INTEREST OF THE AMICI CURIAE[1]

Each of the *amici curiae* is a professor who has published books or articles on affirmative action or American constitutional history.

Amici submit this brief to show the true place of Michigan's Proposal 2 in American constitutional history; as an illegitimate attempt by a temporary majority to prevent a racial minority from achieving integration through the normal political and administrative processes. During the Jim Crow era, the Supreme Court approved such restrictions on the political activity of racial minorities, but since the dawn of the modern Civil Rights era, the Supreme Court has protected the fairness of the political process against these types of distortions.

Amici are: Michelle Adams, Professor of Law, Benjamin N. Cardozo School of Law; Richard L. Aynes, John F. Seiberling Chair of Constitutional Law, University of Akron Law School; Michael A. Lawrence, Associate Dean for International and Graduate Programs and Professor of Law, Michigan State University College of Law; Michael Perry, Robert W. Woodruff Professor of Law, Emory University School of Law; Richard Saphire, Professor Emeritus, University of Dayton Law School; and Rebecca Zietlow, Charles W.

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[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have consented to this filing.

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SUMMARY OF ARGUMENT

The purpose of this brief is to place the dispute over affirmative action in Michigan's public universities within a broader historical context. State constitutional amendments such as Proposal 2 are not uncommon in American history. In reaction to calls for reform from a minority group – whether it be the end of slavery, the enactment of non-discrimination laws, or the adoption of voluntary programs of racial integration – the majority has often responded by attempting to prevent the debate from occurring, by denying members of the minority group the opportunity to participate in the political process, or by making it impossible for the government to adopt the reform. State constitutional amendments like Proposal 2 are unconstitutional because they deny minority groups the equal right to achieve their goals through the normal political process.

ARGUMENT

I. CIVIL RIGHTS MOVEMENTS ARE EXERCISES IN DEMOCRACY

Movements for civil rights express the deepest yearnings of Americans for fundamental fairness and reflect our enduring faith in democracy. These struggles have often commanded the attention and consumed the energy of entire generations of American citizens. Carrie Chapman Catt described the women's suffrage movement in these words:

> "To get the word 'male' in effect out of the Constitution cost the women of the country fifty-two years of pauseless campaign... During that time they were forced to conduct fifty-six campaigns of referenda to male voters; 480 campaigns to get Legislatures to submit suffrage amendments to voters; 47 campaigns to get State constitutional conventions to write woman suffrage into state constitutions; 277 campaigns to get State party conventions to include woman suffrage planks in party platforms, and 19 campaigns with 19 successive Congresses." Carrie Chapman Catt and Nettie Rogers Shuler, *Women Suffrage and Politics* 107 (New York, Chas. Scribners Sons, 1923).

Peaceful change is possible only if the democratic process is permitted to operate on a non-discriminatory basis. A temporary majority may not defend its privileges by making it impossible for the government to respond to the minority.

II. WHEN CIVIL RIGHTS MOVEMENTS BEGIN TO ACHIEVE VICTORIES, THE TEMPORARY MAJORITY OFTEN RESPONDS BY ATTEMPTING TO MAKE IT MORE DIFFICULT FOR MINORITIES TO ACHIEVE THEIR GOALS THROUGH THE DEMOCRATIC PROCESS

When a movement for civil rights begins to make progress and accumulates victories in the legal and legislative arenas, the majority of the public pushes back and resists the minority's claims for equal opportunity. Favorable court decisions may be reversed and civil rights laws may be repealed. This back-and-forth interaction, the slow and halting pace of human progress, is to be expected within any adversarial system of justice or democratic political process. It is of course legitimate for the majority to assert its views both in the courts and before political bodies in seeking to persuade judges, legislators, and other public officials that the minority should not be granted the rights or opportunities they seek.

However, there is another common tactic – an illegitimate one – that is often utilized by members of a then-existing majority who resist reform. That is to distort the political process to make it more difficult for the minority than it is for the temporary majority to obtain the passage of laws or adoption of policies that reflect its views or interests. These tactics take many forms: restrictions on freedom of speech, denial of voting rights, or laws that constrain the authority of governmental institutions to enact reforms sought by the minority. Proposal 2 is an example of the third type of illegitimate tactic.

It was measures like Proposal 2 that led to the Civil War. The Civil War erupted in part because the southern states adopted amendments to their state constitutions that made it impossible to limit or abolish slavery through the democratic process. As a result, the conflict over slavery was transformed from a social, political, and economic contest into a military confrontation. The Equal Protection Clause of the Fourteenth Amendment was adopted to overrule these types of barriers to the political success of minorities, and to prohibit these types of laws from being enacted in the future.

III. DURING THE ANTEBELLUM PERIOD, SUPPORTERS OF SLAVERY ADOPTED LAWS AND STATE CONSTITUTIONAL AMENDMENTS THAT MADE IT IMPOSSIBLE FOR SLAVERY TO BE ABOLISHED THROUGH THE DEMOCRATIC PROCESS, THUS LEADING TO THE CIVIL WAR

The purpose of the Fourteenth Amendment becomes more clear when we consider the nature of the political crisis that led to the Civil War.

Many people in the antislavery movement hoped to persuade the people of the south to reject slavery. To achieve that purpose, antislavery advocates published works intended to stoke debate and stimulate democratic action. See, *e.g.*, Angelina Grimke, *Appeal to the Christian Women of the South* (1836) (contending that slavery is contrary to moral and religious teachings); Hinton Helper, *The Impending Crisis In the*

South (1857) (addressed to the non-slaveholding whites of the south and contending that slavery was harmful to their economic interests). However, instead of generating a robust debate on slavery in the south, these works were banned and burned. *See e.g.*, An Act to Suppress the Circulation of Incendiary Publications, ch. 66, 1836 Va. Acts 44-45 (outlawing antislavery books and speeches); Shannon D. Gilreath, *The Technicolor Constitution: Popular Constitutionalism, Ethical Norms, and Legal Pedagogy*, 9 Tex. J. Civ. Lib. & Civ. Rts. 23, 34 fn. 63 (2003) (Grimke's *Appeal* publicly burned by South Carolina postmasters). The censorship of dissent over the issue of slavery precluded the use of the democratic process to abolish the institution. State constitutional amendments prohibiting the abolition of slavery had a similar effect.

The southern states had not always prohibited public discussion about the merits of slavery. In January and February of 1832, in the wake of the Nat Turner rebellion, the Virginia General Assembly earnestly debated a bill that would have instituted a plan of gradual emancipation of slaves within the state. The bill was defeated by a margin of 73-58. See Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 Chi-Kent L. Rev. 1113, 1128 (1993). It was the last time that a state that would eventually join the Confederacy submitted the issue of slavery to the political process.

In the 1830s and 1840s southern attitudes towards slavery hardened and a number of laws were adopted that would make it impossible to resolve the continued

existence of slavery through the democratic process. Free negroes lost the right to vote (see North Carolina History Project, Constitution of 1835, at http://www.northcarolinahistory.org/commentary/32/entry; and NCPedia, John C. Sanders, NC Constitutional History 1776-1866, at http://ncpedia.org/government/constitution1776); it was forbidden to teach slaves to read and write (Curtis, *The 1859 Crisis, supra* at 1123); and, finally, it became illegal to promote the abolition of slavery. (See Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (2000), pages 131-154 (describing the efforts of southern states to make public opposition to slavery illegal); *id.* at 194-215 (describing legal theories supporting suppression of slavery agitation); *id.* at 271-299 (describing the southern response to Helper's *Impending Crisis* and the trials of Daniel Worth in North Carolina for circulating it). Even at the federal level laws and policies were adopted to silence antislavery views. The "Gag Rule" was adopted prohibiting discussion of abolition in Congress, and the Post Office refused to carry antislavery newspapers or other materials advocating emancipation into the southern states. (See Curtis, *Free Speech,* pages 155-181 (describing federal efforts to silence opposition to slavery)).

Foremost among the legal changes withdrawing slavery from the political process were amendments to the constitutions of many of the states that later formed the Confederacy. Those amendments withdrew the power of the state legislatures to abolish slavery. The Virginia Constitution of 1851 provided:

> The general assembly shall not emancipate any slave, or the descendant of any slave, either before or after the birth of such descendant. (Vir. Const. of 1851, art. IV, § 21)

This constitution also granted the state legislature the power to "impose such restrictions and conditions as they shall deem proper on the power of slave-owners to emancipate their slaves ...." (Vir. Const. of 1851, art. IV, § 20). According to historian Kenneth Stampp, "Most southern constitutions prohibited the legislatures from emancipating slaves without both the consent of the owners and the payment of a full equivalent in money." Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* 198 (1956). See, *e.g.*, Ala. Const. of 1819, art. VI, § 1; Ark. Const. of 1836, art. VII, § 1; Fla. Const. of 1838, art. XVI, § 1; Miss. Const. of 1817, art. VI, § 1; Tenn. Const. of 1834, art. II, sec. 31; Tex. Const. of 1845, art. VIII, § 1.

Abraham Lincoln condemned these state constitutional amendments in his famous "Hundred Keys" speech in Springfield, Illinois, on June 26, 1857. Lincoln observed that most Americans of the revolutionary generation believed that slavery was wrong and expected its eventual extinction, but that the present generation had enacted laws – including amendments to their state constitutions – that made slavery a virtual "prison house." Speaking of the Revolutionary period, Lincoln said:

> In those days, as I understand, masters could, at their own pleasure, emancipate their slaves; but since then, such legal restraints have been made

> upon emancipation, as to amount almost to prohibition. In those days, Legislatures held the unquestioned power to abolish slavery in their respective States; but now it is becoming quite fashionable for State Constitutions to withhold that power from the Legislatures. 2 *Collected Works of Abraham Lincoln* 404 (Roy P. Basler, ed. 1953).

Lincoln employed a powerful metaphor to express the fact that the purpose of these state constitutional amendments was to make it impossible to abolish slavery:

> They have him in his prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is. *Id.*

The Civil War is the central tragedy of American history and the central failure of American democracy. Why were our ancestors unable to resolve the question of slavery peacefully? Why were we unable to abolish slavery through the democratic process?

Contemporaries believed that democracy failed because it was not given the opportunity to succeed. In a letter to John C. Calhoun, Francis Lieber wrote:

> "If you fear discussion, if you maintain that the South cannot afford it, then you admit at the same time that the whole institution is to be kept up by violence only, and is against the spirit of the times and unameliorable, which means, in other words, that violence supports it, and violence will be its end." Curtis, *Free Speech*, at 193.

In an 1864 editorial Harper's Weekly drew a similar conclusion about the cause of the war:

> "It was the knowledge that, if the right of free speech, guaranteed by the Constitution, were tolerated in the South, slavery would be destroyed by the common-sense of the Southern people, which made Calhoun and all his school insist upon suppressing it. Consequently, in its most important provision, the Constitution has been a dead letter in every slave State for more than thirty years." "The Truth Confessed," Harper's Wkly., Jan. 16, 1864, at 34 in Richard L. Aynes, 18 Journal of Contemporary Legal Issues 77, *Enforcing the Bill of Rights Against the States: The History and the Future* (2009).

Present-day historians agree. Michael Curtis states:

> "Vocal domestic Southern opposition to slavery reached a brief high water mark in the 1830s

> and thereinafter began to recede in much of the South. Southern laws and vigilance committees silenced abolition expression and did their best to take opposition to slavery off the Southern political agenda. As a result, the institution could only be dislodged by violence." Curtis, *Free Speech*, at 192-193.

Avery Craven states, "The most significant thing about the American Civil War is that it represents a complete breakdown of the democratic process." Avery Craven, *The 1840's and the Democratic Process*, Journal of Southern History XVI (1950), pp. 161-76, in Kenneth M. Stampp, *The Causes of the Civil War* 195 (Simon & Schuster 1991). Michael Holt agrees: "The Civil War represented an utter and unique breakdown of the normal democratic political process." Michael F. Holt, *The Political Crisis of the 1850s* 1 (Norton, 1978).

In the absence of the Fourteenth Amendment, the antebellum courts were powerless to protect the democratic process against state laws and practices that prevented citizens and legislators from addressing the evils of slavery, and this judicial powerlessness led directly to the Civil War. A leading objective of the newly-formed Republican Party was to incorporate the principles of the Declaration into the Constitution because this was "essential to the preservation of our republican institutions." See Plank 2 of the 1860 Republican Party Platform in John Wooley and Gerhard Peters, The American Presidency Project, *The Republican Platform of 1860*, at http://www.presidency.ucsb.edu/ws/index.php?pid=29620#axzzlalRmV7UZ. Following the war under the leadership of Republicans in Congress the nation

adopted the Fourteenth Amendment which was designed, intended, and understood to prohibit interference with the democratic operation of the political process. Despite this, however, for many decades the states continued to adopt anti-democratic laws and state constitutional amendments that were intended to make it impossible for minorities to achieve progress through the democratic process. Nearly a century passed before the Supreme Court fulfilled its duty under the Fourteenth Amendment and declared these laws unconstitutional.

IV. FOR MORE THAN A CENTURY AFTER THE CIVIL WAR THE OPPONENTS OF CIVIL RIGHTS AND RACIAL INTEGRATION SOUGHT TO REMOVE THESE SUBJECTS FROM CONSIDERATION BY THE DEMOCRATIC PROCESS. THE SUPREME COURT EVENTUALLY STUCK DOWN THESE LAWS AND CONSTITUTIONAL AMENDMENTS THAT DISTORTED THE POLITICAL PROCESS.

For more than a century after the Civil War similar illegitimate tactics were employed to distort the political process and delay the attainment of equal rights for black citizens and to block integration. These tactics included restrictions on freedom of speech, impediments to the right to vote, and super-majoritarian barriers to government action. As before the Civil War, these tactics both limited discussion of the issues and interfered with the democratic process. These tactics have come to be known as the "Mississippi Plan." The noted historian C. Vann

Woodward describes the three stages of the Mississippi Plan, which were widely copied across the south. In 1875, white mobs terrorized African-American candidates and voters; in 1890, state laws and constitutional amendments enacting poll taxes, literacy tests, and property qualifications were adopted to deprive African-Americans of the right to vote; and in 1954 the Citizens Councils were formed "to wage unrelenting war in defense of segregation." C. Vann Woodward, *The Strange Career of Jim Crow* 152 (Oxford University Press 1966). In 1898 the Supreme Court upheld the amendments to the Mississippi constitution that were used to bar African-Americans from exercising the franchise. *Williams v. Mississippi*, 170 U.S. 213 (1898). These tactics were successful in depriving African-Americans of the opportunity to participate in the political process. For example, in 1896, there were 130,334 African-Americans registered to vote in the State of Louisiana; in 1904, there were only 1,342. Woodward, at 85. In the 1950's, only two percent of adult African-Americans in the State of Mississippi were registered to vote. Woodward, at 174. State constitutions from this era also required the separation of children by race in public schools. See, *e.g.*, Ala. Const. of 1901, Art. XIV, § 256 ("Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race."); Geo. Const. of 1877, art. VIII, § 1 ("The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races.")

The foregoing portions of this brief describe how in response to the antislavery movement the southern states made changes to their constitutions limiting the

power of their state legislatures to abolish slavery, and how in response to Reconstruction states adopted laws and constitutional amendments limiting the franchise and requiring segregation of the races. The same strategy was employed during the modern civil rights era. After *Brown v. Board of Education* was decided a number of states enacted laws and constitutional amendments that were intended to make it impossible for their public institutions to comply with that decision. See *e.g.*, Ala. Const., art. XIV, § 256 amend. 111 (1956) (eliminating the requirement that the state provide every child a free public education and permitting the state to turn over land and buildings to private educational institutions); Opinion of the Justices No. 333, 624 So. 2d 107 (Ala. 1993), referencing *Alabama Coalition for Equity, et a. v Hunt*, CV-90-883 (striking down Amendment 111 because it was enacted for a discriminatory purpose); Virginia Pupil Placement Act, VA Code. §22-232.1 *et seq.* (1950), repealed in 1966 (divesting local school boards of authority to assign children to particular schools and placing that authority in a State Pupil Placement Board which without exception assigned children to separate schools based upon their race); see generally *1958 American Jewish Year Book* pp.44-68, available at http://www.ajcarchives.org/AJC_DATA/Files/1958_4_USCivicPolitical.pdf, (describing the laws and constitutional amendments adopted in several states to oppose racial integration of the public schools); *id.* at 69 (table entitled "Major Types of Legislation Adopted in Eleven Southern States Since 1952 Designed to Prevent or Control Desegregation," reprinted from *Southern School News*, September 1957). These types of laws, like Proposal 2, are unconstitutional under the Equal Protection Clause because they prohibit state-

supported educational institutions from exercising their discretion to choose to adopt policies of racial integration.

After 1938 the Supreme Court began to address many of the abuses that had accumulated during the Jim Crow era. In a series of cases, the Court struck down barriers to minorities' freedom of expression and the right to vote, as well as barriers to the adoption of anti-discrimination laws and policies of racial integration. A theme that is common to many of these cases is that the Court was restoring democracy by striking down laws that interfered with the right of minorities and their allies to seek justice through the normal political process. These decisions are consonant with what John Hart Ely has called "representation-reinforcement" – the role of the courts as the guardian of democracy. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 87-104 (1980).

The first series of cases upheld the First Amendment rights of minorities to advocate in the political process. In *NAACP v. Alabama*, 357 U.S. 449 (1958) and *NAACP v. Button*, 371 U.S. 415 (1963) the Court struck down Alabama and Virginia laws that were intended to hinder the operation of the nation's leading civil rights organization. In *Edwards v. South Carolina*, 372 U.S. 229 (1963) and *Cox v. Louisiana*, 379 U.S. 536 (1964) the Court upheld the right of citizens to engage in peaceful protests in support of civil rights. And in *New York Times v. Sullivan*, 376 U.S. 254 (1964) the Court prohibited the states from using the law of libel to silence newspapers from covering the civil rights movement.

The second set of cases reaffirmed and protected the right to vote and the effectiveness of those votes. In *Smith v. Allwright*, 321 U.S. 649 (1944) the Supreme Court abolished white primaries, thus opening the nomination process to African-Americans. See also *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down malapportionment of the Alabama legislature); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (striking down Virginia poll tax); and *Rogers v. Lodge*, 458 U.S. 615 (1982) (striking down an at-large representation scheme in a rural Georgia county). In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court considered the constitutionality of an Alabama constitutional provision adopted in 1901 that barred felons from voting. The Court found this provision to be unconstitutional because it was adopted for the purpose of disenfranchising African-Americans. *Id.* at 229 (stating, "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks."). In all of these cases the Supreme Court removed impediments to voting and protected the rights of all citizens, regardless of race, to participate in the political process on an equal basis.

In a third set of cases, most closely analogous to the issue at hand, the Court invalidated barriers to minorities achieving success in the political process, including constitutional amendments like Proposal 2. The Supreme Court considered the constitutionality of three such popularly-enacted laws and found them all to be invalid. In the first case, the Court struck down a California constitutional amendment that prohibited the state legislature from enacting fair housing laws. *Reitman v. Mulkey*, 387 U.S. 369 (1967). In a second

case, the Court struck down an amendment to the city charter of Akron that made it more difficult to enact fair housing laws. *Hunter v. Erickson*, 393 U.S. 395 (1969). In a third case, the Court rejected a statewide initiative prohibiting school districts from voluntarily busing children for integration. *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). In all of these cases, the laws had a similar effect to Proposal 2 – blocking minorities from using the democratic process to secure the adoption of anti-discrimination measures or policies promoting racial integration. Accordingly, in all of these cases the laws were declared unconstitutional.

In *Romer v. Evans*, 517 U.S. 620 (1996) the Supreme Court announced a simple guiding principle that explains the decisions in *Reitman*, *Seattle School District*, and *Hunter*. In *Romer* the Court stated:

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. 517 U.S., at 633.

In all of these cases the Supreme Court properly struck down state laws that interfered with the equal right of minority groups to end discrimination and promote integration.

V. PROPOSAL 2 IS SIMILAR TO OTHER STATE CONSTITUTIONAL AMENDMENTS THAT HAVE BEEN PROPERLY DECLARED UNCONSTITUTIONAL

Michigan Proposal 2 makes it more difficult for public universities to integrate their institutions as allowed by this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). The state constitutional amendment makes it more difficult for African-Americans and other racial minorities to "seek aid from the government" in their admission to state universities. The fact that Proposal 2 is a product of direct democracy does not diminish the fact that it is profoundly anti-democratic. It is but one example of the long history of discriminatory state constitutional amendments and other laws adopted by a temporary majority to prevent the minority from being able to make progress in civil rights through normal governmental channels. The closest analogy to Proposal 2 is the statewide initiative struck down in *Washington v. Seattle School District* that prohibited school districts from voluntarily adopting programs of busing to integrate the public schools.

Throughout American history movements for civil rights have sought to transform their goals into law by pursuing justice in the courts and the adoption of legislation and official policies through the political process. While it is legitimate for a majority to refuse to adopt civil rights policies or to repeal policies that have already been adopted, it is illegitimate for a temporary majority to enact constitutional amendments such as Proposal 2 that distort the political process to make it more difficult for the minority to achieve its goals.

CONCLUSION

The Court should affirm the decision of the Sixth Circuit and rule that Michigan Proposal 2 is unconstitutional under the Equal Protection Clause because it makes it more difficult for minorities to achieve integration of the public universities through normal political and administrative processes.

Respectfully Submitted,

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August 28, 2013

AMICUS CURIAE BRIEF

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION, AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PAUL FINKELMAN AND 75 OTHER HISTORIANS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

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Amici are therefore well qualified to address whether the history of the Fourteenth Amendment supports this Court's precedents holding that the Amendment precludes a state from imposing special burdens on a minority group's ability to access the political process.

SUMMARY OF ARGUMENT

The history surrounding the Fourteenth Amendment demonstrates that the Amendment's Framers intended to eliminate special burdens on racial minorities' ability to seek legislative change such as the enactment of race-conscious affirmative action.

In the immediate aftermath of the Civil War, newly freed slaves found themselves unable to influence the legislatures of the former Confederate states. On one side, freedmen were bounded by Northerners, some of whom were not yet interested in granting blacks the franchise.

On the other side, freedmen who sought to persuade their neighbors and countrymen to support

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[2] Institutional affiliations are provided for identification purposes only.

their reform initiatives and policy goals faced systematic exclusion, as well as outright violence, from Southern Democrats and former Confederates hostile to the notion of black freedom—let alone self-determination. Northern blacks, most Northern white Republicans, and the small number of white Republicans and Unionists who lived in the South supported the freedmen's efforts.

That support produced the Civil Rights Act of 1866 and the Fourteenth Amendment, both of which were designed to eliminate obstacles adopted by the states to prevent freedmen from realizing their goals through state political processes. See U.S. Const. amend. XIV; Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). The Fourteenth Amendment thus includes a guarantee that minority groups will not be subject to special burdens in pursuing their interests through state legislation.

ARGUMENT

THE FOURTEENTH AMENDMENT'S HISTORY CONFIRMS THAT THE EQUAL PROTECTION CLAUSE PRECLUDES STATES FROM ERECTING SPECIAL OBSTACLES TO RACIAL MINORITIES' EFFORTS TO OBTAIN BENEFICIAL LEGISLATION.

This Court held in *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), that the Fourteenth Amendment's Equal Protection Clause prohibits a state from adopting "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." 458 U.S. at

467 (internal quotation marks and citations omitted). See also *Hunter* v. *Erickson*, 393 U.S. 385 (1969).

The en banc Sixth Circuit held in this case that Michigan's Proposal 2 violates that principle. Pet. App. 21a-22a. Petitioners argue that if that holding is correct, this Court should overrule *Seattle School District* on the ground that it incorrectly interpreted the Equal Protection Clause. See Pet. Br. 37-38.

But the history relevant to the adoption of the Fourteenth Amendment confirms the correctness of this Court's precedents. A core concern animating the proposal, passage, and ratification of the Fourteenth Amendment was ensuring that democratic majorities in the states did not hamper freedmen (as former slaves were then called) from exercising influence in governmental processes, including the consideration of legislation, in support of their rights and interests.

To understand that core concern—and why it was so important to the Congress, state legislatures, and individuals who supported the Amendment—the Court should look both to "the history leading up to the Civil War," and also to "the legal repression and brutal racial violence that took place" in the South "immediately after the Civil War ended." Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 Akron L. Rev. 671, 671 (2003).

There is no "Rosetta Stone" in the "records of the Thirty-Ninth Congress" (which proposed, revised, and sent the Fourteenth Amendment to the states) that comprehensively explains the Amendment. Finkelman, 36 Akron L. Rev. at 671. It is thus critically important to focus on the "history leading up to" the drafting of the Amendment to inform its

meaning. Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 Temp. Pol. & Civ. Rts. L. Rev. 389, 390 (2004). Members of Congress had that history fresh in their minds, having "received reports of these conditions" in the South "while they were framing the Fourteenth Amendment and the Civil Rights Act of 1866." Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 Am. Hist. Rev. 45, 51 n.25 (1987). See also Alexander Tsesis, *We Shall Overcome: A History of Civil Rights and the Law* 99-105 (2008).

A. Free Blacks' Participation In The Political Process Both Before And During The Civil War.

Before the Civil War, the Northern states did not uniformly grant the franchise to freedmen; voting restrictions were widespread. "Only five states in New England allowed blacks to vote, and only seven percent of the Northern black population lived in these states." Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 Cardozo L. Rev. 2153, 2162 (1996). Free blacks could also vote in New York (but not on the same basis as whites), and could also vote for some purposes in Michigan. Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 Rutgers L.J. 415, 425 (1986).

But even where free blacks could not pursue their civil, political, and economic interests by voting in elections, they could and did speak up for themselves—asking for or insisting on receiving more rights. Free blacks could (and did) "agitate, petition, publish their views in newspapers and pamphlets, hold public meetings, and in many other

ways seek to persuade the white majority that they deserved better." Finkelman, 17 Rutgers L.J. at 480. In antebellum debates, these voices formed an integral part of the abolitionist chorus that framed the nation as being at the crossroads—whether it would become a more free republic, or remain a captive of the Slave Power.

Midway through the war, President Lincoln and his generals came to understand that "slavery was incompatible with both a free country and the smooth operation of military forces suppressing the rebellion." Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 Sup. Ct. Rev. 349, 376-77. With "military victory likely" and other perceived necessary preconditions for emancipation satisfied (*id.* at 386), Lincoln freed slaves in unoccupied rebel states or portions of rebel states (see Emancipation Proclamation, No. 17, 12 Stat. 1268 (Jan. 1, 1863)).

Before the end of the war, free blacks in the North and the South alike began to participate in political debate, arguing strongly that suffrage rights were a critical next step beyond presidential and constitutional emancipation. See Wang, 17 Cardozo L. Rev. at 2171 (describing an 1863 convention of free blacks in Kansas, and a 1864 delegation from New Orleans to meet with politicians in Washington D.C.). Delegates to a "national black convention" in 1864 "established a National Equal Rights League" that sought to pursue "abolition, equality before the law, and suffrage." Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 27 (1988).

These and other efforts to persuade Republicans and other sympathetic Northern politicians began to

reap some dividends: "Joined by white abolitionists and Republicans, African-Americans won repeal of discriminatory laws in California and Illinois, convinced Massachusetts legislators to ban discrimination in public accommodations, and launched an all-out effort for the ballot." Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 Cardozo L. Rev. 2115, 2120 (1996).[3] And more broadly, the arguments that free blacks were making began to resonate strongly with Republican lawmakers (see Wang, 17 Cardozo L. Rev. at 2171), including those Radical Republicans who would later be instrumental in proposing and sending the Fourteenth Amendment to the states.

B. Post-War Obstacles To Blacks' Participation In Political Debate In The Former Confederacy.

As the fog of the war began to clear, freedmen were optimistic about the possibility of throwing off the yoke of slavery. Across the former Confederacy blacks "held mass meetings and religious services unrestrained by white surveillance" and the "innumerable regulations" imposed by the Southern slave codes. Foner, *Reconstruction* at 79. And nearly ten percent of the victorious Union army was black. See Finkelman, 36 Akron L. Rev. at 680.

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[3] Significantly, even though freedmen began making political gains, Northern voters were not yet keen on extending suffrage to freedmen. They opposed the idea for a number of reasons, including federalism, concerns about stirring up support for women's suffrage, and a perceived lack of sophistication among newly freed former slaves. See, *e.g.*, Wang, 17 Cardozo L. Rev. at 2171.

Many black former Union Army and Navy veterans in particular would reasonably have assumed that in consideration for their service, they would attain new civil and political rights. More broadly, they anticipated that emancipation would entail not only the right not to serve a master, but also the logically connected rights of political autonomy and self-government. See Steven F. Miller *et al.*, *Between Emancipation and Enfranchisement: Law and the Political Mobilization of Black Southerners during Presidential Reconstruction, 1865-1867*, 70 Chi.-Kent L. Rev. 1059, 1059 (1995).

But the conditions under which President Johnson offered amnesty and readmission to the Union created significant obstacles to achieving that result. Amnesty was available to most former Confederates who swore allegiance to the Union (see Proclamation No. 37, 13 Stat. 758 (1865)), and President Johnson established minimal conditions under which the former rebel states would be eligible for readmission to the union (see, *e.g.*, Proclamation No. 38, 13 Stat. 760 (1865)). Although Southern whites had to "conced[e] that blacks were no longer the slaves of individual masters," they "intended to make [freedmen] the slave of society." Finkelman, 36 Akron L. Rev. at 681 (internal quotation marks omitted).

The white supremacists who obtained amnesty were able to use newly called state constitutional conventions and other legal reforms to implement obstacles to blacks' participation in the political process. See Miller, 70 Chi.-Kent L. Rev. at 1060-61. Blacks' petitions to the 1865 constitutional convention in South Carolina, for example, were uniformly "tabled * * * without being read," while

petitions two months later to the state legislature were rejected on grounds that the grievances should have been raised at "the constitutional convention" that had rejected them. Thomas Holt, *Black over White: Negro Political Leadership in South Carolina during Reconstruction* 22 (1977). Because blacks lacked the franchise, these additional limits on their political influence provided white supremacists the opportunity to impose disabilities on the newly freed black citizens.

These disabilities included the infamous "Black Codes," which stripped blacks of rights to contract, to hold property, to rent in certain locations, or otherwise to live and work as free and independent people. See Finkelman, 36 Akron L. Rev. at 682-84; see also Miller, 70 Chi.-Kent L. Rev. at 1061 ("Less dramatic but equally significant were myriad revisions in state criminal codes, domestic relations laws, municipal licensing regulations, and tax policies—changes that, although often couched in racially neutral language, were intended to apply primarily or exclusively to the former slaves.").

Moreover, the Black Codes were aimed specifically at blacks' participation in governmental processes. One frequently-adopted provision restricted blacks' ability to testify in court, a disability that imposed significant limitations on blacks' personal security and their exercise of civil rights.

For example, Alabama's code of 1865-66, declared that "all freedmen, free negroes, and mulattoes" had "the right to be sue and be sued, plead and be impleaded." Act of Dec. 9, 1865, No. 86, § 1, 1865-66 Ala. Acts 98. Although that law (and others like it) granted a civil right—access to the courts—

unavailable to slaves and free blacks in the antebellum South, the right was dangerously incomplete, for it permitted blacks to testify "only in cases in which freedmen, free negroes, and mulattoes are parties, either as plaintiff or defendant." *Ibid.*; see also, *e.g.*, Act of Nov. 25, 1865, ch. IV, § 4, 1865 Miss. Laws 83; Act of Dec. 15, 1865, tit. 31, § 3, 1865-66 Ga. Laws 239; Act of Feb. 20, 1866, ch. 24, § 1, 1865-66 Va. Acts 89-90.

These laws did not permit blacks to testify in cases between whites, and thereby posed a grave threat to their civil rights: "southern vigilantes could kill a white Republican or a white teacher of blacks in front of black witnesses, and those witnesses could not testify at the trial." Finkelman, 36 Akron L. Rev. at 684.[4] The testimony laws imposed a real burden on blacks by deterring support of white allies, who had suffrage rights and louder political voices.

These threats were no abstract concern. Racial violence in the South was endemic in the immediate aftermath of the Civil War. Congress took note, authorizing a Joint Committee on Reconstruction to investigate racial violence. Among its members was Congressman John Bingham, the principal drafter of Section 1 of the Fourteenth Amendment. See Finkelman, 36 Akron L. Rev. at 686; Tsesis, *We Shall Overcome* at 109-12.

The Committee took testimony from across the South, and its Report described systematic "violence

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[4] The geographic distribution of these unequal laws was nothing new. Unlike in the North, where "all but four northern states by 1860" had given blacks this "most important due process right—to testify in court *without racial restrictions*, * * * only in Louisiana" could antebellum free blacks exercise that right. Finkelman, 17 Rutgers L.J. at 451 (emphasis added).

and denial of rights": "[b]lacks disappeared, were beaten, maimed, and killed. Legislatures passed laws to prevent them from owning land, moving to towns, voting, testifying in all court cases, or in any other way asserting and protecting their rights as free people." Finkelman, 36 Akron L. Rev. at 690; see generally H.R. Joint Committee on Reconstruction, 39th Cong., *Report of the Joint Committee on Reconstruction* (1st Sess. 1866).

Freed blacks fought back against these restrictions, seeking to persuade their neighbors to enact beneficial legislation and policies. Those freedmen who were "educated and literate," and others who were "formally untutored but distinguished by property holding, workplace skill, religious standing, or rhetorical ability," gained the attention of their communities and served in local and regional conventions. Miller, 70 Chi.-Kent L. Rev. at 1063; see generally Howard N. Rabinowitz, ed., *Southern Black Leaders of the Reconstruction Era* (1982); Holt, *Black over White*, *supra*; cf. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 241 (1998) ("[T]he exclusion of blacks from formal political rights like voting underscored the importance of their participation in other organizations, like churches, that could help gather the voice of the community.").[5]

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[5] A good number of these men—and they were mostly all men, in contrast with the structure of slave culture in which men and women were equally powerless (see Foner, *Reconstruction* at 85-87)—would later go on to participate in "the flowering of African-American politics during Radical Reconstruction," owing to their experiences giving voice to their communities during presidential Reconstruction (Miller, 70 Chi.-Kent L. Rev. at 1063). Black advocates' growing

These efforts were part and parcel with a "broader theme" of blacks' "quest for independence from white control, for autonomy both as individuals and as members of a community itself being transformed as a result of emanicipation." Eric Foner, *Rights and the Constitution in Black Life during the Civil War and Reconstruction*, 74 J. Am. Hist. 863, 870 (Dec. 1987). As Foner explains, "[a]chieving a measure of political power seemed indispensible to attaining the other goals of the black community, including access to the South's economic resources, equal treatment in the courts, and protection against violence." *Id.* at 871-72.

Violence was often aimed at those blacks who sought to engage governmental processes, including legislative reform: for example, "twice in 1865, [whites] assaulted peaceful black meetings, one a gathering to select delegates to a statewide black convention, the second a meeting of a black 'secret society' addressed by a speaker from the state capital." Foner, *Reconstruction* at 120. Whites viewed the exercise of political activity by freedmen and their allies as an existential threat: "To white observers schooled in slave society, black men and women convening in secret evoked the specter of servile insurrection." Miller, 70 Chi.-Kent L. Rev. at 1072.

Thus, not only did the Black Codes threaten to undo the hard-fought victory in the War, but they carried an additional insult through the "political process that had allowed them to be enacted." Miller, 70 Chi.-Kent L. Rev. at 1062. Freedmen bristled at

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"sophistication" allowed freedmen "a stronger voice in party affairs." Nieman, 17 Cardozo L. Rev. at 2130.

the fact that the former rebels "who had fought to destroy the Union" were back at the helm of state and local politics, while loyal blacks (including former Union soldiers and sailors) "were denied a voice in electing the men who governed them and enacted the laws they had to obey." *Ibid.*

The freedmen turned, instead, to the national government—embarking on an informal process of persuading policymakers in Washington D.C. and in sympathetic, Republican-controlled Northern states' legislatures. The freedmen's goal was twofold: first, achieving beneficial legislation that would improve the lot of the often indigent former slaves; and second, alleviating the special burdens that the states had imposed on black civil and political rights—including by extending the franchise to blacks.

During Presidential Reconstruction, for example, freedmen petitioned "President Johnson directly, hoping he would give their rights and aspirations as much consideration as those of amnestied traitors." Miller, 70 Chi.-Kent L. Rev. at 1062. When Johnson paid them no heed, they appealed to the legislature. To that end, "as Congress convened its first postwar session in December 1865, northern blacks sent a handful of lobbyists to Washington to press legislators for a federal guarantee of equality." Nieman, 17 Cardozo L. Rev. at 2121 (citing *Black Men Intend to Help Themselves*, N.Y. Times, Dec. 11, 1865, at 8). Blacks also attended debates about civil rights at the U.S. Capitol, "where Republican lawmakers had" opened "the spectators' galleries" to them. *Id.* at 2124-25.

The freedmen's presence in the halls of power in Washington helped bring into sharp relief the way in

which freedmen were subject to a political system in the States in which they had few civil rights and, with rare exceptions even in the North, no formal role to play.

C. Congress Was Aware Of And Responded To The Obstacles To Freed Blacks' Ability To Obtain Appropriate Legislative Relief In The States.

The freedmen's inability to petition state legislatures effectively, combined with their advocacy before the national government, was a key factor leading to enactment of the Civil Rights Act of 1866, with its unambiguous intent to "destroy" all the discriminatory measures that the Southern states had implemented since the war. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., 474 (1866) (statement of Sen. Lyman Trumbull).

That same Congress also proposed, drafted, and passed the Fourteenth Amendment. The Amendment was designed in part to provide constitutional authority for the Civil Rights Act of 1866.[6] But it was also the product of a compromise of moderate and Radical Republican forces in Congress. Some were ready to support extending suffrage to freedmen,

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[6] It is canonical history that one of the goals of the Fourteenth Amendment was to annul permanently the Black Codes, which the Civil Rights Act was similarly intended to ban. See, *e.g.*, Finkelman, 13 Temp. Pol. & Civ. Rts. L. Rev. at 400; Timothy S. Bishop, Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 Nw. U. L. Rev. 142, 150-51 (1984); Cong. Globe, 39th Cong., 1st Sess., 340 (1866) (statement of Sen. Henry Wilson) (explaining this was one of the goals of the Civil Rights Act of 1866, which became Section 1 of the Fourteenth Amendment); see also Amar, *The Bill of Rights* at 162.

while many others were hesitant. See note 3, *supra*. When the Civil Rights Act of 1866 had not extended the franchise to blacks, for example, "[t]he fact that most Northern states still withheld suffrage from blacks was certainly on the minds of many Republicans." Wang, 17 Cardozo L. Rev. at 2190.

Accordingly, in framing the Fourteenth Amendment, Congress distinguished between the "political" rights of suffrage and "civil" rights expressly protected by the Amendment, which included more indirect methods of seeking beneficial policies and reforms. This distinction was not without its critics: "The essential reason that Radical Republicans criticized the Fourteenth Amendment as too moderate was its failure to provide the same protection for voting rights as for civil rights." Kaczorowski, 92 Am. Hist. Rev. at 49.

In the final days of the Thirty-Ninth Congress's debates on the Fourteenth Amendment in the summer of 1866, word reached Washington of extensive mob violence in Memphis. Scores of blacks, many of whom were recently discharged Union soldiers, were killed by white ex-Confederates. Representative Thaddeus Stevens, an important framer of the Fourteenth Amendment and probably the most powerful Republican leader in the House of Representatives, "denounced the 'atrocity' during the final House debate on the Amendment." Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507, 569 (1991). Congress dispatched an investigatory committee, which issued a report submitted "six weeks after final congressional approval of the Fourteenth Amendment" (*id.* at 570)—too late to influence Congress, but with plenty

of time to lend support for broader efforts to bring justice to the freedmen through ratification of the Amendment.

The report noted, for example, that "it was impossible for a colored man in Memphis to get justice against a white man." 39th Cong., *Reports of the Committees of the House of Representatives, Report No. 101* 30 (1st Sess. 1866). The Memphis Riots and similar riots in New Orleans were fresh and prominent on the minds of the Congress that proposed the Fourteenth Amendment. And the violence further undermined Republican support for Andrew Johnson's Reconstruction policies—what historians call Presidential Reconstruction—giving legislators and the public alike reason to think that more drastic measures were needed to secure blacks' ability to influence Southern state governments.

The Radical Republicans secured massive electoral victories in 1866, as voters decisively rejected the influence of resurgent ex-Confederates and Johnson's program of Presidential Reconstruction—all while simultaneously expressing support for freedmen's rights. The Radical Republicans extended the Fourteenth Amendment's mantle of civil rights to political rights in the Reconstruction Acts. See Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (1867); Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (1867); Act of July 19, 1867, ch. 30, 15 Stat. 14 (1867); Act of Mar. 11, 1868, ch. 25, 15 Stat. 41 (1868). In these laws, Congress instituted military districts across the former Confederacy, and required those states to ratify the Fourteenth Amendment and grant voting rights to freedmen—even before the Fifteenth Amendment mandated such rights. See U.S. Const. amend. XV. The Army's primary role was

to ensure that the Southern states implemented suffrage and other Reconstruction efforts to protect minority participation in the political process. See generally Foner, *Reconstruction* at 266-67.

During this short-lived period of Radical Reconstruction, black activists around the country found their efforts at exerting influence outside the electoral system had begun to pay dividends. Black suffrage imposed by the Reconstruction Acts and enforced by the Army created opportunities for activists to stand for and win election to local, state, and even national offices. See Foner, *Reconstruction* at 281-94. And the effects permeated into the communities: "Under Republican rule," with blacks and their allies more firmly entrenched in state and local offices, "arrests and prosecutions of African-Americans for vagrancy were almost unknown. This denied planters and farmers one of the tools they had relied on during the early years of Reconstruction to compel blacks to enter into contracts on terms favorable to employers." Nieman, 17 Cardozo L. Rev. at 2131.

Sympathetic Congresses also undertook efforts to improve directly black communities' opportunities for advancement. It was widely understood that equal protection of civil rights entailed steps that would ensure freedmen could pursue economic independence: "Bingham and others in the majority on the Joint Committee [on Reconstruction] understood that they had to protect the life, liberty, safety, freedom, political viability, and property, of the former slaves." Finkelman, 13 Temp. Pol. & Civ. Rts. L. Rev. at 409. And in turn, increased educational opportunities provided a primary means by which freedmen and their children could improve

their station—giving them tools not only to prosper in the market, but also in the marketplace of ideas (and thereby to become more effective political advocates of their interests). Freedmen "needed to be able to express themselves in public and to organize politically. They needed equal schooling to participate in the political process." *Ibid.*

To that end, Reconstruction Congresses implemented race-conscious education reforms that were calculated to improve educational opportunities for blacks. In 1867, a year before the Fourteenth Amendment was ratified, Congress chartered Howard University, which was then "open to all races" yet was required by the Freedmen's Bureau as a condition of receiving federal aid to make "special provision for freedmen." Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 782 (1985); see also Dwight O.W. Holmes, *Fifty Years of Howard University: Part I*, 3 J. Negro Hist. 128, 136 (1918) (recounting that the Freedmen's Bureau paid approximately $500,000 to Howard). Congress promoted race-conscious programs in other colleges as well. See Scott Blakeman, *Night Comes to Berea College: The Day Law and African American Reaction*, 70 Filson Club Hist. Q. 3, 26 n.45 (1996).

What is more, the same Congress that approved the Fourteenth Amendment funded an array of additional race-conscious educational initiatives through the Freedmen's Bureau bills. See, *e.g.*, Act of July 16, 1866, ch. 200, 14 Stat. 173 (1866). As W.E.B. Du Bois wrote, "[t]he greatest success of the Freedmen's Bureau lay in the planting of the free school among Negroes, and in the idea of free elementary education among all classes in the

South." W.E.B. Du Bois, "The Freedmen's Bureau," 81 *The Atlantic*, Mar. 1901, at 361. This history of freedmen's education in the Reconstruction area therefore confirms the notion that among other evils, Congress was attempting to address in the Fourteenth Amendment the disparity of power caused by unequal access to economic opportunity and to the public square.

To be sure, blacks' political, economic, and educational gains during this era were short lived. As Du Bois wrote, "[t]he slave went free; stood a brief moment in the sun; then moved back again toward slavery." W.E.B. Du Bois, *Black Reconstruction in America, 1860-1880* 30 (Simon and Schuster 1999) (1935). The political crisis in 1876 over the contested Presidential election resulted in victory for Rutherford B. Hayes and the Republicans' withdrawal of support for Reconstruction. The compromise resulted in "a decisive retreat" from a model "of a powerful national state protecting the fundamental rights of American citizens." Foner, *Reconstruction* at 582.

Nevertheless, the Congress that proposed the Fourteenth Amendment and the people who ratified it in 1868 were very much aware of the systematic exclusion of black voters. They knew full well about the violence frequently directed at blacks who advocated on behalf of freedmen's rights. And they were familiar with the other, more subtle means used to prevent the freedmen's concerns—in particular promotion of race-conscious affirmative assistance of the type enacted at the federal level—from consideration by state legislatures. These special burdens on racial minorities' advocacy efforts

therefore were among the principal evils against which the Fourteenth Amendment was directed.

Because this Court's interpretation of the Amendment's Equal Protection Clause in *Hunter* and *Seattle School District* is fully consistent with this history, the Court should reaffirm, rather than overrule, those precedents.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* FORMER ATTORNEYS OF THE DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION IN SUPPORT OF MICHIGAN ATTORNEY GENERAL BILL SCHUETTE AND REVERSAL

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are Hans A. von Spakovsky, Karl S. "Butch" Bowers, Jr., H. Christopher Coates, and J. Chrisian Adams. Each of the individuals submitting this brief formerly worked as a career attorney or, in one instance, a political appointee in the Department of Justice, Civil Rights Division. Accordingly, each has a significant and longstanding interest in civil-rights and voting-rights matters in general, along with a specific interest in the particular issues raised in this case.[1]

SUMMARY OF ARGUMENT

The Sixth Circuit's use of the "political process" doctrine of *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) undermines the initiative process enshrined in the constitutions of more than half the States, and in this instance actively hinders Michigan's attempts to promote Equal Protection and achieve a colorblind society. Because that doctrine has outlived whatever usefulness it may have once had, this Court in addition to reversing the Sixth Circuit, should retire the "political process" doctrine.

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[1] Pursuant to Rule 37.3, the parties have consented to the filing of this brief, and correspondence from each counsel granting that consent has been filed with the Clerk's office. Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made such a monetary contribution to its preparation or submission.

ARGUMENT

I. The Sixth Circuit's use of the "political process" doctrine to frustrate Equal Protection compels its abandonment.

This case stands at the confluence of two powerful streams coursing through our Nation's society and its jurisprudence: the right to Equal Protection of the laws, and foundational notions of democratic self-governance. Employing the "political process" doctrine of *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), the Sixth Circuit determined not that the two can flow together harmoniously, but that the latter must yield to the former, behind a groaning dam woven from strained logic and contorted meaning.

Far from being a triumph of Equal Protection, the Sixth Circuit's decision shows the degree to which the "political process" doctrine has perverted that concept – to the point where a constitutional provision designed to bar consideration of race in college admissions and other public spheres, enacted by a solid majority of Michigan voters, can itself be deemed unlawful discrimination.

Amici have dedicated large portions of their professional careers to safeguarding the voting rights of all Americans, including African-Americans, within and without the Department of Justice's Civil Rights Division. The Sixth Circuit's ruling stands as an affront to those efforts, and to all who have labored to ensure the proper, fair, free, and colorblind exercise of the franchise. Reversing the Sixth Circuit is the

obvious answer, but it is not sufficient. For giving rise to this Orwellian outcome, the *Hunter / Seattle* "political process" doctrine has forfeited its right to continued existence, and should be rejected once and for all.

A. The "political process" doctrine has stripped Michigan's citizenry of the ability to order their society along non-discriminatory, color-blind grounds.

A half-century ago, the Rev. Martin Luther King, Jr. came to Washington to cash a check, and relay his dream of a Nation where his children would be judged not by the color of their skin, but by the content of their character. Ten months later, this Court spoke emphatically about a crucial means of making Dr. King's dream a reality:

> [T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

That admonition is especially well-placed here, where eight judges now have countermanded the expressed will of 2.1 million Michigan voters that students be admitted to their public colleges and universities without regard to the color of their skin.

As *Reynolds* teaches, the Constitution protects the right to vote in State as well as Federal elections, and encompasses the right of all qualified voters to cast a ballot, to have those votes counted, and to not have them diluted by ballot alteration, ballot-box stuffing, racial gerrymandering, one-race primaries, or other odious means. *Id.* at 554-555 (citations omitted). "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . " *United States v. Classic*, 313 U.S. 299, 315 (1941). This right is essential in voting for any officeholder, be it Governor, Mayor, or dogcatcher. But it becomes even more critical when the electorate of an entire State goes to the polls to decide whether to change the content of its organic governing document.

B. The doctrine here was used to short-circuit Michigan voters' decision to remove considerations of race from their college and university admissions, after recalcitrant, politically insulated decisionmakers refused to do so.

Measures that allow citizens to amend their State constitutions via referendum and initiative spread across the Nation beginning in the early 20th Century, as a key aspect of the Progressive movement. In the States, the initiative process "is necessary to implement the theory that all power of government ultimately resides in the people." *Hollingsworth v. Perry*, 570 U.S. __ (2013) (Kennedy, J., dissenting), Op. at 6, *citing Perry v. Brown*, 52 Cal. 4th 1116, 1140, 265 P.3d 1002, 1016 (2011) (discussing California's initiative provision). It is "one of the most precious

rights of our democratic process," *Perry*, 52 Cal 4th at 1140, 265 P.3d at 1016, whose advent "grew out of the dissatisfaction with the then governing public officials and a widespread belief that the people had lost control of the political process." *Hollingsworth*, 570 U.S. at __, (Kennedy, J. dissenting), Op. at 6, *quoting Perry*, 52 Cal. 4th at 1140, 265 P.3d at 1016. "Its primary purpose, then, was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions *that their elected public officials had refused or declined to adopt*." *Ibid* (internal quotation marks omitted) (emphasis added).

Michigan first added the initiative mechanism to its Constitution via amendment in 1913, after the Legislature passed a joint resolution and voters approved it. 2 Official Record, State of Michigan Constitutional Convention 1961 ("Official Record"), p. 2460 (remarks of Mr. Durst). It was revised and updated at the most recent Constitutional Convention, and adopted as art. XII, § 2 of the 1963 Constitution. *See* Address to the People *(What the Proposed New State Constitution Means to You)*, pp. 99-100 (August 1, 1962), *reprinted in* 2 Official Record, pp. 3406-07.

Speaking at the 1961 convention in support of a proposal that would have eased the ability to place constitutional amendments before voters via initiative, Prof. Harold Norris – a constitutional scholar, civil-rights lawyer, and then-head of the metro Detroit chapter of the ACLU – noted that the thrust of the initiative power was to give the People flexibility to adapt to changed circumstances:

> Now I notice Miss Donnelly mentioned the question of the hope and aspiration that the people of the state of Michigan will grow in numbers. And there is no question about it, they will also grow in problems. They will also grow in the number of ways in which the constitution impinges upon the life of the people and we do have to keep open the way in which the reserved power of the people may operate upon the constitution so that the constitution can be flexible in meeting the needs of our people. [2 Official Record, pg. 2462 (April 16, 1962) (remarks of Del. Norris)].

One such measure that invoked the need for flexibility was *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which this Court approved – though plainly did not *mandate* – the University of Michigan Law School's self-proclaimed "highly individualized, holistic" review process that considered an individual's race as a factor in admissions. But one person's holism is another's smokescreen and sophistry, and proponents of race-neutral admissions properly reacted to *Grutter* by gathering enough signatures to place Proposal 2 on the statewide November 2006 ballot, via the initiative mechanism of art. XII, § 2. It passed overwhelmingly, by a 58-42 margin among nearly 4 million voters. Thus, while this Court in *Grutter* voiced its expectation that by 2028, "the use of racial preferences will no longer be necessary to further the interest approved today," 539 U.S. at 343, the People of Michigan, through the initiative process, brought their State to that point 22 years ahead of schedule.

The direct line from *Grutter* through MICH. CONST., art. XII, § 2, to the Sixth Circuit's ruling shows the fundamental flaw in the "political process" doctrine that warrants its burial. As applied by the Sixth Circuit, the doctrine finds Michigan's electorate guilty of acting unlawfully by reordering the State's political structure to place at a more remote and inaccessible level, decision-making over the use of race in college admissions. But that runs flatly counter to the factual and historical record. As Petitioner's brief shows, pp. 24-28, public university admissions in Michigan simply are not "political processes" as *Seattle* uses that term. To the contrary, those who control them are shielded from the electorate by a virtually impregnable web of elected partisan trustees (with staggered terms) and unelected deans, department heads, committees, and administrators – who hold no real authority over the faculty, anyway. *See also*, Pet. App. 86a-87a (Sutton, J., dissenting). In throwing open the doors of the faculty lounge and removing from politically unaccountable functionaries the ability to parcel out spoils to favored groups (and freeze out disfavored groups), the People of Michigan showed that amending their constitution is a *more*, not less, accessible means of political change in this area. Through the ballot box, they wielded the initiative power in exactly the manner its framers intended:

> ...I do feel very strongly that if we are going to have a responsive government we are going to have to give the people back home the opportunity, not to put legislative matters into the constitution but to act as a sort of check and balance to an unresponsive legislature. [2

> Official Record, pg. 2463 (April 16, 1962) (remarks of Del. Snyder].

Speaking against another (ultimately rejected) provision that would have required constitutional amendments proposed via initiative to pass by a 3/5 vote of the electorate, another delegate to the 1961 convention sounded a similar theme. He called the initiative power

> ...one of the great institutions developed in the progressive era. I think that the history of its use in the state of Michigan has been good and, as long as we cannot be assured of a completely representative and responsible legislative body, it seems to be doubly necessary. [2 Official Record, pg. 2470 (April 16, 1962) (remarks of Del. Pollock].

Post-*Grutter*, the People of Michigan were faced with something worse than an unresponsive and irresponsible legislature: unresponsive and irresponsible university admissions bureaucrats. Some of them actively malevolent to Dr. King's noble vision of America, yet hiding behind a cloak of "highly individualized, holistic" applicant review. And absent constitutional amendment it would stay that way, since a camel could pass through the eye of a needle more easily than the average Michigander can influence the admission criteria of his or her public universities. Indeed, the only people who could possibly view amendment of Michigan's constitution as a *more difficult* route to such change are those who enjoy grossly disproportionate influence over admissions decision-makers – that they would preserve, in some

cases, by any means necessary. Yet, as applied by the Sixth Circuit, the "political process" doctrine ignores all that, and transforms a measure designed to ensure Equal Protection and fair access, into one that denies both. It is the "political process" doctrine that must go, not art. I, § 26.

The challenge to Michigan's constitutional guarantee of equal treatment readily fails without the benefit of *Hunter/Seattle*'s "political process" argument, since art. I, § 26 easily passes traditional Equal Protection analysis. Pet. App. 78a (Gibbons, J., dissenting); *see also Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 701-702 (9th Cir. 1997); *Coral Construction, Inc. v. San Francisco*, 235 P.3d 947, 957 (Cal. 2010). It would be bad enough if this Court's jurisprudence were wrongly invoked to undo the valid electoral decision of the tiniest burgh or remotest village. But where it acts to frustrate the overwhelming will of millions of residents statewide who cared enough about race-neutral college admissions, public employment and the like to go to the polls and amend their constitution, the deprivation is even greater.

"The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around." *Hollingsworth*, 570 U.S. at __ (Kennedy, J., dissenting). "Freedom resides first in the people without need of a grant from government." *Ibid.* In telling Michigan's 10 million residents they are not allowed to determine for themselves, by going to the polls and amending their own constitution, that public university seats, public jobs, public contracts, and the like will be distributed without regard to one's

race, the Sixth Circuit has made a mockery of that notion. And the *Hunter/Seattle* "political process" doctrine is the tool it used.

If ever the doctrine had any use, this case shows it has surely outlived it. It should be scrapped.

CONCLUSION

The court of appeals should be reversed, and the "political process" doctrine of *Hunter* and *Seattle* overruled.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-682

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Supreme Court of the United States

BILL SCHUETTE, Michigan Attorney General,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE JUDICIAL EDUCATION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of these judiciary on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and internet media.

SUMMARY OF ARGUMENT

Our Constitution creates a government of limited powers, not only because the federal government may only exercise the authority expressly granted to it, but because the Constitution itself includes affirmative prohibitions on the use of those powers. Just as there is balance between the various branches and

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

levels of government, there is a balance between the proper powers of the government and the Constitutional limits on those powers. Interpreting the proper scope of those limits is essential to maintaining that balance, because a judicial expansion of the Constitution's terms robs the federal and state governments of their proper authority, whether granted by the Constitution or reserved to the States and the people via the Tenth Amendment.

The Sixth Circuit's interpretation of the political process doctrine worked just such a judicial usurpation of power. The fundamental goal of the Equal Protection Clause is spelled out in its text: ensuring to all people "the equal protection of the laws." The question presented – whether the Equal Protection Clause permits states to require equal treatment of university applicants – is answered by a tautology. The Equal Protection Clause not only permits equal treatment – it requires it. By carving out a set of cases in which the people and their elected representatives cannot give full effect to the clause's goal of equal treatment, the court below usurped the powers properly retained by the people. Ironically, by expanding one doctrine within Equal Protection Clause analysis beyond its bounds, the decision below undercuts the ability of both the federal and state governments to effect the central goal of the Equal Protection Clause itself.

The Sixth Circuit's interpretation of the political process doctrine is overly broad, going beyond what *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457

(1982) require, and disregarding later Supreme Court decisions which mandate a narrower reading of those cases to ensure the doctrine does not violate the Equal Protection Clause itself. The Sixth Circuit's interpretation of the political process doctrine calls into question a host of federal and state laws, including many laws whose aim was precisely to advance the goals of that Clause.

These broad implications do not by themselves prove that the Sixth Circuit's holding was incorrect, but they lend weight to Petitioners' legal argument demonstrating the errors of that holding. The fact that this holding would invalidate laws or constitutional amendments passed by so many federal and state legislatures and so many citizen referenda points to its novelty and disconnect with traditional Equal Protection Clause analysis. And a holding which declares that so many laws purporting to carry out the Equal Protection Clause actually *violate* that Clause should raise particular red flags.

These broad and serious implications are evidence that the decision below, which uniquely expands the political process doctrine to unconstitutionally tie the hands of both state and federal legislators, misinterprets longstanding constitutional doctrine and should be reversed.

ARGUMENT

I. The Sixth Circuit's Decision Applied an Overly Broad Interpretation of the Political Process Doctrine

The "'central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.'" *Seattle*, 485 U.S. at 484 (omission in original) (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)). While "[a] racial classification, regardless of purported motivation, is presumptively invalid" under the Equal Protection Clause, *id.* at 485 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979)), facially neutral legislation is only invalid under the Clause if "the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations," *id.* at 484-85. This is because "*purposeful* discrimination is 'the condition that violates the Constitution.'" *Seattle*, 458 U.S. at 484 (1982) (emphasis added) (quoting *Personnel*, 442 U.S. at 274 (1979)).

The decision below invoked the political process doctrine originally articulated in *Hunter v. Erickson*, 393 U.S. 285 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), to hold that a law violates the Equal Protection Clause if it "(1) has a racial focus, targeting a policy or program that 'inures primarily to the benefit of the minority'; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through

that process." *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 477 (6th Cir. 2012) (citing *Seattle*, 458 U.S. at 467, 472; *Hunter*, 393 U.S. at 391). The court below concluded that Proposition 2 runs afoul of the political process doctrine because it meets these two conditions by (1) blocking admissions policies that "inure primarily to the benefit of racial minorities, and that such groups consider these policies to be in their interest," *id.* at 479, and (2) "reorder[ing] the political process in Michigan to place special burdens on minority interests." *Id.* at 485.

Contrary to the holding of the Sixth Circuit, the political process doctrine should only apply when the reordering of the political process is done with discriminatory intent and works to *impede*, not mandate, equal treatment. Under the proper analysis, Proposition 2 does not trigger equal protection scrutiny.

A. The Political Process Doctrine Applies Only Where There is Discriminatory Intent

The Sixth Circuit's holding that a discriminatory intent requirement in the political process doctrine "has no basis in law," *BAMN*, 701 F.3d at 478 n.3, is itself not grounded in proper Equal Protection Clause doctrine. As both *Hunter* and *Seattle* clarify, the political process doctrine requires a finding of discriminatory intent, not merely a disparate impact on a

minority group or a judgment by certain members of that group that it negatively affects them.

In *Hunter*, the city in question did "not attempt[ ] to allocate governmental power on the basis of any general principle," *Hunter*, 393 U.S. at 395 (1969) (Harlan, J., concurring), or "aim [to] provid[e] a just framework within which the diverse political groups in our society may fairly compete. . . ." *Id.* at 393 (Harlan, J., concurring). Such laws would not have triggered constitutional scrutiny. Instead, the provision had a clearly disallowed discriminatory purpose: "making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395 (Harlan, J., concurring).

Similarly, *Seattle* explained that facially neutral legislation is only invalid if "the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations." *Seattle*, 458 U.S. at 485. The initiative in *Seattle* "was effectively drawn for racial purposes," and "enacted 'because of,' not merely 'in spite of,' its adverse effects upon busing for integration," an explanation that draws upon language from the Court's prior definition of "discriminatory purpose." *Seattle*, 458 U.S. at 471 (quoting *Personnel*, 442 U.S. at 279).[3]

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[3] *Personnel*, 442 U.S. at 272 (1979) explains that a decisionmaker must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel*, 442 U.S. at 279 (footnote omitted).

To be sure, *Seattle*'s holding on the issue of discriminatory intent is confusing, because the opinion is at odds with itself. At one point, that Court protests that "a particularized inquiry into motivation" to discern discriminatory intent is not required when "the governmental action 'plainly rests on distinctions based on race.'" *Seattle*, 458 U.S. at 485 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971). But the *Seattle* Court itself appealed to discriminatory intent to show why the legislation at issue was a "racial classification" that is "inherently suspect." *See Seattle*, 458 U.S. at 485, *see also id.* at 471 ("We find it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes."). The *Seattle* Court supported its conclusion that the legislation was racially based by pointing to several indicators of intent: the drafting of the initiative, statements of its proponents, and the public knowledge of the initiative's disproportionate effect on integrative busing as opposed to other types of busing. *Id.*

A reading of *Hunter* and *Seattle* that requires discriminatory intent is consistent with the Ninth Circuit's interpretation of the political process doctrine. The Ninth Circuit distinguishes "'between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters.'" *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 705 (9th Cir. 1997) (quoting *Crawford v. Board of Education of the City of Los*

Angeles, 458 U.S. 527, 538 (1982)). The former is disallowed, while the latter is allowed. *Id.* A state must "reallocate political authority in a discriminatory manner," to run afoul of the doctrine. *Id.* at 706. *See also Valeria v. Davis*, 307 F.3d 1036, 1040 (9th Cir. 2002) ("*Hunter* and *Seattle* are illustrative of [the] purposeful discrimination requirement, for they both dealt with political obstructions placed in the way of minorities seeking to remedy identified patterns of racial discrimination.").

Even if *Hunter* and *Seattle* did not explicitly require discriminatory intent to invoke the political process doctrine, other cases clarify its necessity. In *Washington v. Davis*, the Supreme Court rejected an Equal Protection challenge to an employment qualifications test for Washington, D.C. police officers, even though the test disproportionately rejected minority applicants. 426 U.S. at 232-33 (1976). *Washington* explains that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Washington*, 426 U.S. at 239. *See also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) ("Our decision last Term in *Washington v. Davis* . . . made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

This interpretation of the political process doctrine is the most appropriate, because it avoids exporting influence over a law's constitutionality to outside minority groups. Under the Sixth Circuit's interpretation, courts must determine when a facially neutral law that lacks a discriminatory requirement hurts a minority group. This difficult inquiry – one that a discriminatory intent requirement renders unnecessary – necessarily involves significant input from outside groups. For example, in *BAMN*, the 6th Circuit determined that because "racial minorities lobbied for the implementation of the very policies that Proposal 2 permanently eliminates, it is beyond question that Proposal 2 targets policies that 'minorities may consider . . . [to be] in their interest.'" *BAMN*, 701 F.3d at 478-79 (alteration in original) (quoting *Seattle*, 458 U.S. at 474).

Following the Sixth Circuit's use of outside minority groups as a proxy for the effect on minorities raises serious questions. No minority community is monolithic, and courts would inevitably be faced with laws which had organizations purporting to represent minority interests on both sides. The challenge of determining which are representing genuine minority interests and how to balance the weight of minority interests on both sides is an inquiry wholly unsuitable for the judicial branch. Rather than using such a proxy for minority impact, an inquiry into intent addresses the real problem of discriminatory government action.

B. The Political Process Doctrine Applies to Laws that Impede the Equal Treatment of Minority Groups, not Those that Mandate Equal Treatment

Second, a law must impede the *equal treatment* of minority groups to run afoul of the political process doctrine. Laws that mandate the equal treatment of all races effect the very essence of the Equal Protection Clause and thus must be constitutional even if they invalidate programs that allegedly "inure primarily to the benefit of" minorities. *See BAMN*, 701 F.3d at 479.

This interpretation of the political process doctrine – that a "denial of equal protection entails, at a minimum, a classification that treats individuals differently," *Wilson*, 122 F.3d at 707 (citing *Adarand Constructors v. Pena*, 515 U.S. 200, 223-24 (1995)) – is consistent with both *Hunter* and *Seattle*. *Hunter* "involved the repeal of a presumptively valid law that mandated equal treatment; it did not involve the repeal of a racial preference policy or any other law that was itself presumptively invalid." *BAMN*, 701 F.3d at 495 (Gibbons, J., dissenting) (citations omitted). *See also Wilson*, 122 F.3d at 707 ("In *Hunter*, the lawmaking procedure made it more difficult for Nellie Hunter to obtain protection against unequal treatment in the housing market."). *Seattle* involved the repeal of laws designed to combat a specific form of discrimination: the segregation of neighborhoods that resulted in the effective segregation of schools. While busing to alleviate that segregation may not have been ordered by a court, the record explains that fear

of litigation was the impetus for the busing in the first place. *See Seattle*, 458 U.S. at 460 n.2, n.3. Thus the Sixth Circuit's characterization of this busing as a benefit rather than a prophylactic measure to ensure equal treatment fails to take into account *Seattle*'s full context. *See BAMN*, 701 F.3d at 479. The racial preferences that Proposal 2 eliminated, on the other hand, amounted to a zero-sum benefit to certain races over others and were not designed to remedy past discrimination but to increase diversity.

Even if the Sixth Circuit correctly held that *Seattle* did involve group benefits, not equal treatment, subsequent Supreme Court precedent has clarified that such group benefits are not required or encouraged under the Equal Protection Clause, but are instead subject to heightened scrutiny. This mandates a narrower reading of the political process doctrine than that supplied by the Sixth Circuit.

In *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), the Supreme Court applied strict scrutiny to racial classifications in school admissions policies, and speculated that those classifications would outlive their usefulness within 25 years. These racial classifications were suspect for deviating from "'the norm of equal treatment of all racial and ethnic groups,'" *Grutter*, 539 U.S. at 342 (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion)), even though they would have, under *BAMN*'s formulation, "inure[d] primarily to the benefit" of minority groups. *See BAMN*, 701 F.3d at 477. The Supreme Court, in *Fisher v. Univ. of Texas at Austin*, reaffirmed *Grutter*, explaining that "*Grutter* made clear

that racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" 570 U.S. ___, slip op. at 8 (2013) (quoting *Grutter*, 539 U.S. at 326). *Fisher* also reiterated that "[s]trict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Id.* at 12.

In practice, *Grutter* and *Fisher* require a case-by-case evaluation of each instance of affirmative action, which requires that universities either win a lawsuit or ban affirmative action altogether to verify the constitutionality of their admissions policies. Despite this, the Sixth Circuit believes that Michigan voters cannot prohibit these policies that "deviat[e] from the norm of equal treatment," *BAMN*, 701 F.3d at 498 (quoting *Grutter*, 539 U.S. at 342), and must instead "contest and succeed, one-by-one, in elections or selections in all of the many individual [educational authority] jurisdictions and methods of selection" to ensure that their state's education policies follow that norm, and avoid potential legal liability. *BAMN*, 701 F.3d at 492 (Boggs, J., dissenting).

The most logical interpretation of the political process doctrine is to exempt group benefits. It is beyond comprehension to argue, as in *BAMN*, that a law which impedes access to *preferential* treatment can also violate the right to *equal* protection, when equal protection itself may *require* invalidating certain forms of preferential treatment. "The *Fourteenth Amendment* . . . does not require what it barely permits."

Wilson, 122 F.3d at 709. *See also Wilson*, 122 F.3d at 708 ("The controlling words, we must remember, are 'equal' and 'protection.' . . . It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment."). The equal protection clause is rightly implicated "whenever the government treats any person unequally because of his or her race. . . ." *Adarand*, 515 U.S. at 229-30 (1995) (quoted by *Wilson*, 122 F.3d at 701), including when it offers minorities race-based benefits, not just when someone discriminates based upon race.

II. The Sixth Circuit's Misinterpretation of the Political Process Doctrine Will Seriously Undermine State and Federal Legislative Prerogatives

A. An Overly-Broad Understanding of the Political Process Doctrine Ties The Hands of Legislatures and Individual Citizens

Our Constitution grants certain enumerated powers to the legislature, *see* U.S. Const. art. I, and reserves the remaining powers to the States and the people, *see* U.S. Const. amend. X, notwithstanding the limitations on those powers given in the Constitution itself. Just as the branches of the government itself are carefully designed to provide checks and balances, *see* Federalist No. 51 (James Madison), and

the aggrandizement of any one branch comes "at the expense of the other," *see Buckley v. Valeo*, 424 U.S. 1, 122 (1976), so the judicial expansion of constitutional limits on government takes away properly delegated and reserved constitutional authority from the federal and state governments. The Sixth Circuit's misreading of the political process doctrine does just that.

An overly-broad reading of the political process doctrine would preclude all but the most local of policy-making if an issue implicates a minority group. This overly restricts the constitutional powers granted to Congress, including its Fourteenth Amendment right to enforce the Equal Protection Clause itself. Federal laws aimed at a minority group under the Equal Protection Clause could be constitutionally suspect under the reasoning of the Sixth Circuit if they precluded or preempted state policies that could inure to that class's benefit. This could also call into question similar state policies, because they could preclude more beneficial local policies.

Precluding all but the most local of policies effectively shuts down the state laboratories of democracy, which help achieve the best positive policy outcomes. As Justice O'Connor explains, "One of federalism's chief virtues . . . is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*,

285 U.S. 262, 311 (1932)) (Brandeis, J., dissenting). *See also DA's Office v. Osborne*, 557 U.S. 52, 79 (2009) (Alito, J., concurring) ("[DNA testing] is an area that should be . . . explored 'through the workings of normal democratic processes in the laboratories of the States.'" (quoting *Atkins v. Virginia*, 536 U.S. 304, 305, 326 (2002) (Rehnquist, C. J., dissenting)). The Sixth Circuit's interpretation shuts down these state laboratories, forcing policy-makers to govern on a more fragmented level, on subjects ranging from immigration and civil rights to tax law and education.

An overly-broad interpretation of the political process doctrine also allows unelected state and federal judges to thwart the individual right of citizens to self-governance, by potentially holding a wide range of policies to be implicated by the political process doctrine. The mere possibility of applicable legislation on particular subjects could limit the ability of citizens to employ the initiative and referendum process, or to lobby for certain kinds of state and federal legislation. It would also judicially block Members of Congress from fulfilling the quintessentially political duty of resolving complicated policy issues. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (opinion of Kennedy, J.) ("Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here") (quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)); *see also Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 513 (1982) ("The very difficulty of these policy

considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.") (footnote omitted).

Under the Sixth Circuit's holding, federal and state legislators could be powerless to address certain issues, even where a local government has failed to take action, and their constituencies have demanded it. *See Wilson*, 122 F.3d at 709 ("[Judging whether compelling state interests have been vindicated] most certainly *is* for the people of California to decide, *not* the courts. . . . [Otherwise] judicial power would trump self-government as the general rule of our constitutional democracy.").

In many of these cases, the judgment of these state legislatures and United States Congresses was that their provisions – laws that lacked a discriminatory purpose and "allocat[ed] government power on the basis of [a] general principle," *Hunter*, 393 U.S. at 395 (Harlan, J., concurring) – were required by the Equal Protection Clause, not opposed to it. The appropriate requirement of discriminatory intent would clarify that such laws, even those that restructure the political process, do not violate the Equal Protection Clause.

B. The Decision Below Calls into Question a Host of Federal and State Laws[3]

The Sixth Circuit's broad ruling would have far-reaching consequences for a wide variety of federal, state, and local laws. It would call into question any elimination of a racial preference that had been previously established by a more local rule; a state could not override a county's rule, and the federal government could not override a state law. *See BAMN*, 701 F.3d at 505 (Rogers, J., dissenting) ("Under the majority opinion, it is hard to see how any level of state government that has a subordinate level can pass a no-race-preference regulation, ordinance, or law."). It would also endorse a disparate impact standard for Equal Protection Clause doctrine that could "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Washington*, 426 U.S. 229, 248 (1976) (footnote omitted).

Notably, the Sixth Circuit's rationale would not be cabined to racial preferences, but would extend to other suspect and quasi-suspect classes under the Equal Protection Clause, such as sex, ethnicity,

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[3] *Amicus* takes no position on these laws either as a policy matter or as a constitutional matter, beyond observing that they should not violate the Equal Protection Clause's political process doctrine, but would do so under the interpretation adopted by the Sixth Circuit.

national origin, or religion. Just as distinctions based upon both race and sex must withstand some form of heightened scrutiny under traditional Equal Protection Clause analysis, they must withstand the same scrutiny under the Clause's political process analysis. No analysis in either *BAMN*, *Hunter* and *Seattle* provides indication to the contrary.

In particular, the Sixth Circuit's interpretation could invalidate various federal civil rights laws, as long as they mandate a level playing field for members of a suspect class, such as race. While these federal civil rights laws prohibit discrimination in a particular field, they also prohibit special benefits. They would be unconstitutional under the Sixth Circuit's interpretation for prohibiting lower political bodies, including cities or states, from offering benefits based upon that suspect class. This would violate the political process doctrine by making it more difficult for class members to secure programs that inure to their benefit, by forcing members of that class to lobby the federal (rather than the state or local) government to change the laws. This would implicate numerous federal civil rights laws. *See* Equal Credit Opportunity Act, Pub. L. No. 94-239, 90 Stat. 251 (1974) (mandates level playing field in provision of credit); Fair Housing Act of 1968, 42 U.S.C.A. §§ 3601-3631 (1968) (same, housing); Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq. (1964) (same, employment). It would also implicate numerous state-level civil rights laws, including fair housing laws and anti-discrimination employment laws,

for prohibiting cities and counties from offering preferential treatment to members of a suspect class.

The Sixth Circuit's reasoning would also invalidate seven other state affirmative action bans, which are legally indistinguishable from Michigan's. *See* Ariz. Const. art. II, § 36 (requiring a level playing field "for any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."); Neb. Const. art. I, § 30 (same); Okla. Const. art. II, § 36A (same); Cal. Ballot Proposition 209 (1996) (same); Florida Governor's Executive Order 99-281, "Executive Order Regarding Diversity" (1999) ("[Prohibits] the use of racial or gender set-asides, preferences or quotas in admissions to all Florida institutions of Higher Education, effective immediately."); N.H. Rev. Stat. Ann. § 21-I:52 (2012) (prohibits "preferential treatment or discrimination in recruiting, hiring, or promotion based on race, sex, sexual orientation, national origin, religion, or religious beliefs."); Wash. Rev. Code § 49.60.400(1) (1998) (requiring a level playing field "for any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

Additionally, the Sixth Circuit's interpretation of the law would implicate the 37 state-level Blaine

Amendments,[4] which prohibit religious schools from receiving state funding, and generally prohibit school vouchers for religious schools. These laws could make it more difficult for religious adherents – who qualify as members of a suspect class – to receive provisions that "inure" to their benefit, i.e., state funding for their private schools. In order to receive such benefits members of religious groups would have to amend the state constitution, instead of pass state legislation implementing vouchers.

Furthermore, three popularly enacted state ballot initiatives that ban bilingual education could be constitutionally suspect. The bans, which decide the issue on a statewide level instead of the school district level, obstruct minorities' efforts to promote school programs that certain minority groups deem to be in their benefit, which would be sufficient to trigger strict scrutiny, if the Sixth Circuit's interpretation is correct. *See* Ariz. Proposition 203 (2000); Cal. Proposition 227 (1998); Mass. Question 2 (2002). A more limited interpretation of the political process doctrine would allow for bilingual education bans. *See Valeria*, 307 F.3d 1036 (9th Cir. 2002) (dismissing a political process doctrine challenge to California's bilingual education ban). As *Valeria* explained, the ban did "not obstruct minorities from seeking protection against unequal treatment" and was not "motivated by racial animus." *Valeria*, 307 F.3d at 1041. Under

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[4] *See* Blaine Amendments – Beckett Fund, http://www.becketfund.org/blaineamendments/ (last visited June 28, 2013).

the Sixth Circuit's reasoning however, both considerations would be constitutionally irrelevant, thus almost certainly subjecting a bilingual education ban to strict scrutiny, lack of discriminatory intent notwithstanding.

Finally, state constitutions that set special limits on property taxes could also fall under constitutional scrutiny under the Sixth Circuit's interpretation of the political process doctrine. By definition, constitutional property tax caps alter the political decision-making structure, making it more difficult to raise property tax rates. Some minority groups such as the NAACP deem this to be against their interest because property is held disproportionately by whites. For example, in 2011 Hazel Dukes, President of the NAACP New York State Conference wrote New York Governor Andrew Cuomo asking him to oppose "any type of property tax cap," the passage of which "would be reversing the trend of the gains we have made in education in our state" and "exacerbate the achievement gap."[5] Accordingly, under the Sixth Circuit's interpretation of the political process doctrine, a number of state constitutional provisions, legislation and ballot initiatives that limit property taxes would fall under scrutiny. *See, e.g.*, Ala. Const., § 214 (limits the property state tax rate to 6 ½ mills); Cal. Const. art.

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[5] Letter from Hazel Dukes, President of the NAACP New York State Conference, to New York Governor Andrew Cuomo (May 9, 2011), http://www.scribd.com/fullscreen/55377684?access_key=key-1tl1qio328vlw350beue&allow_share=true.

13A (various rate limitations on state and local property taxes); Colo. Const. art. X, § 11 (limits the state property tax rate, in general, to 4 mills); Ga. Const. art. VII, § 1 (limits the state property tax rate to ¼th mill); Idaho Const. art. VII, § 9 (limits the state property tax rate, in general, to 10 mills); Ind. Const. art. 10, § 1 (various rate limitations on local property taxes); Ky. Const. § 157 (various rate limitations on city and county property taxes); La. Const. art. VII, § 19 (limits state property tax rate to 5 ¾ mills); Mich. Const. art. IX, § 6 (various rate limitations on state and local property taxes); Mo. Const. art. X. § 8 (limits property taxes to $0.10 on $100); Neb. Const. art. IX § 5 (limits county property tax rate, in general, to $0.50 on $100); N.Y. Const. art. VIII, § 10 (various rate limitations on city, county, village, or school district property taxes); N.D. Const. art. X, § 10 (limits state property tax rate to 1 mill); Ohio Const. art. XII, § 2 (limits the state and local property tax rate, in general to 1%); Okla. Const. art. X, § 8 (various rate and rate increase limitations on state and local property taxes); Or. Const. art. XI, § 11 (various rate limitations on state and local property taxes); Tex. Const. art. XIII, § 1-e (banning state property taxes); Wash. Const. art. VII, § 2 (various rate limitations on state and local property taxes); W. Va. Const. art. X, § 1 (various rate limitations on state and local property taxes).

CONCLUSION

For the foregoing reasons the judgment of the Sixth Circuit should be reversed.

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AMICUS CURIAE BRIEF

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No. 12-682

IN THE
Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION ETC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici are concerned that the Sixth Circuit's use of the political restructuring doctrine to propagate racial preferences in Michigan violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Amici* are further concerned that the Sixth Circuit's decision unlawfully limits the right of the people to make laws by misusing an

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of this brief. Letters reflecting this blanket consent have been filed with the Clerk.

outdated constitutional doctrine, and are concerned about the corrosive effect of that decision on American society and the rule of law. Among the harms caused by the Sixth Circuit's decision are: a dangerous erosion of the people's right to democratic self-governance; the needless further enshrinement of the intellectually impoverished concept of race into law; the perpetuation of a culture of racial and ethnic politics in American public life; and the perpetuation of racial and ethnic resentment and intolerance in American society. For these reasons, *amici* urge the Court to overturn the Sixth Circuit's decision.

SUMMARY OF THE ARGUMENT

The Sixth Circuit unjustly deprived Michigan's voters of their right to ban discrimination by incorrectly invoking a constitutional doctrine that is nearly as outdated as the affirmative action policies it was invoked to support. The Sixth Circuit was able to arrive at this conclusion through a convoluted application of an outdated constitutional doctrine. This doctrine, known as "political restructuring," derives from two cases, *Hunter v. Erickson*, 393 U.S. 385 (1969) (*"Hunter"*) and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (*"Seattle"*). However, rather than provide justification for the Sixth Circuit's opinion, the results in those cases show why the political restructuring doctrine cannot be applied to the Michigan law. *Hunter* and *Seattle* relied on the political reality of racial majority and minority relations in 1969 and 1982. Those realities no longer exist because of the profound demographic and

cultural changes that this nation has undergone in the intervening years.

As noted by Judge Gibbons in her dissent below, declaring that the constitution insulates racial *preferences* from the political process flies "in the face of the core equal protection principle of non-discrimination" and is "at odds with the basic meaning of the *Equal Protection Clause*, as understood and explained through decades of jurisprudence." *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 701 F.3d 466, 493-494 (6th Cir. 2012, J. Gibbons, *dissenting*) ("*Coalition*"). The decision presented a "marked departure" from precedent: the first instance of judicially mandated racial discrimination. *Id.* Furthermore, unlike the initiatives at issue in *Hunter* and *Seattle*, affirmative action today is widely unpopular among voters of all races, making this case unsuited for resolution under the political restructuring doctrine. Both the political restructuring doctrine and its application to affirmative action are judicially unjustifiable in present day America. The Court should so find.

ARGUMENT

I. CHANGED POLITICAL REALITIES MAKE THE POLITICAL RESTRUCTURING DOCTRINE OUTDATED

Political restructuring doctrine relies on an interpretation of the Equal Protection Clause to overturn state and local ballot initiatives intended to make it more difficult for "racial" minorities to

achieve political objectives. A product of the Court's 1960s civil rights jurisprudence, the doctrine was designed for a time when large "white" majorities would use the initiative process in ways that allowed them to exclude and discriminate against minority "black" populations. In 2013, those "white" majorities are not only dramatically smaller due to immigration, but have also grown more tolerant and accepting of others of different "races" due to the successes of the civil rights movement.[2] Political restructuring doctrine, a novel legal concept to begin with, has now largely outlived its usefulness.

In the days of the early civil rights movement, the racial composition of the country was largely binary, with a white majority and a black minority.[3] In 1960, the U.S. population was roughly 85% white

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[2] To avoid the use of scare quotes throughout this brief, *amici* note that the concept of distinct human "races" is an unscientific and inherently ambiguous social construct, and the need for *amici* to refer to different human "races" in a legal brief in 2013 is due only to the unfortunate historical legacy the use of the concept has left in its wake. *See* Brief of *Amici Curiae* Judicial Watch and Allied Educational Foundation, *Fisher v. University of Texas at Austin*, Case No. 11-345 (filed with U.S. Supreme Court on May 29, 2012), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/Final-11-345-JudicialWatch-Brief.pdf.

[3] *See* Laura B. Shrestha and Elayne J. Heisler, Congressional Research Serv., Report for Congress, RL34756, *The Changing Demographic Profile of the United States* (2011), ("Once, a mainly biracial society with a large white majority and relatively small black minority—and an impenetrable color line dividing these groups—the United States is now a society composed of multiple racial and ethnic groups."), available at http://www.fas.org/sgp/crs/misc/RL32701.pdf.

and 10% black, which meant that all other races combined were less than 5% of the population.[4] In 2011, after 50 years of non-discriminatory immigration policies, the U.S. population is roughly 16% Latino, 5% Asian, 13% black, and 63% white (non-Latino).[5]

Furthermore, thirty years ago America still had a recent history of deliberate discriminatory mistreatment against minorities in the political process. This history began with the institution of slavery and continued with the perpetuation of segregation laws, which lasted through the 1960s. The civil rights movement developed in this context, and its goal was to change race relations in the United States and prevent racial discrimination. In addition to the impact of the civil rights movement, changes in immigration policy starting with the Hart-Cellar Act of 1965 have since transformed American politics far beyond anything recognizable by the political restructuring doctrine courts of the past.[6]

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[4] International Encyclopedia of the Social & Behavioral Sciences, *Population Composition by Race and Ethnicity: North America*, Table 2 (2001, Elsevier Science Ltd.), available at http://as.nyu.edu/docs/IO/1043/Pop.Comp.IESBS.2001.pdf.

[5] *See U.S.A. QuickFacts from the U.S. Census Bureau*, State and County QuickFacts, available at http://quickfacts.census.gov/qfd/states/00000.html (visited June 22, 2013).

[6] The goal of the Civil Rights Act was to enforce non-discrimination in the way Americans interact with each other. The Hart-Cellar Act carried this non-discrimination principle into America's immigration policy. As Rep. Philip Burton (D-CA) said of the Bill: "Just as we sought to eliminate discrimina-

A review of *Hunter* and *Seattle* shows the significance of the historical backdrop. In *Hunter*, the city charter of Akron was amended so that an ordinance protecting against racial discrimination in housing could not be used by those it was meant to protect from discrimination without a citywide referendum. 393 U.S. 385 (1969). The majority electorate in *Hunter* wished to protect their right to flagrantly discriminate based on race. The plaintiff in *Hunter* was a woman who had been told by a real estate agent that she could not show her the houses on the list she had prepared for her "because all of the owners had specified they did not wish their houses shown to negroes." *Id.* at 387. What was at stake in *Hunter* was an individual's right to be protected from racial discrimination, because "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." *Id.* at 391.

In *Seattle*, the voters of Washington approved a statewide initiative that prevented local school districts from busing schoolchildren for desegregation purposes. The initiative at issue had been passed by 66% of the voters of Washington State and by 61% of voters in the city of Seattle. The Court found that was a case of the majority denying the needs of a minority. The 1982 *Seattle* Court held

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tion in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration to this nation composed of the descendants of immigrants." 111 Cong. Rec., 21749, 21783 (1965). The passage of these two laws has ushered in profound changes in the nation.

that, although people "both white as well as Negro benefit" from policies which increase students' exposure to different races, "at bottom [the policy] inures primarily to the benefit of the minority and is designed for that purpose." 458 U.S. 457, 472 (1982). As in *Hunter*, the issue was a classic civil rights-era confrontation between a small black minority population and a large white majority.

Times have changed. Due in large part to immigration following the Hart-Cellar Act of 1965, in 2012, for the first time, whites made up a minority of births in the United States.[7] 2012 was also the first year that white deaths outnumbered white births in the U.S.[8] *Hunter* was decided in 1969, only four years after the 1965 Hart-Cellar Act. *Seattle* was decided in 1982 – more than thirty years ago, when the demographic change was just starting but not yet manifested itself to the degree it has today.[9]

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[7] *Most Children Younger than 1 are Minorities, Census Bureau Reports*, Press Release, U.S. Census Bureau, May 17, 2012, available at http://www.census.gov/newsroom/releases/archives/population/cb12-90.html.

[8] Neil Shah, *More White Americans Dying Than Being Born*, Wall Street Journal, June 13, 2013, available at http://online.wsj.com/article/SB10001424127887324049504578541712247829092.html.

[9] In fact, it was in 1980 that the demographic changes related to immigration became very substantial. *See* Shrestha and Heisler, *supra* ("The net immigration rate . . . fluctuated in the low range of 1.5 to 2.4 net migrants per 1,000 resident populations between 1950 and 1979. An increasing trend has been noted since 1980, and the annual rates in the 1990s were generally in the range of 3.0 to 3.9.").

Furthermore, in the periods both before and after passage of the Civil Rights Act, this Court oversaw the broad cultural changes in a once largely segregated society, upholding the act and its enforcement in court, and preventing backlash against it from undermining its promise.[10] The success of the civil rights era has forever changed American culture and politics.[11]

Today, the concept of racial minorities and majorities as understood in 1969 and 1982 no longer exists. The political reality of the electorate in the days of the *Hunter* and *Seattle* decisions is gone. In 2013 significant populations of blacks, whites, Latinos, and Asians all must compete at the ballot box. Moreover, the smaller and shrinking white majori-

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[10] This Court's decisions influencing the success of the civil rights movement began with *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Shelley v. Kraemer*, 334 U.S. 1 (1948), which declared that courts could not enforce racially restrictive covenants. As the civil rights movement progressed, the Court continued to promote non-discrimination and racial equality with a host of cases. *See, e.g., Lucy v. Adams*, 350 U.S. 1 (1955), establishing that students could not be refused admission to a public university on the basis of race; *Boyton v. Virginia*, 363 U.S. 454 (1960), which prevented racial segregation in bus terminals; *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), which upheld the Civil Rights Act; *Whitus v. Georgia*, 385 U.S. 545 (1967), preventing discriminatory jury panels; and *Loving v. Virginia*, 388 U.S. 1 (1967), declaring laws against interracial marriage unconstitutional.

[11] Some view Barack Obama's election and reelection as the culmination of the civil rights movement. *See, e.g.* Glenn Eskew, *Barack Obama, John Lewis, and the Legacy of the Civil Rights Struggle*, 56 American Studies Journal (2012), available at http://www.asjournal.org/archive/56/208.html.

ties of 2013 have been successfully transformed by the civil rights movement and no longer favor racial exclusion and discrimination. The political restructuring doctrine should therefore be laid to rest alongside America's binary racial history.

II. POLITICAL RESTRUCTURING DOCTRINE CANNOT BE APPLIED TO AFFIRMATIVE ACTION

Even if the political restructuring doctrine had not been rendered obsolete by intervening changes in American society, it could still not be applied to the Michigan ballot initiative in this case. Political restructuring doctrine relies heavily on the idea of protecting minorities from unjust ballot initiatives passed by the majority. As *Hunter* eloquently states: "The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U.S. at 390. *Hunter's* foundational premise, therefore, is that as long as a majority wants to stop racial discrimination it can do so with a referendum. Here, the Sixth Circuit has said that a majority of people may *not* pass a referendum that prevents state actors from using racial discrimination. This turns *Hunter* on its head. As the lower court's dissent said, "the equal protection clause cannot both prohibit racial discrimination and prohibit laws banning racial discrimination." *Coalition*, 701 F.3d 466, 494 (6th Cir. 2012).

Furthermore, the political restructuring doctrine has only been applied to cases where popula-

tions vote their racial group interests alone. This assumption is no longer true for popular initiatives on affirmative action, if it ever was. The broad public dislike of affirmative action is spread evenly among America's racial groups:

> The wide opposition to affirmative action in college admissions spans partisan and racial divides. Nearly eight in 10 whites and African Americans and almost seven in 10 Hispanics oppose allowing universities to use race as a factor.[12]

Support for affirmative action is now at an historic low.[13] Accordingly, affirmative action politics today are not about racial rent-seeking, but about overwhelming majorities of *all* Americans united in rejecting a poor public policy choice. Absent a vote based on pure prejudice and animosity against a minority group, it is radically dangerous for federal courts to take away the people's right to govern themselves by legislating at the ballot box:

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[12] Scott Clement, *Wide majority opposes race-based college admissions programs, Post-ABC poll finds*, Washington Post, June 11, 2013, available at http://www.washingtonpost.com/politics/poll-majority-opposes-race-based-college-admissions-programs/2013/06/11/4aee6cf8-d2b9-11e2-8cbe-1bcbee06f8f8_story.html.

[13] *Id.* (a June 2013 poll found "[a]bout 45 percent said the [affirmative action] programs are a good idea, while the same number said they have gone too far and now discriminate against whites, *marking the first time in more than two decades that supporters did not outnumber opponents.*") (italics added).

> Support for direct democracy draws on the idea that popular self-rule is an important part of what it means for a society to be free. . . Direct democracy is also associated with the hope or expectation that voters will be more active, informed, and responsible – as citizens and as people – when important decisions are in their hands.[14]

The reasons for affirmative action's declining popularity today should be obvious to all but the most partisan observers. In the 1970s, the case could plausibly be made that affirmative action was temporarily desirable to remedy immediate past discrimination against blacks. Preferential policies of any kind are far more justified when aimed at helping people who have actually faced severe discrimination *in their own lifetimes*.[15] Even this Court has recognized the relevance of proximity in time to past injustices, holding that race-conscious admis-

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[14] Maimon Schwarzschild, *Voter Initiatives and American Federalism: Putting Direct Democracy in its Place*, Maimon Schwarzschild, Public Law and Legal Theory Research Paper Series, University of San Diego School of Law, pp. 2-3 (Fall 2003).

[15] *See* President Lyndon Johnson's Commencement Address at Howard University, "To Fulfill These Rights," June 4, 1965, ("You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."), available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp.

sions will probably be completely unconstitutional 15 years from now. *Grutter v. Bollinger*, 539 U.S. 306, 341-342 (2003). Whatever discrimination blacks and Latinos face today, any attempt to compare it to the discrimination faced by blacks in the 1950s and 1960s is a shameful trivialization of history.

CONCLUSION

Political restructuring doctrine is as outdated as affirmative action. Neither should be allowed to fall back on the other as a means of perpetuating itself in an era neither was designed for. The Sixth Circuit should be reversed, and the decision of the voters of Michigan to end affirmative action should stand.

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AMICUS CURIAE BRIEF

No. 12-682

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IN THE

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BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
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v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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INTEREST OF AMICI CURIAE[1]

Donald R. Kinder is the Philip E. Converse Collegiate Professor of Political Science and Professor of Psychology at the University of Michigan and Research Scientist in the Center for Political Studies at the University of Michigan Institute for Social Research. Professor Kinder has held fellowships from the Guggenheim Foundation and from the Center for Advanced Study in the Behavioral Sciences and is a member of the American Academy of Arts and Sciences. His books include *News That Matters* (1987), *Divided by Color* (1996), *Us Against Them* (2010), and *The End of Race?* (2011). Professor Kinder was on the Design Committee for the 2006 Cooperative Congressional Election Study, which is the source of the data analyzed in this brief.

The other amici are also political scientists who have conducted empirical research regarding and written extensively on issues of race and political participation. They are:

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[1] Letters consenting to the filing of amicus briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. The university affiliations of amici curiae are provided for identification purposes only. As noted below, some of the amici are members of the faculty of the University of Michigan, a respondent in this case. Any use by those amici of university resources (such as its computer or library facilities) in performing the analysis presented in this brief was limited to resources generally available to amici due to their positions on the faculty and did not constitute a "monetary contribution intended to fund the preparation or submission of th[is] brief." S. Ct. R. 37.6.

- Nancy Burns, Warren E. Miller Professor of Political Science at the University of Michigan
- Vincent L. Hutchings, Professor of Political Science at the University of Michigan
- David O. Sears, Professor of Psychology and Political Science, former Dean of Social Sciences, and current Director of the Institute for Social Science Research at the University of California, Los Angeles.

INTRODUCTION AND SUMMARY OF ARGUMENT

After a highly publicized campaign, the Michigan Civil Rights Initiative—commonly known as Proposal 2—passed into law in the November 7, 2006 election. Petitioner and respondents dispute whether Proposal 2 is an enactment about race, and if it is, whether it has the effect of aggravating or healing racial division. Petitioner contends that Proposal 2 "does not classify on the basis of race" (*e.g.*, Pet. Br. 14, *see also id.* at 29), but rather promotes the laudable goal "to eliminate, not foster discrimination" (*id.* at 36). Respondents counter that Proposal 2 is "unquestionably about race" (Cantrell Resp. Br. 2), and that race was the predominant factor behind Proposal 2's enactment (*e.g.*, *id.* at 37-40). Further, notwithstanding any purpose to reduce the salience of race, respondents assert that Proposal 2 had the opposite, deleterious effect of "balkaniz[ing] the political process." *Id.* at 57-58.

This Court has recognized that legislation that has a tendency to "balkanize us into competing racial factions" may be particularly likely to violate the Fourteenth Amendment. *Shaw* v. *Reno*, 509 U.S. 630, 657 (1993). Such legislation "threatens to carry us further

from the goal of a political system in which race no longer matters." *Id.*; *see also Bush* v. *Vera*, 517 U.S. 952, 980-981 (1996) (plurality) (racially gerrymandered districts "cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial" and "intensif[y] the emphasis on race"). Thus, the question whether Proposal 2 and the surrounding campaign divided the races into opposing political coalitions and stoked racial tensions may bear relevance to the measure's constitutionality.

To evaluate whether Proposal 2 ameliorated or activated racial tensions, the Court need not rely on the parties' assertions alone. A survey of support for Proposal 2 and race and racial attitudes was conducted during the initiative's campaign. This survey, which included extensive sampling of Michigan voters and a comparison group drawn from voters outside Michigan, was conducted in conjunction with the 2006 Cooperative Congressional Election Study, a highly regarded study frequently relied upon by social scientists. The purpose of this brief is to present an original analysis of that survey data as it bears on this dispute.

In short, an analysis of the 2006 survey data shows to a high degree of statistical certainty that Proposal 2 and the surrounding campaign balkanized voters in Michigan along racial lines. The degree of racial polarization regarding Proposal 2 far exceeded the degree of polarization concerning even the most racially contentious issues of the past several decades. Moreover, the gap between white and black support for the measure far outstripped the racial disparities generally observed in views on affirmative action.

It also appears likely that the unexpectedly high degree of racial polarization regarding Proposal 2 stems, at least in part, from the campaigns conducted by the Proposal's supporters and opponents. Proposal 2 was pervasively framed as a racial conflict, with one side arguing that it was time to put an end to a racial entitlement or spoils system, while the other classified the Proposal as a direct attack on Michigan's black community.

The 2006 survey data corroborate that the campaign surrounding Proposal 2 transformed the measure into a far cruder racial question than whether Michigan universities should continue to consider racial factors to a permissible degree in the context of holistic consideration of applicants. Among both whites and blacks, racial attitudes strongly predicted support for Proposal 2, even accounting for other factors normally correlated with views about affirmative action. Moreover, the degree to which racial views correlated with support for Proposal 2 was higher for both whites and blacks in Michigan—who were exposed to the campaign surrounding Proposal 2—than was true of a comparison sample of voters from elsewhere in the United States who were asked their views of a measure worded identically to Proposal 2. This suggests that Proposal 2 and its surrounding campaign heightened the salience of racial considerations in Michigan and transformed the vote on Proposal 2 into something akin to a referendum on race.

BACKGROUND AND DESCRIPTION OF METHODOLOGY

To assess the effects of the Proposal 2 campaign, a pair of coordinated and simultaneous surveys were designed, one carried out in Michigan (the primary sam-

ple), the other carried out in the country as a whole (the comparison sample). Interviews were conducted online with samples of the Michigan and national electorates, both before the November 2006 election and then again (with the same respondents) immediately afterwards. Both surveys included a deliberate oversampling of African Americans to ensure a sufficient sample to support statistically valid analysis of African-American opinion.[2]

Both surveys were carried out as part of the 2006 Cooperative Congressional Election Study (CCES), a cooperative venture of research teams from 38 leading universities.[3] CCES makes its data available

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[2] For purposes of analysis, Hispanics, Asians and other ethnic and racial groups are excluded. The analysis focuses exclusively on (non-Hispanic) whites and African Americans.

[3] The Principal Investigator for the 2006 CCES was Steve Ansolabehere (MIT); the Study Director was Lynn Vavreck (UCLA); and the Design Committee was made up of Ansolobehere, Vavreck, Robert Erickson (Columbia), Elizabeth Gerber (Michigan), Donald Kinder (Michigan), Jeremy Pope (Brigham Young), Wendy Rahn (Minnesota), Douglas Rivers (Polimetrix and Stanford), and John Sides (George Washington). Respondents were selected by sample matching. *See* Rivers, *Sampling for Web Surveys*, Joint Statistical Meetings (Aug. 1, 2007). Sample weights are applied throughout the analysis. On the relative advantages and disadvantages of Internet-based surveys, *see* Ansolabehere & Rivers, *Cooperative Survey Research*, 16 Ann. Rev. Pol. Sci. 307 (2013); Ansolabehere & Schaffner, *Does Survey Mode Still Matter?* (2013); Chang & Krosnick, *National Surveys Via RDD Telephone Interviewing Versus the Internet: Comparing Sample Representativeness and Response Quality*, 73 Pub. Op. Q. 641 (2009); Hill, et al., *The Opt-In Internet Panel: Survey Mode, Sampling Methodology and the Implications for Political Research* (2007); Malhotra & Krosnick, *The Effect of Survey Mode and Sampling On Inferences*

online.[4] Data from the 2006 CCES have been relied upon in numerous peer reviewed articles, including several published in highly regarded social science journals and law reviews.[5]

In the pre-election phase of the CCES, respondents in both the Michigan and national samples were asked a standard battery of questions probative of their racial sentiments. Two batteries of questions were included, one for use with white respondents and the other for use with black respondents. In both populations, the responses to these questions were averaged to compute a racial sentiment score for each participant.

White respondents were asked to rate their reactions to each of six statements on a scale from "strongly agree" to "strongly disagree." In general, the six questions were designed to elicit the respondent's views as to the continuing prevalence of racial discrimination and the extent to which blacks should bear responsibility for overcoming any remaining prejudice. Questions of this type are a standard tool for measuring white ra-

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about Political Attitudes and Behavior, 15 Pol. Analysis 286 (2007); and Rivers & Baily, *Inference from Matched Samples in the 2008 U.S. National Elections*, Proceedings of the Joint Statistical Meetings (2009).

[4] *See* http://projects.iq.harvard.edu/cces/pages/welcome-cooperative-congressional-election-study.

[5] *See, e.g.*, Ansolabehere & Persily, *Vote Fraud In The Eye Of The Beholder: The Role of Public Opinion In The Challenge To Voter Identification Requirements*, 121 Harv. L. Rev. 1737 (2008); Gerber & Huber, *Partisanship, Political Control, and Economic Assessments*, 54 Am. J. of Pol. Sci. 153 (2010); Neblo, et al., *Who Wants To Deliberate—And Why?*, 104 Am. Pol. Sci. Rev. 566 (2010).

cial sentiment and have been used in many peer-reviewed studies. *See, e.g.*, Pasek, et al., *Determinants of Turnout and Candidate Choice in the 2008 U.S. Presidential Election*, 73 Pub. Op. Q. 943, 983-984 (2009); Kinder & Winter, *Exploring the Racial Divide*, 45 Am. J. of Pol. Sci. 439, 442-443 (2001). For purposes of the analysis described in this brief, respondents who were more skeptical that racial discrimination continues and/or believed that blacks bear responsibility for overcoming any remaining discrimination are assigned higher racial sentiment scores, whereas whites who perceived a higher degree of continued racial discrimination and/or believed that blacks are not solely responsible for overcoming discrimination are assigned lower racial sentiment scores.[6]

To measure racial sentiment among African Americans, black respondents were asked three questions designed to elicit the degree of solidarity or identification they felt toward their racial group. Like the questions asked of white respondents, questions of this type are a standard tool for measuring racial sentiment among blacks and have been used in peer-reviewed studies. *See, e.g.*, Tate, *Black Political Participation in the 1984 and 1988 Presidential Elections*, 85 Am. Pol. Sci. Rev. 1159, 1166 (1991); Kinder & Winter, 45 Am. J. of Pol. Sci. at 442. For purposes of the Proposal 2 study, black respondents who expressed a high degree of solidarity or identification with their racial group were assigned

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[6] A standard measure of reliability is given by Cronbach's *alpha*, which is used to measure consistency across respondents, and which ranges in principle from 0 to 1. In this case, *alpha* = .868, a very respectable figure.

higher racial sentiment scores, while respondents who viewed themselves as comparatively independent from their group were assigned lower racial sentiment scores.[7]

In the post-election stage of the surveys, respondents in Michigan were asked whether they had voted in support of Proposal 2.[8] For the analysis presented here, this information was used to calculate the extent to which whites and blacks in Michigan supported Proposal 2 and to calculate the degree of difference in support between the races. Respondents in the national survey were asked whether they would have supported

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[7] Cronbach's *alpha* for the 3-item racial sentiment scale used with black respondents is a modest .450, which limits the capacity to detect whatever impact racial sentiment might have had on voting against Proposal 2 for black respondents.

[8] The exact question was:

> This November's ballot contained a proposition called the Michigan Civil Rights Initiative. This initiative would make it illegal for state and local governments to give preferential treatment to any individual or group on the grounds of race, sex, color, ethnicity, or national origin. This would affect hiring and promotion, college admissions, and the selection of government contractors. Did you vote on this ballot measure—the Michigan Civil Rights Initiative?
>
> Yes
> No
>
> If YES:
>
> How did you vote on the Michigan Civil Rights Initiative?
>
> Favor
> Oppose

or opposed a hypothetical ballot initiative that mimicked Proposal 2.[9] Similar calculations were done with respect to the national sample. In addition, respondents were tracked by their racial sentiment scores, enabling calculation of the relationship between racial sentiment and support for Proposal 2 and comparison of this correlation between voters in Michigan and the sample drawn from the national population.

ARGUMENT

I. EMPIRICAL EVIDENCE ESTABLISHES THAT PROPOSAL 2 POLARIZED THE ELECTORATE ALONG RACIAL LINES AND WIDENED THE DIVIDE BETWEEN THE RACES

A. Proposal 2 Polarized Michigan Voters Along Racial Lines

An empirical analysis of data collected in the 2006 CCES survey supports the conclusion that Proposal 2 sharply divided white and black Michigan voters. Whites in Michigan voted decisively in favor of Pro-

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[9] The question posed to the national sample was:

> Some states have recently proposed ballot initiatives that would make it illegal for state and local governments to give preferential treatment to any individual or group on the grounds of race, sex, color, ethnicity, or national origin. This would affect hiring and promotion, college admissions, and the selection of government contractors. If such a proposition had appeared on the election ballot in your state this November, how do you think you would have voted?
>
> Favor
> Oppose
> Not sure
> Wouldn't have voted

posal 2, while blacks voted overwhelmingly against it. The racial difference over Proposal 2 in Michigan in 2006 is exceptional—greater than differences associated with other divisive issues in 2006, and greater than the differences observed between blacks and whites over the most contentious racial issues of the last 50 years.

Of those Michigan voters who said they had participated in the election, 65.2 percent of whites, but only 13.8 percent of blacks, reported that they had voted for Proposal 2. The gap between white and black support for Proposal 2 was thus 51.4 percentage points. This difference far outstrips the difference between other pairs of groups that had differing views towards Proposal 2, including men and women, Catholics and Protestants, and those with relatively little formal education and those with relatively extensive formal education.[10] No other social factor comes close to race in dividing the Michigan electorate over Proposal 2.

The 51.4 percentage-point gap in racial views regarding Proposal 2 exceeds that of even the most con-

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[10] Specifically, 56.4 percent of men voted for Proposal 2 compared to 40.4 percent of women (a difference of 16.0 percentage points); 64.0 percent of Catholics voted for Proposal 2 compared to 55.2 percent of Protestants (a difference of 8.8 percentage points); and 62.1 percent of those whose formal education ended with a high school diploma or less voted for Proposal 2 compared to 39.2 percent of those whose formal education included post-graduate work (a difference of 22.9 percentage points).

tentious racial issues of the last 50 years. The National Election Studies[11] series provides these examples:

- In 1956, shortly after the decision in *Brown* v. *Board of Education*, 46 percent of whites and 66 percent of blacks reported support for the idea that the federal government should take steps to ensure that black and white children could attend school together (a racial difference of 20 percentage points).

- In the fall of 1964, shortly after passage of the Civil Rights Act, 49 percent of whites and 92 percent of blacks endorsed the policy of ensuring equal access to hotels and restaurants (a racial difference of 43 percentage points).

- In 1968, following race riots in Los Angeles, Detroit, and other cities, 52 percent of whites and 80 percent of blacks said that riots should be addressed by working on underlying problems of poverty and unemployment (a racial difference of 28 percentage points).

- At the conclusion of the contentious 1972 Nixon-McGovern presidential campaign, 13 percent of whites and 43 percent of blacks supported the use of busing to achieve school desegregation (a racial difference of 30 percentage points).

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[11] Data from the National Election Studies are available at http://www.electionstudies.org/studypages/download/datacenter_all_NoData.php.

In each example, the racial differences, though large, are smaller—and in most instances much smaller—than the racial difference provoked by Proposal 2.[12]

B. The Campaign Surrounding Proposal 2 Exacerbated The Degree Of Racial Division

Evidence suggests that the campaign surrounding Proposal 2 exacerbated the degree of racial division. In particular, the 51.4 percentage-point gap between the races exceeds to a statistically significant degree both the gap that would be predicted by background politics of affirmative action and the division observed in the national sample.

The racial divide over Proposal 2 significantly exceeded the racial divide that would have been predicted by general views on affirmative action, as observed in national surveys carried out at about the same time. Opinions on affirmative action—for whites and blacks alike—depends on the exact variety of affirmative action under discussion, and on what justification is offered for the policy. But whatever variety of affirmative action is considered and however it is justified, the racial divide over affirmative action falls short of the racial divide provoked by Proposal 2. This is shown in Table 1, which summarizes results on public opinion on

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[12] The only racial division that amici are aware of that compared in magnitude to the division associated with Proposal 2 was the racial difference in voting generated by the 2008 presidential election. *See* Kinder & Dale-Riddle, *The End of Race? Obama, 2008, and Racial Politics in America* 87-88 & n.30 (2011).

affirmative action taken from leading surveys conducted in and around 2006.[13]

Table 1
Racial Differences On Affirmative Action
National Samples (*circa* 2006)

	Whites	Blacks
Government should make special efforts to help blacks (NES)		
2004	35.4	61.0
2008	30.8	61.2
Support for racial preferences in hiring and promotion (GSS)		
2002	17.5	49.8
2004	18.7	51.2
2006	17.1	46.4
2008	19.1	50.8
2010	19.3	49.3
Support for affirmative action in employment (NES)		
2004	15.9	56.7
2008	14.2	56.3

[13] As noted in the table, these data come either from the National Election Studies (NES), carried out by the Institute for Social Research at the University of Michigan (data available at http://www.electionstudies.org/studypages/download/datacenter_all_NoData.php) or by the General Social Survey (GSS), carried out by the National Opinion Research Center at the University of Chicago (data available at http://www3.norc.org/GSS+Website/).

Government has special obligation to improve blacks' standard of living (GSS)		
2002	30.8	61.5
2004	29.5	61.9
2006	31.6	63.7
2008	31.0	63.8
2010	30.7	56.7

The racial differences displayed in Table 1 are considerable, averaging 32.1 percentage points, and ranging from a low of 26.0 percentage points to a high of 42.1 percentage points. The racial differences provoked by Proposal 2 in Michigan, however, were far greater—nearly 20 percentage points greater than the average reflected in these studies.

That Proposal 2 divided the races to an extent beyond what would be predicted by general views on affirmative action is corroborated by comparing the gap measured in Michigan against the gap found in the national comparison group. Respondents in the national sample were asked their opinion of legislation worded identically to Proposal 2. *See supra* note 9. In the national sample, 83.2 percent of whites said they would have supported Proposal 2, compared to 40.6 percent of blacks—a racial difference of 42.6 percentage points. While this is a large difference, it is smaller to a statistically significant degree ($p < .01$) than the 51.4 percentage-point gap generated by Proposal 2 in Michigan. And the difference remains significant and undiminished after accounting for a variety of variables including employment status, union membership, and party affiliation.

This does not, of course, by itself establish that the campaign surrounding Proposal 2 caused increased polarization. Michigan is not the same as the nation. It could be that racial differences in opinion over matters of race in Michigan are generally greater than in the country as a whole and that the campaign surrounding Proposal 2 did not exacerbate racial division over the measure.

This possibility, however, is not supported by the data. The 2006 CCES (which included a sample of 36,000 respondents nationwide who were representative of their respective States) included a question regarding affirmative action. Using response data for that question in conjunction with other information, it is possible to predict an expected racial divide over affirmative action in Michigan based on its economic and social characteristics.[14] Variation across States[15] in black and white opinion regarding affirmative action was analyzed as a consequence of differences across States in racial makeup (percentage African American), education, unemployment (percentage unemployed), income (median family annual income in 2006 inflation-adjusted dollars), poverty (percentage of families with

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[14] The pertinent question from CCES read:

> Some people think that if a company has a history of discriminating against blacks when making hiring decisions, then they should be required to have an affirmative action program that gives blacks preferences in hiring. What do you think? Should companies that have discriminated against blacks have to have an affirmative action program?

[15] The analysis excluded Michigan, as well as States with very small black populations.

income below poverty level), region, and unionization (percentage of employed who are members of a union). As Table 2 shows, the magnitude of the racial divide over affirmative action in a given State does indeed correlate with these characteristics.[16]

Table 2
Social And Economic Characteristics Of States As Predictors Of The Magnitude Of The Racial Divide Over Affirmative Action

Characteristics of States	White Opinion	Black Opinion
Income	0.004**	0.001
	(0.002)	(0.003)
Unionization	-0.235	0.001
	(0.157)	(0.310)
Education	-0.844**	-1.055
	(0.329)	(0.652)
Deep South	0.002	-0.056
	(0.036)	(0.071)

[16] Whites living in States where education is relatively high and unionization is relatively strong tend to be more supportive of affirmative action than whites in other States; and whites living in States that are relatively affluent and contain a relatively large percentage of blacks tend to be less supportive of affirmative action than whites in other States. Meanwhile, blacks living in States characterized by relatively high levels of education and relatively high levels of unemployment tend to be more supportive of affirmative action than blacks in other States. The information on States is taken from the Bureau of Labor Statistics, Current Population Survey, and the American Community Survey conducted by the Census Bureau, all as of 2006.

Rim South	0.001	-0.017
	(0.025)	(0.049)
Border	0.012	-0.060
	(0.020)	(0.039)
Northeast	-0.016	-0.015
	(0.017)	(0.034)
West	0.014	0.047
	(0.018)	(0.035)
Unemployment	-0.352	-2.900
	(0.954)	(1.890)
Poverty Rate	0.612	-0.030
	(0.506)	(1.003)
Percentage Black	0.210*	0.022
	(0.111)	(0.220)
Constant	0.732***	0.802**
	(0.143)	(0.284)
Observations	31	31
R-squared	0.831	0.505

*** p<0.01, ** p<0.05,
* p<0.1

Based on the relationships shown in Table 2, it is possible to predict the expected magnitude of the racial divide over affirmative action in Michigan given its economic and social characteristics (or more precisely, the magnitude of the racial divide over affirmative action in a State with the same economic and social characteristics as Michigan). That predicted value is 47.7 percentage points (with a standard error of 6.1). The racial difference over affirmative action as actually observed in Michigan in the 2006 CCES, however, was 55.3 percentage points—well above the value predicted for Michigan based on its social and economic charac-

teristics. These results lend additional support to the claim that the campaign surrounding Proposal 2 polarized the Michigan electorate along racial lines.

In sum, Proposal 2 divided the Michigan electorate along racial lines to an extraordinary degree—more than school desegregation or the Civil Rights Act, more than a hypothetical version of Proposal 2 divided the national electorate, more than what is generally observed in opinion on affirmative action, and more than would be expected from Michigan's social and economic characteristics. While the data themselves cannot provide any conclusive explanation for why this was the case, the results certainly suggest that Proposal 2 was about something more fundamental than whether affirmative action at Michigan universities should be repealed.

II. Proposal 2 Significantly Exacerbated The Importance Of Racial Considerations Among Black And White Voters

It appears that the stark racial polarization in support for Proposal 2 was not happenstance. The campaigns supporting and opposing Proposal 2 were framed as racial appeals that played to racial sentiments. The evidence corroborates that the campaign surrounding Proposal 2 exacerbated the degree to which Michigan voters—white and black—relied on considerations of race in forming their views on Proposal 2. Among both white and black voters, the relationship between racial sentiment and the vote on Proposal 2 was strong and remained strong after accounting for other political considerations. Indeed, the evidence shows that racial sentiment was a stronger determinant of vote on Proposal 2 than any other factor.

And the relationship between racial sentiment and vote on Proposal 2 was stronger than the relationship in the national survey between racial sentiment and vote on a hypothetical ballot initiative worded identically to Proposal 2 (for whites, to a statistically significant degree), suggesting that the link between support or opposition to Proposal 2 and racial sentiment was exacerbated by Proposal 2 itself.

A. Framing And The Proposal 2 Campaign

1. The phenomenon of framing

Based on established social science literature, it is plausible to expect Proposal 2 to have exacerbated the importance of racial considerations among black and white voters.[17] Presidents, members of Congress, cor-

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[17] This analysis draws on the work of Kahneman and Tversky. In a series of experiments that transformed cognitive science, Kahneman and Tversky established (among other things) that the judgments people reach and the decisions they make are subject to systematic and pervasive framing effects. *See* Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 Am. Econ. Rev. 1449 (2003); Tversky & Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Sci. 453 (1981). The Kahneman and Tversky experiments gave rise to an industry of research; spawned an entire new field ("behavioral economics"); and in time, delivered to Kahneman the Nobel Prize in Economic Science. (Kahneman was awarded the Nobel Prize in 2002 for the work he did with Tversky, who died in 1996.) For summaries and reviews of this work, *see* Gilovich, et al., *Heuristics and Biases: The Psychology of Intuitive Judgment* (2002); Kahneman & Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment, in Heuristics and Biases: The Psychology of Intuitive Judgment* 49 (Gilvich, et al., eds. 2002); and Kahneman, et al., *Judgment Under Uncertainty: Heuristics and Biases* (1982). For applications of the principle of framing to political communication

porate publicists, activists, policy analysts, reporters, and editors, among others, all perpetually engage in efforts to "frame" current events. Frames "bring order to events by making them something that can be told about; they have power because they make the world make sense." Manoff, *Writing the News (By Telling the "Story")*, *in Reading the News: A Pantheon Guide to Popular Culture* 228 (Manoff & Schudson eds., 1986). Frames supply "a central organizing idea or story line that provides meaning to an unfolding strip of events, weaving a connection among them." Gamson & Modigliani, *The Changing Culture of Affirmative Action*, *in Equal Employment Opportunity* 376 (Braungart ed., 1994).

The issues taken up by government are always complex; they are always subject to alternative interpretations. Many citizens, preoccupied with the vicissitudes of private life, ordinarily pay little notice to these issues. But at special junctures, especially at the climax of intensive campaigns, they seek out guidance about how to think and how to vote. Under such circumstances, framing can have powerful effects because frames reduce complex policies to simpler, easier, more manageable questions.

Frames influence voters' judgments and decisions by altering the relative salience of different aspects of the issue. Frames highlight some features and ignore others. Highlighted features are psychologically accessible, thereby contributing to decisions and judgments;

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and public opinion, *see* Chong & Druckman, *Framing Theory*, 10 Ann. Rev. Pol. Sci. 103 (2007).

ignored features are less-readily accessible and therefore less likely to be influential. Which frames prevail can affect how citizens understand issues, and, in the end, what their opinions turn out to be.

Opinion on policy in the domain of race is no different. For example, support for a government policy requiring companies to allocate a certain number of jobs to blacks increases when the issue is framed to include the information that the companies in question engaged in discrimination in the past. Stoker, *Political Value Judgments, in Citizens and Politics: Perspecitves from Political Psychology* 445-447 (Kuklinski ed., 2001). Opposition to affirmative action in university admissions diminishes when presented as a policy to ensure that all qualified black applicants are "considered," versus a policy to give qualified blacks a "preference." Stoker, *Understanding Whites' Resistance to Affirmative Action: The Role of Principled Commitments and Racial Prejudice, in Perception and Prejudice: Race and Politics in the United States* 144-145 (Hurwitz & Peffley eds., 1998). These results and others like them establish that frames matter for opinion on matters of race.

Thus, depending on how the issue was framed, the campaign surrounding Proposal 2 could have had the effect of activating racial divisions and hostility.

2. Anecdotal evidence shows the campaign surrounding Proposal 2 was framed in a way that appealed to racial sentiment

The Proposal 2 campaign generated extensive media coverage within Michigan leading up to the November 2006 election. A review of contemporaneous news articles reflects that proponents of Proposal 2 framed

the measure as seeking to eliminate racial "preference" and to promote individualism. They characterized affirmative action as an unfair and obsolete "racial spoils system." *See, e.g.*, Editorial, *In Michigan Rights Fray, Foes' Tactic Is to Block the Vote*, Grand Rapids Press, Sept. 24, 2006, at F2; Bray, *Beware Using 'Racist' Label in Racial Preferences Battle*, Detroit News, Aug. 17, 2005, at 13A.

For example, as echoed in many accounts endorsing Proposal 2, one supporter argued that "Michiganders ... despise preference by race," and cautioned that those opposed to Proposal 2 "wish to retain racial preferences ... [o]r they hope to introduce new preferences for some ethnic groups." *See* Cohen, *Aim for True Equality by Ending Preferences*, Detroit Free Press, July 17, 2005. Another proponent urged voters to support Proposal 2 if they "agree with the principle of equal opportunity for individuals, instead of equal outcome for groups." White & White, *November Vote for MCRI Supports Equal Opportunity for Individuals*," Kalamazoo Gazette, Apr. 23, 2006; *see also* Littmann, *Vote Yes: Affirmative Action Is Bad for State's Business Climate, True Equality*, Detroit Free Press, Oct. 2, 2006, at 6 (arguing "special preferences" and "special privileges to a chosen few at the expense of many" hamper the economy, and that "[t]hrough MCRI, individual effort and excellence are rewarded," which will make markets thrive).

The campaign against Proposal 2 also had the effect of appealing to racial sentiment, as opponents warned that strides made by women and racial minorities would be lost if the initiative passed. For example, on editorial argued that enacting Proposal 2 "would send the wrong message about Michigan as a place of oppor-

tunity," that Proposal 2 would "end[] opportunities for minorities and women," and that "[a]ffirmative action is about equalizing opportunities" and "helping to create opportunities for segments of the population that have historically been denied them." Editorial, *No Steps Back on Opportunity; MCRI, State Proposal 06-2, Would Push Back Progress on Hiring and Access to College for Minorities*, Detroit Free Press, Oct. 8, 2006, at 1.

Opponents also warned of the balkanization created by the Proposal 2 campaign. In an interview, Linda Parker, director of the Michigan Department of Civil Rights, called the initiative "divisive" and one that exacerbated Michiganders' "continued failure to live together" as evident by Michigan's place as "No. 2 in the country in terms of residential segregation." She termed the initiative's campaign as one "capitalizing on ... fears" based on negative assumptions about race. *Face It: Realities Demand Better Balance*, Detroit Free Press, Mar. 23, 2004, at 7A.

B. Empirical Evidence Regarding Racial Sentiment Corroborates That Proposal 2 Activated Racial Considerations

Analysis of the 2006 CCES survey data supports the conclusion that the campaign surrounding Proposal 2 exacerbated the degree to which Michigan voters—white and black alike—relied on considerations of race in deciding how to vote. Racial sentiments correlated more strongly than any other factor with voters' support for or opposition to Proposal 2. Moreover, the extent of this correlation between racial sentiment and support for or opposition to Proposal 2 was stronger for Michigan voters than for the national sample, suggest-

ing that the campaign surrounding Proposal 2 activated racial sentiments. As a result, racial sentiments dominated racially neutral factors in voters' choices.

1. Racial sentiment strongly predicts support for Proposal 2 among Michigan voters, after controlling for confounding variables

As noted, racial sentiment scores were calculated for all survey participants. *See supra* pp. 6-7. These scores were very strongly associated with how respondents voted on Proposal 2. Whites with low racial sentiment scores (*i.e.*, those who were less skeptical of ongoing discrimination or who questioned whether blacks should be responsible for overcoming that discrimination) voted against Proposal 2 overwhelmingly (85.0 percent to 15.0 percent), while whites with high racial sentiment scores voted for Proposal 2 to an even more lopsided extent (90.7 percent versus 9.3 percent). Similarly, blacks with high racial sentiment scores (*i.e.*, those whose survey responses suggested the highest level of racial group solidarity or identification) were overwhelmingly opposed to Proposal 2 (92.8 percent), while those with low scores were more divided (only 79.1 percent opposed Proposal 2).

The correlations between racial sentiment and views regarding Proposal 2 are robust, and remain strong after controlling for other factors. The independent strength of the link between racial sentiment and views on Proposal 2 can be assessed by controlling for other known important factors in explaining opinion on affirmative action. Three such factors are party identification, belief in limited government, and belief

in equal opportunity.[18] The pre-election CCES survey included questions to measure each of these factors, making it possible to estimate and compare the effect of each of these factors against the effects of racial sentiment using multivariate and probit regression.[19]

The results for white and black voters respectively are presented in Table 3.

Table 3
The Effect Of Racial Sentiment On Voting For Proposal 2 In Michigan

	Whites	Blacks
Racial Sentiment	2.785***	-1.134*
	(0.427)	(0.678)
Party Identification	0.597*	-0.669
	(0.308)	(0.786)
Limited Government	0.556**	1.378***
	(0.231)	(0.331)
Equal Opportunity	0.085	-0.415
	(0.406)	(0.865)

[18] On partisanship, see Campbell, et al., *The American Voter* (1960), and Bartels, *Partisanship and Voting Behavior*, 44 Am. J. Pol. Sci. 35 (2000); on limited government, see Markus, *American Individualism Reconsidered, in Citizens and Politics* (2001); and on equal opportunity, see Feldman, *Structure and Consistency in Public Opinion: The Role of Core Beliefs and Values*, 32 Am J. Pol. Sci. 416 (1988).

[19] The analysis uses multivariate regression because voting on Proposal 2 is a product of more than one factor, and probit regression because voting on Proposal 2 is a binary variable (scored 1 if the person votes for Proposal 2 and scored 0 if the person votes against Proposal 2).

Constant	-1.658***	-0.316
	(0.452)	(0.718)
Observations	498	253

Standard errors in parentheses
*** p<0.01, ** p<0.05, *p<0.1

The results indicate a statistically significant and substantively sizable effect of racial sentiment on support for Proposal 2, after controlling for other factors. Whites with high racial sentiment scores were much more likely to vote for Proposal 2 than were whites with low scores. And blacks with high racial sentiment scores were more likely to vote against Proposal 2 than were blacks with low scores.

Racial sentiment was not the only factor at work. Table 3 also reveals that Republicans were somewhat more likely to vote for Proposal 2 than were Democrats (among white voters), and that those voters concerned about the scope and size of the federal government were somewhat more likely to vote for Proposal 2 than those who said they believed in the necessity of a strong central government (among both white and black voters).

The magnitude of the effect due to racial sentiment on the vote can be seen in Figures 1 and 2, which translate the coefficient results presented in Table 3 into graphical form. Figure 1 presents the predicted vote among whites for Proposal 2 as a consequence of variation in racial sentiment, holding constant the effects of

partisanship, limited government, and equal opportunity.[20]

Figure 1
Racial Sentiment And White Support For Proposal 2

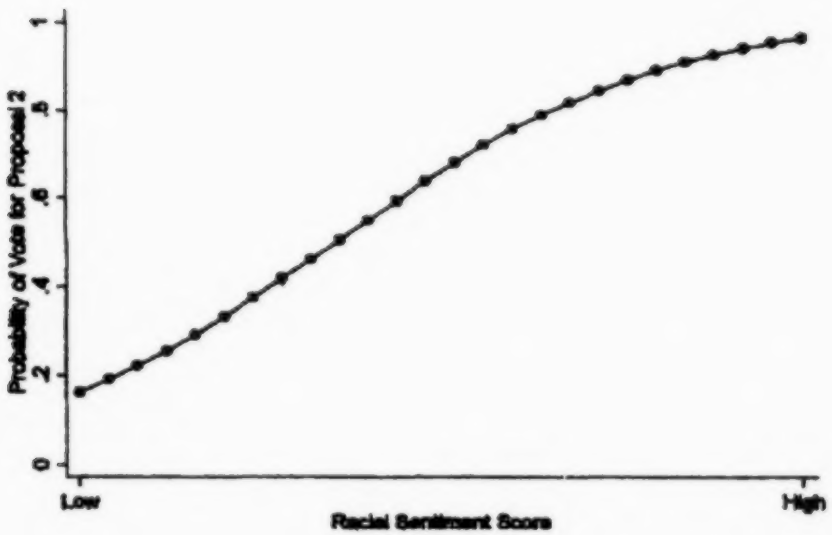

Figure 1 reveals how quickly support for Proposal 2 gathered strength with increasing racial sentiment scores. White voters with a comparatively low score (a score of .25 on the 0-1.0 racial sentiment scale) voted decisively against Proposal 2 (by a margin of 63-37); white voters with relatively high scores (a score of .75 on the 0-1.0 scale) voted decisively for Proposal 2 (83-17).

The magnitude of the effect due to racial sentiment on black voters can be seen in Figure 2. Figure 2 like-

---

[20] The predictions displayed in Figure 1 assume a white voter who is a political Independent, with average views on limited government and equal opportunity.

wise shows the predicted vote for Proposal 2 as a consequence of variation in racial sentiment, holding constant the effects due to partisanship, limited government, and equal opportunity.[21]

Figure 2
Racial Sentiment And Black Support For Proposal 2

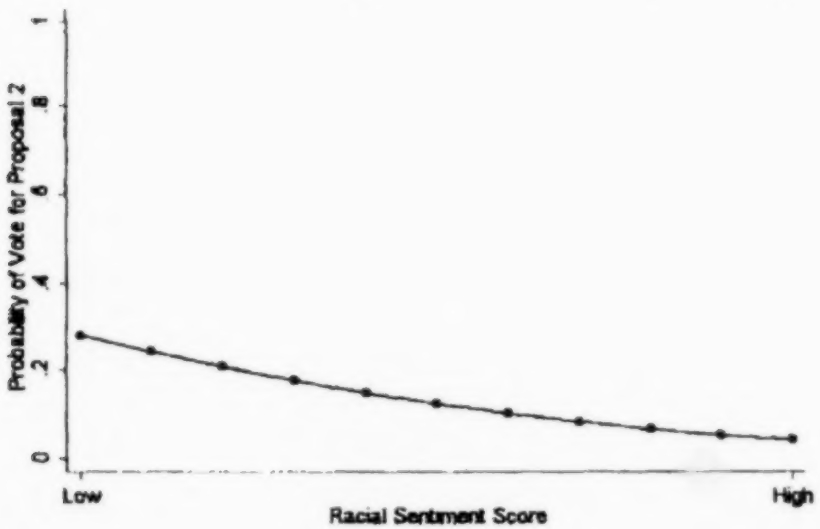

Figure 2 foremost reflects just how overwhelmingly black voters opposed Proposal 2. Disapproval was strong even among those with low racial sentiment scores. That said, racial sentiment did make a difference to the vote. As Figure 2 reveals, predicted vote for Proposal 2 falls, gently but perceptibly, as racial sentiment scores increase.

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[21] The predictions displayed in Figure 2 assume a black voter who is a political Independent, with average views on limited government and equal opportunity.

2. Michigan voters were influenced more by racial sentiment than were voters in the national sample

The data reveal not only that racial sentiment had a large independent correlation with voting on Proposal 2 for both black and white Michigan voters, but also that the effect was larger for Michigan voters than for survey respondents in the national comparison sample (who, as noted, were also asked the battery of questions used to measure racial sentiment and who were asked their opinion of a hypothetical initiative worded identically to Proposal 2).

Table 4 presents the data for white Michigan voters alongside the corresponding results for white voters from the national comparison sample:

Table 4
The Effect Of Racial Sentiment On White Voting For Proposal 2

	Michigan (Proposal 2)	Nation (Hypothetical)
Racial Sentiment	2.785***	2.107***
	(0.427)	(0.448)
Party Identification	0.597*	0.061
	(0.308)	(0.261)
Limited Government	0.556**	0.048
	(0.231)	(0.226)
Equal Opportunity	0.085	-1.107***
	(0.406)	(0.390)

Constant	-1.658***	0.575
	(0.452)	(0.414)
Observations	498	478

Standard errors in parentheses
*** p<0.01, ** p<0.05, *p<0.1

As shown in Table 4, the effect of racial sentiment on white support for eliminating affirmative action is positive and statistically significant in the national sample, as it was in Michigan. But the magnitude of the effect was greater among Michigan voters than in the national sample. And the difference between the effect of racial sentiment in Michigan and the effect of racial sentiment nationally is statistically significant.[22] Proposal 2 and the surrounding campaign thus appear to have exacerbated the importance of racial considerations in the white vote in Michigan.[23]

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[22] $p < .05$, one-tailed test. The result holds under alternative model specifications: adding employment status and union membership to the analysis, or comparing the results for Michigan voters only to voters living in States that resemble Michigan (Illinois, Ohio, Indiana, Pennsylvania, New Jersey and New York).

[23] In addition to augmenting the effect of racial sentiment, Proposal 2 also enhanced the effects of partisanship and limited government (both of which are associated with the vote in Michigan, but not elsewhere), and overrode the effect of views on equality of opportunity.

Table 5 presents the results for black Michigan voters alongside the corresponding results for black voters from the national comparison sample:

Table 5
The Effect Of Racial Sentiment On Black Voting For Proposal 2

	Michigan (Proposal 2)	Nation (Hypothetical)
Racial Sentiment	-1.134*	-.980**
	(0.678)	(0.410)
Party Identification	-0.669	0.495
	(0.786)	(0.338)
Limited Government	1.378***	0.543**
	(0.331)	(0.268)
Equal Opportunity	-0.415	-0.675
	(0.865)	(0.424)
Constant	-0.316	0.627
	(0.718)	(0.466)
Observations	253	439

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

As shown in Table 5, the effect of racial sentiment on black opposition to Proposal 2 is positive and statistically significant in the national sample, just as it was in the Michigan sample. Table 5 also shows that, as was true for white voters, the effect of racial sentiment on opposition to affirmative action was stronger among Michigan voters than in the national sample, though

(unlike with whites) the difference between the effect of racial sentiment on black Michigan voters and the effect of racial sentiment on black voters in the national sample does not rise to the level of statistical significance. It thus cannot confidently be said to reflect a meaningful difference between Michigan respondents and the rest of the country.[24]

* * *

In sum, for both white and black voters, racial sentiment served as a dominant factor in explaining how a person voted. And for both white and black voters in Michigan (to a statistically significant degree, for whites), racial sentiment played a stronger role than in the national sample. The evidence thus strongly suggests that Proposal 2 activated racial sentiments and led voters to see their ultimate choice on Proposal 2 largely in racial terms.

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[24] Parallel with the analysis of white voters, the effect of racial sentiment on opposition to affirmative action remains greater among black voters in Michigan than in the national comparison sample under alternative model specifications: adding employment status and union membership to the analysis, or comparing the results for Michigan voters to voters living in States that resemble Michigan (Illinois, Ohio, Indiana, Pennsylvania, New Jersey and New York).

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS AND THE LEADERSHIP CONFERENCE EDUCATION FUND *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS CHASE CANTRELL *ET AL.*

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INTEREST OF *AMICI CURIAE*[1]

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States.[2] It is the Nation's premier civil and human rights coalition working to build an America that is as good as its ideals. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. For more than half a century, The Leadership Conference has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of the Civil Rights Acts of 1957, 1960, and 1964; the Voting Rights Act of 1965; the Fair Housing Act of 1968; and the Americans With Disabilities Act of 1990.

The Leadership Conference has long been involved in achieving and promoting diversity in higher education throughout the country. In Michigan, the Leadership Conference, and its sister organization The Leadership Conference Education Fund, has partnered with grassroots organizations to enhance diversity in education and inform Michigan residents

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[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See* Appendix A for a list of The Leadership Conference's member organizations.

about the adverse impact that the ballot initiative at issue in this case would have if enacted.

The Education Fund builds public will for federal policies that promote and protect the civil and human rights of all persons in the United States. The Education Fund's campaigns empower and mobilize advocates around the country to push for progressive change in the United States. The Education Fund has published fact sheets and reports on many subjects, including on the role and benefits of diversity in higher education.

Several other organizations interested in promoting diversity in higher education, many of which are members of The Leadership Conference, also join as signatories of this brief. They include:

- 9to5
- American Association for Affirmative Action
- American Association of University Women
- American Citizens for Justice/Asian American Center for Justice
- Asian Americans Advancing Justice-AAJC (Advancing Justice-AAJC)
- Asian Americans Advancing Justice - Los Angeles (Advancing Justice LA)
- The Asian American Legal Defense and Education Fund (AALDEF)
- American Federation of State, County and Municipal Employees (AFSCME)
- Chinese for Affirmative Action (CAA)
- Chicago Lawyers' Committee for Civil Rights Under Law

- Dēmos
- Disability Rights Legal Center (DRLC)
- The Equal Justice Society (EJS)
- Equal Rights Advocates (ERA)
- Haas Institute for a Fair and Inclusive Society
- Lambda Legal
- LatinoJustice PRLDEF
- Lawyers' Committee for Civil Rights of the San Francisco Bay Area
- Legal Momentum
- Mexican American Legal Defense and Educational Fund (MALDEF)
- National Association for Equal Opportunity in Higher Education (NAFEO)
- National Association of Latino Elected and Appointed Officials (NALEO)
- The National Black Law Students Association (NBLSA)
- National Council of Jewish Women (NCJW)
- National Council of La Raza (NCLR)
- National Urban League
- National Women's Law Center
- National Organization for Women (NOW)
- UNC Center for Civil Rights
- Union for Reform Judaism, Central Conference of American Rabbis and Women of Reform Judaism

- YWCA USA

These organizations' interests are set forth in more detail in Appendix B.

Education has long been recognized as a foundation for creating and promoting democratic values and participation, and diversity in education is, and has long been, recognized as a compelling state interest that benefits a student body, a community, and the Nation as a whole. *Amici* have a vital interest in ensuring that the normal political channels for influencing state education policy—including advocating for the use of holistic, race-sensitive admissions practices to promote diversity—remain open to *Amici* and their constituencies.

Amici do not contend that race-sensitive diversity measures are constitutionally *required*. Rather, *Amici* strongly believe that educational institutions do, and should continue to, have discretion in how they implement their academic missions. Proposal 2, however, is not merely a repeal of race-sensitive diversity measures. Rather, it amends the state constitution as to one racially-focused issue, to eliminate the existing political channels in which advocates like *Amici* have been particularly successful in achieving diversity goals.

For that reason, *Amici* write to emphasize that the political restructuring doctrine—embodied in *Washington* v. *Seattle School District No. 1*, 458 U.S. 457, 467 (1982), and *Hunter* v. *Erickson*, 393 U.S. 385, 393 (1969), and applied by the Sixth Circuit below—is an appropriate tool for applying heightened judicial scrutiny to the racially-focused ballot measure at issue here. In connection with this point, *Amici* also seek to dispel pernicious falsehoods and misconceptions perpetuated by proponents of

Proposal 2 and Petitioner's briefs about how holistic diversity considerations work in universities and what makes for a "meritorious" application for admission.

SUMMARY OF ARGUMENT

The political restructuring doctrine, also known as the *Hunter/Seattle* doctrine, is well-grounded in constitutional history, equal protection doctrine, and political theory. The architects of the Constitution recognized that "factions" inherently pose risks to the effective functioning of a democratic government. The political restructuring doctrine recognizes not merely that a majority can impose tyranny on the minority, but that a factional interest acting through *one channel* of governmental power at one particular time can entrench itself by foreclosing *other channels of democratic influence*, enacting measures that have systemic and self-perpetuating effects that insulate the preferences of that faction from future democratic change.

The *Hunter/Seattle* doctrine thus compels heightened judicial scrutiny when laws threaten to "subtly distort[ ] governmental processes" so as to place special burdens on minority groups' "entering into the political process in a reliable and meaningful manner." *Seattle*, 458 U.S. at 467; see also *Hunter*, 393 U.S. at 393. As the Court recognized in *Romer* v. *Evans*, 517 U.S. 620 (1996), in similarly striking down a popularly passed initiative amending the state constitution to prohibit perceived special treatment for a certain group: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

The doctrine plainly applies in assessing Proposal 2, as the Sixth Circuit recognized. While Petitioner and his supporters argue that the Sixth Circuit's decision contravenes the "democratic will" of the people of Michigan, that decision is actually focused on *preserving* the operation of democratic institutions, not thwarting it. Nearly half a century of grassroots political organizing and advocacy, bolstered by robust social science, has fostered an extensive coalition in support of diversity measures. This coalition, which actively participated in the briefing before this Court last Term in *Fisher* v. *University of Texas*, 133 S. Ct. 2411 (2013) (No. 11-345), includes university administrators and on-campus associations, elected leaders, former military leaders, corporations, social scientists, and a wide array of national, regional, and local community organizations representing people of diverse racial, ethnic, and religious backgrounds.

In Michigan, however, a special interest group—one that has largely failed to persuade decision-makers within existing political processes about the pursuit of diversity in university admissions—instigated an initiative process to amend the state constitution and change the rules. Proposal 2 eliminates the normal channels of democratic influence for a racially-focused issue, and thereby reduces minority access to the very educational institutions that provide the basis for future democratic participation.

Amici agree with the Sixth Circuit and Respondents that the *Hunter/Seattle* doctrine properly applies in this case. *Amici* write separately to emphasize two points.

First, heightened judicial scrutiny under the political restructuring doctrine is particularly appropriate for race-focused constitutional amend-

ments passed by ballot initiative. Popular initiatives, by their nature, bypass the normal checks and balances and deliberative processes associated with a republican form of government. That is their intended purpose. But a ballot initiative also poses an inherent danger—evident in the circumstances surrounding the ballot initiative here—of takeover by "factions" seeking to entrench themselves at the expense of alternative democratic processes. Heightened judicial scrutiny remains an important, and likely the only viable, check for such measures.

Second, heightened judicial scrutiny under the political restructuring doctrine is particularly appropriate in what the Sixth Circuit below aptly described as the "high-stakes context of education." Pet. App. 7a-12a. Education is critical both to the vitality of an individual's future civic engagement and participation in self-governance; each of these interests implicates special First Amendment and Equal Protection concerns. By misconstruing how holistic diversity measures operate, and by banning *any consideration* of race, ethnic heritage, or sex—even when it may be important to a candidate's personal life-story or necessary to promote a diversity student body across fields of study—Proposal 2 grossly and unfairly intrudes into and distorts university decision-making processes, to the detriment not only of minority applicants, but to the student body and community as a whole.

For these reasons, in addition to those set forth in Respondents' brief and by the Sixth Circuit below, *Amici* urge the Court to affirm the decision invalidating Proposal 2.

ARGUMENT

I. THE POLITICAL RESTRUCTURING DOCTRINE IS THE APPROPRIATE APPROACH TO SCRUTINIZE BALLOT INITIATIVES, LIKE THE ONE HERE, THAT FOCUS ON RACE.

The political restructuring doctrine is founded on the principle that Equal Protection guarantees "the right to full participation in the political life of the community." *Seattle*, 458 U.S. at 467. The doctrine thus requires heightened judicial scrutiny when race is "the predominant factor" motivating the political process. *Bush* v. *Vera*, 517 U.S. 952, 959 (1996) (plurality). As explained below, the use of heightened judicial scrutiny in this context is well-founded in Equal Protection doctrine and is particularly appropriate in the case of race-focused ballot initiatives which amend a state's constitution.

A. Heightened Judicial Scrutiny Is Appropriate For Race-Based Ballot Initiatives That Amend A State's Constitution.

Ballot initiatives play an important role in a number of states and are premised on the people's right to engage in "direct democracy." See, *e.g.*, *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting); Kenneth P. Miller, *Direct Democracy and the Courts* (2009). But the very reason that popular initiatives are appealing—they bypass checks and balances and normal, deliberative political processes—make them ripe for abuse and make heightened judicial scrutiny particularly warranted when they target "discrete and insular minorities."

The Framers of our Constitution were acutely aware that "pure" democracy would be subject to the "mischiefs of faction"—*i.e.*, the risk that a group, united by a "common passion or interest," may seek to "sacrifice the weaker party" and promote its own interests at the expense of the common good. The Federalist No. 10 (James Madison). For that reason, the Framers adopted a republican form of government derived from the concept of "filtered majoritarianism," in which numerous checks and balances are designed to promote deliberation and guard against abuse—and required the states to do the same.[3]

State ballot initiatives and referenda—which trace their roots to the Progressive Movement in the early 1900s—are intended to remove or break through that filter and have been used with increasing frequency in recent decades.[4] Ideally, such initiatives reflect the virtues of popular sovereignty and spur legislative processes into action.

Yet the recent surge of initiative measures "has produced fresh evidence of direct democracy's structural shortcomings and potential abuses," with studies highlighting ways in which "the initiative process in practice violates many basic democratic norms, such as refinement of proposals, informed deliberation, consensus-building, compromise, and

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[3] *See, e.g.*, Miller, *supra*, at 19-20; Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 Colum. J.L. & Soc. Probs. 237, 252 (1999); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1532 (1990) [hereinafter "Eule, *Direct Democracy*"].

[4] *See* Miller, *supra*, at 41-71.

accountability."[5] Unlike representative government, the initiative process does not allow for the creation of the same legislative record as that of the representative government process, making it more difficult to discern the intent of the voters.[6] Many scholars have observed the growth of an "initiative industry" run by sophisticated professional networks and repeat players,[7] often making the initiative process itself "the tool of special interests rather than the common citizen."[8]

Thus, while the initiative process offers many potential benefits, its potential abuses counsel in favor of an important role for judicial scrutiny. For at least two reasons, the need for judicial scrutiny is

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[5] *Id.* at 71 & n.95 (collecting cases); *see also* Julian N. Eule, *Checking California's Plebiscite*, 17 Hastings Const. L.Q. 151, 155 (1989) [hereinafter "Eule, *Checking Plebiscite*"] ("The initiative process in practice confirms the prescience of the Framers' fears. Special-interest groups, aided by one-sided spending and voter ignorance, enjoy the very position of power that a representative government with its checks and balances is designed to prevent. The problem is exacerbated by deceptive wording, practices, and sloganeering, as well as by the large number and complexity of ballot measures. In addition, lack of deliberative mediation, debate, or individual commitment to a consistent or fair course of conduct further taints the republican ideal.").

[6] Eule, *Direct Democracy*, *supra*, at 1556.

[7] Miller, *supra*, at 51-55.

[8] Pak, *supra*, at 247; *see also* Eule, *Checking Plebiscite*, *supra*, at 155; John Diaz, sfgate.com, *A Long Way from the Grassroots* (Oct. 12, 2008), www.sfgate.com/opinion/article/A-long-way-from-the-grassroots-3190565.php ("Today, the initiative process is no longer the antidote to special interests and the moneyed class; it is their vehicle of choice to attempt to get their way without having to endure the scrutiny and compromise of the legislative process.").

particularly acute where the initiative process targets historically recognized racial, ethnic, religious, or other minorities.[9] *First*, ballot initiative campaigns, by their nature, "appeal to passions and prejudices" and are divorced from any deliberative or ongoing coalition-building process.[10] *Second*, popular initiatives operate against the backdrop of historical and current barriers to minorities' participation in the political process, including the current iteration of voter registration restrictions, reductions in the availability of early voting, and voter identification requirements.[11]

This Court, in tacit recognition of such concerns, has long applied heightened judicial scrutiny to

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[9] *See* Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 Cornell L. Rev. 527, 560-61, 578-80 (1994); *id.* at 541 n.48 ("'Direct democracy bypasses internal safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest,' thus requiring special judicial oversight to serve as a defense for minority interests."); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. Colo. L. Rev. 13, 40-41 (1995) (noting that "[t]he only institutional checks on the excesses of direct legislation are the courts," and that the "issue of checks and balances on direct democracy is most relevant when initiatives target racial or other minorities"); Eule, *Direct Democracy*, *supra*, at 1549.

[10] Magleby, *supra*, at 44; *see also, e.g.*, Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1, 11 (1978).

[11] *See New State Voting Laws: Barriers to the Ballot?: Hearing Before the S. Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. On the Judiciary*, 112th Cong. 16 (Sept. 8, 2011) (statement of Judith A. Browne-Dianis, Co-Director of the Advancement Project); *see also* Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 Pol. Sci. & Pol. 127 (2009).

initiatives that impair minority rights. It has done so for nearly a century, from *Pierce* v. *Society of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925),[12] to *Lucas* v. *Forty-Fourth General Assembly*, 377 U.S. 713 (1964), to *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). The Court trenchantly explained the rationale for "searching judicial inquiry" in an oft-cited footnote to an early Equal Protection decision. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (observing that "prejudice against discrete and insular minorities ... which tends seriously to curtail the operation of those political process ordinarily to be relied upon to protect minorities ... may call for a correspondingly more searching judicial inquiry"). The *Hunter/Seattle* political restructuring doctrine—as reflected in those cases and applied by the Sixth Circuit below—falls well within this framework and reflects the modest but critically important role of judicial review under the Equal Protection Clause.

As applied here, for example, the doctrine does not require that any university or other institution adopt or continue to apply any particular race-sensitive diversity measure. Rather, the *Hunter/Seattle* doctrine operates solely as a tool to reinforce and preserve democratic checks and balances. In this vital respect, the *Hunter/Seattle* doctrine functions in a manner similar to the line of cases that enforces norms of equal participation in voting.[13]

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[12] *Pierce* involved an initiative that was facially neutral—it required all children to attend public school—but was largely seen as an attack on Catholic schools and was invalidated as an infringement on the liberty of parents to choose the schooling for their children. 268 U.S. 510.

[13] *See, e.g.*, *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399 (2006); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

This application of *Hunter/Seattle* is particularly appropriate in the context of state constitutional amendments that target race. By requiring heightened scrutiny for racially-focused initiatives that reallocate political power *away from* deliberative democratic processes in which minority groups have had success—leaving them only with more remote and difficult avenues for change, ones in which factional interests and passions are most likely to block their efforts—*Hunter/Seattle* acts as a check on structural change that deprives minority groups of an equal opportunity to participate in self-government. See *Seattle*, 458 U.S. at 474 n.17; *Hunter*, 393 U.S. at 390-92. In the Sixth Circuit's words, the doctrine requires heightened scrutiny in situations where "the majority has not only won, but has rigged the game to reproduce its success indefinitely." Pet. App. 7a-12a.

To be clear, *Amici* do not contend that normal legislative processes or university political policies are always ideal or immune from faction. Democratic processes are inherently messy and flawed and regularly produce winners and losers. That is precisely why we have a constitutional system with robust judicial review. Nor do *Amici* posit that all ballot initiatives implicate the political restructuring doctrine. But within this system of checks and balances, heightened scrutiny is appropriate for initiatives that restructure the political process by singling out racial issues. The specific circumstances of this case, as described below, confirm this point.

B. The Initiative Process Here Confirms The Risk Of Faction At The Expense Of Existing Democratic Processes.

As the district court below observed, "the governance of a university, including the regulation of admissions criteria, is part of the political process."

Supp. App. 327a. Michigan's universities derive their power from Article VIII, § 5, of the Michigan Constitution, which provides for a popularly elected board to supervise each university. University policies, including admissions policies, are thus subject to influence by, and are accountable to, numerous constituencies, including university administrators, faculty, students, alumni, the legislature which controls the purse strings, the board, and ultimately the general populace that elects the board members.

Before Proposal 2 was enacted, this political process functioned as intended. As the district court observed, in the 1960s, racial minority groups in Michigan began advocating that the University of Michigan Board of Regents take minority status into account as a positive factor in admissions decisions. Supp. App. 270a.[14] These lobbying efforts helped lead to the widespread adoption of diversity measures which functioned to lessen the segregation of Michigan's educational institutions. At the same time, affirmative action policies have been subject to vigorous debate, including at the level of the boards.[15]

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[14] *See generally* Lisa M. Stulberg & Anthony S. Chen, *Beyond Disruption, The Forgotten Origins of Affirmative Action in College and University Admission, 1961-1969*, at 32-36, 52-53 (May 5, 2008) (describing political and social mobilization as key factors in advent of affirmative action in Michigan and elsewhere).

[15] *See* Pet. App. 7a-12a, 22a-40a (citing evidence that board members have run on pro- and anti-affirmative action platforms); Aaron Guggenheim, The Michigan Daily, *Candidates Vie for Empty Regents Seats* (Feb. 2, 2012) (noting that Democratic regents have been staunch supporters of affirmative action, which Republican opponents have opposed).

Proposal 2 removed the affirmative action debate from that process and the groups closest to, and most directly affected by, the issue. The initiative was sponsored, in substantial part, by one of the most recognizable members of the "initiative industry"—former University of California Regent Ward Connerly, who has been going state-to-state to put anti-affirmative action measures on the ballot.[16]

As the courts below and in pre-election challenges observed, "the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception .... By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes." Supp. App. 272a (quoting *Operation King's Dream* v. *Connerly*, 501 F.3d 584, 591 (6th Cir. 2007)). Specifically, there were findings that initiative proponents, "by disguising their proposal as a ban on 'preferences' and 'discrimination,' without ever fulfilling their responsibility to forthrightly clarify what these terms were supposed to mean," engaged in "the use of deception and connivance" leading many voters into believing that the petition supported affirmative action. *Operation King's Dream* v. *Connerly*, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *33-35 (E.D. Mich., Aug. 29, 2006); see also Mich. Civil Rights Comm'n, *Report Regarding the Use of Fraud and Deception in the Collection of Signatures for the Michigan Civil Rights Initiative Ballot Petition* (June 7, 2006).

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[16] *See* Supp. App. 271a (noting Connerly's role in Michigan's Proposal 2); Miller, *supra*, at 51 (identifying Connerly as a "repeat player" in the initiative business).

Moreover, it is clear that the initiative had a "racial focus." While couched in terms of appeals to "fairness" and meritocracy in the admissions process, the manifest intent of the provision was to exclude from admissions minority candidates who, in the view of Proposal 2's proponents, did not deserve admission and would not be admitted but for "preferential treatment." The appeal to racial resentment of whites against the perceived injustice of "reverse discrimination" often was explicit, as for example in one supporting website, which proclaimed: "**[F]or every black student who gets admitted due to affirmative action, a higher achieving white student is typically rejected from admission.**"[17] Using rhetoric typical of anti-civil rights groups in the 1960s, the same website labeled affirmative action supporters as "Communist-like radical groups" and blamed them for "foster[ing] continued animosity, jealously, and hatred between the races," and "indirectly play[ing] a role in precipitating race-motivated hate crimes."

Even when using less heated rhetoric, appeals to "fairness" and "meritocracy" in admissions can still carry racial undertones. For example, a recent study found that white respondents generally favored admissions policies that emphasize grades and test scores, but when prompted to think about Asian American enrollment, their views shifted: white respondents assigned less weight to grades and test scores, in favor of subjective qualities such as "leadership."[18] For similar reasons, decrials of the

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[17] *See* Proposal 2, web.archive.org/web/20071027043354/http://www.michiganproposal2.org/.

[18] Scott Jaschik, Inside Higher Educ., *Meritocracy or Bias?* (Aug. 13, 2013).

injustice of minority candidates gaining admission over hard-working, higher-achieving whites reflect stereotypes about both what constitutes "achievement" and the presumed work ethic (or lack thereof) of different groups. Implicit biases are also reflected in the fact that people denied admission to the university of their choice target their blame on minorities and diversity considerations—as opposed to forms of "preferential treatment" for legacies, children of donors or prominent leaders, athletes, and people from different geographic areas or who have other unusual talents or experiences.

Ultimately, Proposal 2 passed with a racially polarized vote.[19] Although Petitioner speculates as to certain non-discriminatory reasons why voters could have supported Proposal 2's rejection of race-based affirmative action, it is notable that Petitioner cites materials published long after the Proposal's passage, as opposed to ballot measures themselves. See Pet'r Br. 15-16, 30-31. In any event, such arguments—to which we respond in more detail below—are the very arguments that did not persuade the stakeholders directly involved in the political process to which university admissions policies have long been accountable. Moreover, as with any ballot initiative that lacks either a legislative record or adopted findings, it can be challenging to discern what voters understood the initiative to mean.

The plain language of the ballot measure, moreover, is not an adequate surrogate for divining the intent of the voters. The principle of holding

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[19] According to CNN's exit poll, 64% of whites supported Proposal 2, while 86% of African-Americans voted against it. CNN.com, *America Votes* 2006, www.cnn.com/ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html.

elected legislators accountable for the plain language of the laws they pass is understandable because the responsibility of legislators is to write law. The average voter, by contrast, plays no role in drafting or amending the language of a ballot initiative, and has no expertise in predicting how courts will interpret the initiative's language that others have drafted. Ballot initiatives are thus particularly susceptible to manipulation and misrepresentation in a way that counsels against any presumption, analogous to what courts may accord a statute, that the intent of a voter fairly may be discerned from the plain language of the initiative itself. For this reason, the political restructuring doctrine properly focuses not on speculation about what voters intended, but on the process-oriented effects and disparate impact of the initiative itself.

Here, the effects are clear. Proposal 2 limits, along race lines, the authority to address a racial problem "in such a way as to burden minority interests." *Seattle*, 458 U.S. at 474. It does so by foreclosing grassroots and ground-level democratic efforts within the deliberative bodies closest to and with the greatest expertise on the issue, leaving the only recourse to "an extraordinarily expensive process and the most arduous of all the possible channels for change," Pet. App. 22a-40a,[20] and one in which the

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[20] Board elections cost a tiny fraction of a statewide race compared to the expense of putting an initiative on the ballot. *See, e.g.*, Steven Pepple, MLive.com, *Ilitch Is Top Spender In University Of Michigan Regents Race* (Oct. 17, 2008) (top spender in 2008 Regents election spent $34,990 on her campaign); Andy Marso, Topeka Capital-Journal, *Cost Of Constitutional Amendments Examined* (Feb. 1, 2013); Daniel Wood, Christian Science Monitor, *Is California's Ballot Initiative Process Broken? Lawmakers Think So* (July 28, 2011)

threat of factional "passion" regarding racial issues looms largest.[21]

Given these dangers, heightened judicial scrutiny over Proposal 2 is warranted. Because its proponents have not identified any compelling state interest in eliminating a university's ability to consider and adopt race-sensitive diversity measures—which they are specifically permitted to do, and which itself furthers a compelling state interest—Proposal 2 was properly invalidated.

II. THE POLITICAL RESTRUCTURING DOCTRINE IS APPROPRIATE IN THE CONTEXT OF EDUCATION.

Heightened judicial scrutiny is particularly warranted in the context of education because policies affecting educational access and universities' ability to implement their academic missions have self-perpetuating effects for future democratic participation and democratic values. This case does not call for a relitigation of the settled issue, addressed in *Fisher*, that universities may adopt holistic, race-sensitive diversity measures. Nonetheless, it is worth reiterating the benefits such measures provide and how diversity considerations actually operate in practice, to counter various of the arguments raised by Petitioner and the defenders of

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("Special interests spent over $1.3 billion on proposition battles between 2000 and 2006").

[21] *See, e.g.*, *Diversity In Democracy: Minority Representation in the United States* 173 (Gary M. Segura & Shaun Bowler eds., 2005) (a comprehensive study of California ballot initiatives over 18 years "found that racial and ethnic minorities—and Latinos in particular—lose regularly on a number of racially targeted propositions," and produce "[r]acial cleavages ... even [for] ostensibly 'race-neutral' policies").

Proposal 2. Responding to these misconceptions also demonstrates why removing race-sensitive educational policies from any ground-level, deliberative political process and putting them to an "up or down" popular vote is inherently flawed and unlikely to produce truly democratic results.

A. Holistic Diversity Initiatives Offer Equal Access To Educational Institutions And Are Critical For Full Democratic Participation.

1. Educational Institutions Are Central To Democratic Participation.

A core premise of this Court's jurisprudence on equal protection and education is that educational institutions do not merely provide tools for learning—they promote social integration, provide the basis for equal opportunity, and forge paths toward fuller participation in our democratic system.

As this Court stressed in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), "education is perhaps the most important function of state and local governments." *Id.* at 493. It "is required in the performance of our most basic public responsibilities, even service in the armed forces," and it "is the very foundation of good citizenship." *Id.* Education is a "principal instrument" in preparing students "for later professional training," "helping [them] to adjust normally to [their] environment," and in providing a reasonable chance "to succeed in life." *Id.* The very act of attending a university, in and of itself, can give students access to professional and social networks and channels of power, and can allow students to wear as a badge the prestige of the institution itself. See *United States* v. *Virginia*, 518 U.S. 515, 557 (1996); *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950)

(examining "those qualities which are incapable of objective measurement but which make for greatness in a ... school," including "position and influence of the alumni, standing in the community, traditions and prestige").

Access to higher education generates positively reinforcing effects. Graduates are more inclined and able to participate and lead political processes and, in turn, expand access and participation for others. As this Court noted in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), a strikingly large number of leaders in all branches of government are graduates of a select number of higher educational institutions. *Id.* at 332. "[U]niversities, and in particular, law schools, represent the training ground for a large number of our nation's leaders." *Id.*; see also *Sweatt*, 339 U.S. at 634. Conversely, limiting access to higher education "remove[s] [individuals] from the interplay of ideas and the exchange of views," *Sweatt*, 339 U.S. at 634, and may limit their access to future channels of economic and civic influence.

2. Diversity Initiatives Promote Democratic Values And Participation.

As this Court has repeatedly recognized over the last three decades, "the interest in the educational benefits that flow from a diverse student body" is a compelling state interest that allows race to be considered in the admissions process. *Fisher*, 133 S. Ct. at 2417 (citing *Univ. of Cal. Regents* v. *Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.)); see also *Grutter*, 539 U.S. at 325 (endorsing "Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions"). Universities have long relied on those decisions in shaping their admissions policies.

In *Fisher*, this Court was presented with a great deal of support for holistic diversity measures from virtually every corner of public life. University administrators and student groups emphasized the importance of diversity and the ability to consider race and ethnic background as part of a holistic admissions process.[22] Military members and government leaders emphasized the value that a diverse student body brings to supporting our Nation's defense and other government functions.[23] Business leaders debunked the notion that minority candidates who benefit from diversity measures are somehow "less qualified" or less productive when entering the workforce.[24] Women's groups outlined the critical role diverse student bodies play in undermining the pernicious stereotypical views that continue to affect the fields of study selected by women of color, and how individualized admissions consideration is necessary to promote diversity specifically in traditionally male-dominated fields, such as math, science, and engineering.[25]

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[22] *See, e.g.*, Amicus Br. of Dean Robert Post & Dean Martha Minow, *Fisher*, No. 11-345 (Aug 13, 2012) [hereinafter "*Fisher* Post & Minow Br."]; Amicus Br. of Law School Admission Council, *Fisher*, No. 11-345 (Aug 13, 2012); Amicus Br. of 28 Student Organizations Within the Univ. of Cal., *Fisher*, No. 11-345 (Aug 13, 2012) [hereinafter "*Fisher* Student Org. Br."]; Amicus Br. of Cal. Inst. of Tech., *Fisher*, No. 11-345 (Aug 13, 2012).

[23] *See* Amicus Br. of Lt. Gen. Julius W. Becton, Jr., *Fisher*, No. 11-345 (Aug 13, 2012).

[24] *See* Amicus Br. of Fortune-100 and Other Leading American Businesses, *Fisher*, No. 11-345 (Aug 13, 2012); Amicus Br. of Small Business Owners and Associations, *Fisher*, No. 11-345 (Aug 13, 2012).

[25] *See* Amicus Br. of National Women's Law Center, *Fisher*, No. 11-345 (Aug 13, 2012).

Likewise, briefs from the Asian American community debunked the argument—raised in this case and by Proposal 2 supporters—that diversity measures operate to the detriment of Asian Americans. As those briefs showed, the myth that Asians writ large are a monolithic "model minority" masks significant variance in the educational backgrounds, test scores, socio-economic status, and immigration histories of different Asian American and Pacific-Islander communities. Thus, certain Asian American individuals and sub-groups benefit directly from diversity considerations, while Asian Americans generally, like all students, benefit from a diverse learning environment that helps to promote cross-cultural understanding, break down stereotypes, and further expand equal opportunity for all.[26]

As the *Fisher amicus* briefs also reflect, a substantial body of social science has developed, demonstrating the benefits of diversity initiatives for the student body and community as a whole, in addition to advancing minority interests.[27] Among other benefits, increased classroom diversity has been shown to lead to: (i) improvements in intergroup contact and increased cross-racial interaction among students; (ii) reductions in prejudice; (iii) improvements in cognitive abilities, critical thinking skills,

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[26] *See* Amicus Br. of Asian American Legal Defense & Education Fund, *Fisher*, No. 11-345 (Aug 13, 2012); Amicus Br. of Members of Asian American Center for Advancing Justice, *Fisher*, No. 11-345 (Aug 13, 2012).

[27] *See* Amicus Br. of American Social Science Researchers, *Fisher*, No. 11-345 (Aug. 9, 2012) [hereinafter "*Fisher* Social Science Researchers Br."]. *See generally* The Civil Rights Project, *Research Basis for Affirmative Action: A Statement by Leading Researchers* (July 11, 2013), *available at* http://civilrightsproject.ucla.edu/.

and self-confidence; (iv) greater civic engagement; (v) enhancement of professional development and leadership skills; and (vi) improved classroom environments. These benefits are not unique to students of any race; all students benefit from greater exposure to and interaction with more diverse arrays of classmates and experiences. See Civil Rights Project, *supra*, at 2.

A recent report on diversity from the University of Michigan confirms these points, finding, based on surveys of student class cohorts from 1990-1994 and 2000-2004, support for three core rationales of diversity initiatives: (a) the creation of a stimulating and challenging environment that benefits all students irrespective of racial background; (b) the preparation of Michigan students for participation as citizens and leaders in our increasingly diverse nation and interconnected world; and (c) the fostering of preparation for citizenship in American society. Office of Academic Multicultural Affairs, Univ. of Mich., *Michigan Diversity Report* 5-6, www.oami.umich.edu/images/MSS%20DIVERSITY%20REPORT.pdf (last visited Aug. 28, 2013). Notably, Michigan students disagreed with views critiquing affirmative action on the basis that such programs stigmatize minority students or promote racial disunity. *Id.* at 23-32. Although there was varying support for affirmative action programs across racial groups, support for these programs among white students *increased* during their time at the University. *Id.*

Ensuring minority access to selective universities thus benefits American society as a whole. Scholars have demonstrated that students of all races at more selective institutions, and particularly African-American students, are more engaged in civic

activities, more engaged in leadership roles, and more politically active than their counterparts at less-selective schools. See generally William G. Bowen & Derek Bok, *The Shape of the River* 158-73 (1998). This translates to increased alumni involvement, and emphasizes the value of diversity measures to the success of the political process in the United States. See Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 Rev. Educ. Res. 29 (Mar. 2011). This Court acknowledged as much in *Grutter*, citing to evidence showing that students who are exposed to "widely diverse people, cultures, ideas, and viewpoints" are "better prepare[d] ... for an increasingly diverse workforce and society." 539 U.S. at 330. This will only become more true as the United States becomes increasingly racially and ethnically diverse.[28]

Diversity initiatives are also important in light of ongoing educational disparities, in particular, disparities in primary education. Notwithstanding real progress on various fronts, achievement gaps among white and African-American and Hispanic students remain "wide and pervasive."[29] These disparities are particularly acute in primary school educational attainment, where, for instance, in mathematics the average African-American eighth

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[28] *See* Karen R. Humes et al., U.S. Dep't of Commerce, *Overview of Race and Hispanic Origin: 2010*, at 22 (Mar. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

[29] *See* Robert Rothman, et al., The Leadership Conference Education Fund, *Reversing the Rising Tide of Inequality: Achieving Educational Equity for Each and Every Child* 11 (Apr. 2013), *available at* civilrightsdocs.info/pdf/reports/Education-Equity-Report-webversion.pdf.

grader performs at the 19th percentile of white students and the average Hispanic student performs at the 26th percentile. Rothman et al., *supra*, at 11. These racial disparities continue through high school. *Id.* As a result, an estimated "[t]en million students ... are having their lives unjustly and irredeemably blighted by a system that consigns them to the lowest-performing teachers, the most run-down facilities, and academic expectations and opportunities considerably lower than what we expect of other students." U.S. Dep't of Educ., *For Each and Every Child: A Strategy for Education Equity and Excellence* 14 (2013).

Ultimately, holistic, individualized diversity initiatives are essential for maximizing educational attainment for all students, while breaking down stereotypes and promoting future democratic participation for minority leaders and the community as a whole. Removing any consideration of race—or sex or ethnic heritage—from the admissions context will have the effect of reducing these benefits associated with diversity in educational institutions, with negative effects for the future functioning of civic and democratic processes both for minority students and for the community as a whole.[30]

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[30] *See., e.g.*, Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1198-99 (2010) (finding that bans on affirmative action result in minority students encountering increased hostility and internal and external stigma compared with peers attending schools with intact affirmative action programs).

B. Proposal 2 Intrudes Upon A University's Implementation Of Its Academic Mission Without Any Well-Grounded Or Compelling Basis.

This Court has repeatedly recognized that a university's academic mission, including its right to decide who may be admitted, is a "special concern of the First Amendment." *Fisher*, 133 S. Ct. at 2418; see also *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (describing academic freedom as of "transcendent value"). That includes the discretion, exercised through normal university governance practices and political processes, to determine that raw test scores alone are not a complete indicator of who is a meritorious candidate, who is likely to contribute most to the overall student body, or who is inclined to be a leader in the future.[31] For years, there has been significant variation in how schools choose to construct their admissions criteria and weigh various elements such as essays, extra-curricular activities, and personal qualities—as well as in whether and how they consider race as one factor among many. Such variation reflects the freedom historically accorded to universities to make decisions critical to the creation of an academic community.

What is so striking about Proposal 2, as the court below observed, is that it intrudes into the normal processes for university governance, which in Michigan consist of elected, independent boards for the three main state universities. Petitioner has

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[31] *See Fisher* Post & Minow Br. 11. Indeed, for example, the American Bar Association's accreditation standards explicitly state that schools should "not use the LSAT score as a sole criterion for admission." Am. Bar Ass'n, *2011-2012 Standards and Rules of Procedure for Approval of Law Schools* 169 (2011).

never purported to identify a compelling state interest to justify this intrusion and re-ordering of the political process. Instead, Petitioner and the defenders of Proposal 2 present two main arguments: (i) use of race-sensitive diversity considerations in admissions degrades the value of the individual; and (ii) abandoning race-sensitive admissions practices will not harm, and may actually benefit, minorities. Neither of these is well-founded or sufficient to survive any level of heightened scrutiny.

1. Holistic Diversity Initiatives Promote Selection Of Meritorious Candidates By Valuing Individual Experiences; Proposal 2 Precludes Such Consideration.

Consistent with this Court's precepts, permissible diversity initiatives do not—*and cannot*—assume that diversity equates to admitting a pre-determined percentage of students from a given demographic or that every person with a common heritage must share the same viewpoint. *Fisher*, 133 S. Ct. at 2418; *Grutter*, 539 U.S. at 337. Indeed, those sorts of quotas and set-asides have been widely recognized as plainly impermissible by universities for more than three decades.[32] While Petitioner makes a passing

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[32] *See Gratz* v. *Bollinger*, 539 U.S. 244, 293 (2003) (Souter, J., dissenting) ("Justice Powell's opinion in [*Bakke*] rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class."); *Fisher*, 133 S. Ct. at 2418 ("'To be narrowly tailored, a race-conscious admissions program cannot use a quota system,' but instead must 'remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'") (citation omitted); *see also* Am. Ass'n for the Advancement of Science, *Handbook on Diversity and the Law* 56 (2010) ("the

assertion that Michigan universities, since *Grutter*, have been more reliant on race, Petitioner cites *nothing* for that assertion.

Contrary to Petitioner's assertions, diversity initiatives that include race-conscious considerations do not devalue the individual. Rather, it is quite the opposite. "The whole point of an individualized application process is to use essays, references and test scores to understand fully each applicant in his or her own particularity .... It does not 'demean[ ] the dignity and worth of an applicant, to listen to what he has to say when he believes that race is an important aspect of his own personal experience." *Fisher* Post & Minow Br. 21-22, 24-27 (citation omitted), *cited in Fisher*, 133 S. Ct. at 2433 n.1 (Ginsburg, J., dissenting). This Court has long recognized that intangible, individual considerations are essential to educational success, such as a student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." *Brown*, 347 U.S. at 493-94 (quoting *McLaurin* v. *Okla. State Regents*, 339 U.S. 637 (1950)).

In marked contrast with this tradition of individualized admissions processes, Proposal 2 bans *any consideration* of race whatsoever, no matter what an individual applicant wishes to share in his or her application or essay. See Supp. App. 284a ("It is the undisputed testimony of university officials that Proposal 2 prohibits them from considering race to any degree."); Pet. App. 7a-12a, 22a-40a (noting that Proposal 2 "remov[es] the power of university officials to even *consider* using race as a factor in admissions

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Supreme Court has made clear may not employ quotas or other exclusive approaches").

decisions—something they are specifically allowed to do under *Grutter*"). Were Proposal 2 to stand, this interpretation would foreclose even the most individualized of admission processes, effectively requiring universities to ignore, redact, or delete application essays that even mention race.

This extreme ban on *any* consideration or mention of race, as well as sex, ethnicity, or national origin, demeans individual applicants for whom their race, sex, or heritage may play an important role in their identity, personal stories, or record of achievement. See *Fisher* Post & Minow Br. 22-23. "We accord dignity to persons when we listen to what they have to say," and it "belittles applicants to invite their self-presentations and then deliberately ignore their personal accounts of their own lives." *Id.* "It is incompatible with the respect we owe our applicants to demand they comply with the preconception that race ought not matter to them." *Id.*

Such misconceptions about how holistic diversity consideration works are also evident in the dissenting opinions below. For example, Judge Boggs hypothesized about an applicant who is "one-half Chinese, one-fourth Eastern-European Jewish, one-eighth Hispanic (Cuban), and one-eighth general North European, mostly Scots-Irish." Pet. App. 54a-55a. Judge Boggs presumed that diversity initiatives would somehow work against that applicant. To the contrary, universities permissibly could (and might well) find that person's unique background and multi-ethnic heritage to be a valuable addition to the academic environment, especially if the student expressed how it was important to him or her.

By contrast, it is Proposal 2 that would require admissions directors to ignore such an individual's unique story and the benefits that a multi-racial and

multi-cultural student might bring to the university as a whole. At the same time, Proposal 2 leaves completely unaffected various other forms of "preferential treatment," particularly those that tend to perpetuate preferences that favor historically privileged groups.

Such popular misconceptions about how university admissions processes work only confirm why it is inherently unreliable and suspect to (a) remove decision-making authority from those bodies who are closest to, and most experienced in, the issue and actually accountable to a university's constituencies; and (b) instead make the decision about a racial issue subject exclusively to a non-deliberative, one-time popular vote.

2. Contrary To What Petitioner Contends, Proposal 2 Will Have A Disparate Impact Upon Minority Candidates' Access To Educational Institutions.

Petitioner also argues that Proposal 2 will not harm, and may actually help, minority students because other kinds of race-neutral programs will mitigate a decline in minority enrollment or because race-sensitive diversity initiatives produce a "mismatch" that results in lower achievement by the assumed minority beneficiaries. As indicated above, to the extent those arguments have merit, they can and should be raised within the political and deliberative processes responsible for setting university policy. But they have largely failed to persuade decision-makers at that level, and for good reason. Petitioner's arguments in support of Proposal 2 likewise cannot survive any form of heightened scrutiny, based on the circumstances described above.

First, the contention that Proposal 2 will not harm minority enrollment is belied by the record evidence and historical experience. The district court itself found it likely that Proposal 2 will have a disparate and negative impact on admission of minority candidates. "It is difficult to see how Proposal 2 could *not* have a disparate impact on minorities." Supp. App. 316a; see also Supp. App. 284a-285a. For example, a leading Proposal 2 advocate, Ward Connerly, admitted that, following the amendment, "the University of Michigan would be **virtually resegregated** as the University of California Berkeley and UCLA have." Supp. App. 285a (emphasis added); see also *Fisher* Student Org. Br. 6.

In particular, the notion that other forms of race-neutral measures—such as socio-economic affirmative action or "Top Ten Percent" plans—can serve as adequate replacements has also been debunked. Rigorous research, including as presented in the *Fisher amicus* briefs, demonstrates why, in general, such class-based programs are not sufficient substitutes for individualized consideration of race-related diversity concerns.[33] And, as the evidence in the district court below showed, there are a number of reasons specific to Michigan—including based on its composition and geographical factors involved in its admissions process—for why such programs would not be effective in promoting racial diversity. Supp. App. 287a-288a. Socio-economic affirmative action or "Top Ten Percent" plans also do little to promote diversity in race or sex within particular programs. Petitioner's argument—and the sources on which it relies—presents a false choice between race and class

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[33] *See Fisher* Social Science Researchers Br.; *see also* Sherrilyn Ifill, N.Y. Times, *Race vs. Class: The False Dichotomy* (June 14, 2013).

consideration. In reality, racial and socio-economic equality are *both* worthy goals and universities should pursue each of them as they see fit.

Second, Petitioner and its supporters rely on the "mismatch theory" in arguing that Proposal 2 will benefit minority students. "Mismatch theory" posits that, when less-prepared minority students are admitted to exclusive institutions based in part on affirmative action policies, they tend to do poorly, to the detriment of themselves and cross-racial perceptions. Notably, the seminal article on this theory, from 2004 by Richard Sander, was not subject to the peer-review standards of social science journals and has been debunked by the weight of empirical evidence.[34] Current scholarship indicates that "race conscious admissions policies are associated with net positive outcomes for underrepresented minority students at highly selective U.S. institutions, including better college and university graduation rates, higher rates of enrollment at graduate and professional school programs, higher leadership contributions, and better prospects in the labor market."[35] For example, graduation rates—one

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[34] David L. Chambers, et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855 (2005); *see also* Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap between Black and White Law Students? A Correction, a Lesson, and an Update Clarification*, 105 Nw. U. L. Rev. 791 (2011).

[35] William Kidder, *Pursuing Diversity in U.S. Higher Education: Empirical Evidence and the 'Mismatch' Hypothesis* (Sept. 2012), *available at* www.civilrightsdocs.info/pdf/equal-opportunity/fisher/brookings-handout-final.pdf; *see also* Amicus Br. of Teach for America, *Fisher*, No. 11-345 (Aug. 13, 2013); Amicus Br. of National Education Ass'n, *Fisher*, No. 11-345

quantitative metric that may be used to evaluate a student's "match" with a particular institution—among minority students are *higher* than rates at more selective institutions, even when controlling for secondary school grade point averages or SAT scores.[36] Moreover, "mismatch theory" has not been borne out in first-year grades or drop-out rates, or in the law school context.[37]

Mechanical class-based admissions policies and "mismatch" theory also overlook the problems caused by racial isolation and insufficiently supportive educational climates in higher education. That is precisely why race-sensitive admissions policies recognize the importance of having a "critical mass" of underrepresented minorities, and why such policies look to how each individual applicants can contribute to the class as a whole.

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In sum, elimination of holistic diversity considerations, in favor of forms of "preferential treatment" that advantage children of privilege or non-minority groups, is likely to harm educational institutions and the ability of minority candidates, not merely to gain access to those institutions, but

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(Aug. 13, 2013); Amicus Br. of American Council on Education, *Fisher*, No. 11-345 (Aug. 13, 2013).

[36] *See, e.g.*, William G. Bowen, Matthew W. Chingos & Michael S. McPherson, *Crossing the Finish Line: Completing College at America's Public Universities* 209 (2009); Sigal Alon & Marta Tienda, *Assessing the Mismatch Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 Soc. Educ. 294, 309 (2005).

[37] *See* Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 Soc. Sci. Res. 531 (2007); Barnes, *supra*; Chambers et al., *supra*.

also to participate equally in the full scope of economic, civic, and political life. It also negatively impacts society as a whole. *Amici* do not contend that racially-sensitive diversity measures are required. *Amici* do submit, however, that the decision about how best to set admissions policy and promote educational goals is best left to the political and university governance processes created specifically for those institutions. For a political faction to rig that political process properly triggers heightened judicial scrutiny and, on the record presented in this case, violates Equal Protection.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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August 30, 2013

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APPENDICES

APPENDIX A

MEMBER ORGANIZATIONS OF THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

- 9to5, National Association of Working Women
- A. Philip Randolph Institute (APRI)
- AARP
- AAUW (formerly known as the American Association of University Women)
- Advancement Project
- African Methodist Episcopal Church (AME Church)
- Alaska Federation of Natives (AFN)
- Alliance for Retired Americans
- Alpha Kappa Alpha Sorority, Inc.
- Alpha Phi Alpha Fraternity, Inc.
- American-Arab Anti-Discrimination Committee (ADC)
- American Association for Affirmative Action
- American Association of Colleges for Teacher Education
- American Association of People with Disabilities (AAPD)
- American Baptist Home Mission Societies, American Baptist Churches USA
- American Civil Liberties Union (ACLU)

- American Council of the Blind (ACB)
- American Ethical Union (AEU)
- American Federation of Government Employees, AFL-CIO (AFGE)
- American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
- American Federation of State, County & Municipal Employees, AFL-CIO (AFSCME)
- American Federation of Teachers, AFL-CIO (AFT)
- American Friends Service Committee (AFSC)
- American Islamic Congress (AIC)
- American Jewish Committee (AJC)
- American Nurses Association (ANA)
- American Society for Public Administration (ASPA)
- American Speech-Language-Hearing Association (ASHA)
- Americans for Democratic Action (ADA)
- Amnesty International USA
- Anti-Defamation League (ADL)
- Appleseed
- The Arc
- Asian Americans Advancing Justice | AAJC
- Asian Pacific American Labor Alliance, AFL-CIO (APALA)
- Association for Education and Rehabilitation of the Blind and Visually Impaired (AER)

- The Association of Junior Leagues International Inc. (AJLI)
- The Association of University Centers on Disabilities (AUCD)
- B'nai B'rith International (BBI)
- Brennan Center for Justice at New York University School of Law
- Building & Construction Trades Department, AFL-CIO (BCTD)
- Center for Community Change (CCC)
- Center for Responsible Lending (CRL)
- Center for Women Policy Studies
- Children's Defense Fund (CDF)
- Church of the Brethren World Ministries Commission
- Church Women United (CWU)
- Coalition of Black Trade Unionists (CBTU)
- Coalition on Human Needs
- Common Cause
- Communications Workers of America, AFL-CIO, CLC (CWA)
- Community Action Partnership
- Community Transportation Association of America (CTAA)
- Compassion & Choices
- DC Vote
- Delta Sigma Theta Sorority, Inc.
- DEMOS: A Network for Ideas & Action

- Disability Rights Education and Defense Fund (DREDF)
- Disability Rights Legal Center
- Division of Homeland Ministries - Christian Church (Disciples of Christ)
- Epilepsy Foundation of America
- Episcopal Church - Public Affairs Office
- Equal Justice Society
- Evangelical Lutheran Church in America (ELCA)
- FairVote
- Families USA
- Federally Employed Women (FEW)
- Feminist Majority
- Friends Committee on National Legislation (FCNL)
- Gay, Lesbian and Straight Education Network (GLSEN)
- Global Rights
- Glass, Molders, Pottery, Plastics & Allied Workers International Union (GMP)
- Hip Hop Caucus
- Human Rights Campaign (HRC)
- Human Rights First (HRF)
- Immigration Equality
- Improved Benevolent and Protective Order of Elks of the World
- International Association of Machinists and Aerospace Workers (IAM)

- International Association of Official Human Rights Agencies (IAOHRA)
- International Brotherhood of Teamsters
- International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
- Iota Phi Lambda Sorority, Inc.
- Japanese American Citizens League (JACL)
- Jewish Council for Public Affairs (JCPA)
- Jewish Labor Committee (JLC)
- Jewish Women International (JWI)
- Judge David L. Bazelon Center for Mental Health Law (Bazelon Center)
- Kappa Alpha Psi Fraternity, Inc.
- Labor Council for Latin American Advancement (LCLAA)
- Laborers' International Union of North America (LIUNA)
- Lambda Legal
- LatinoJustice PRLDEF
- Lawyers' Committee for Civil Rights Under Law
- League of United Latin American Citizens (LULAC)
- League of Women Voters of The United States (LWV)
- Legal Aid Society—Employment Law Center (LAS-ELC)
- Legal Momentum
- Mashantucket Pequot Tribal Nation

- Matthew Shepard Foundation
- Mexican American Legal Defense and Educational Fund (MALDEF)
- NA'AMAT USA
- NAACP Legal Defense and Educational Fund, Inc. (LDF)
- NALEO Educational Fund
- National Alliance of Postal & Federal Employees (NAPFE)
- National Association for Equal Opportunity in Higher Education (NAFEO)
- National Association for the Advancement of Colored People (NAACP)
- The National Association of Colored Women's Clubs, Inc. (NACWC)
- National Association of Community Health Centers (NACHC)
- National Association of Consumer Advocates (NACA)
- National Association of Human Rights Workers (NAHRW)
- National Association of Latino Elected and Appointed Officials (NALEO)
- National Association of Negro Business & Professional Women's Clubs, Inc. (NANBPWC)
- National Association of Neighborhoods (NAN)
- National Association of Social Workers (NASW)
- National Bar Association (NBA)
- National Black Caucus of State Legislators (NBCSL)

- National Black Justice Coalition (NBJC)
- National Center for Lesbian Rights
- National Center for Transgender Equality (NCTE)
- The National Center on Time & Learning
- National Coalition for Asian Pacific American Community Development (National CAPACD)
- National Coalition for the Homeless (NCH)
- National Coalition on Black Civic Participation (NCBCP)
- National Coalition to Abolish the Death Penalty (NCADP)
- National Committee on Pay Equity (NCPE)
- National Committee to Preserve Social Security & Medicare
- National Community Reinvestment Coalition (NCRC)
- The National Conference for Community and Justice
- National Conference of Black Mayors, Inc. (NCBM)
- National Congress for Puerto Rican Rights (NCPRR)
- National Congress of American Indians (NCAI)
- National Consumer Law Center (NCLC)
- National Council of Churches of Christ in the U.S. (NCC)
- National Council of Jewish Women (NCJW)
- National Council of La Raza (NCLR)
- National Council of Negro Women (NCNW)

- National Council on Independent Living (NCIL)
- National Disability Rights Network (NDRN)
- National Education Association (NEA)
- National Employment Lawyers Association (NELA)
- National Fair Housing Alliance (NFHA)
- National Farmers Union (NFU)
- National Federation of Filipino American Associations (NaFFAA)
- National Gay and Lesbian Task Force
- National Health Law Program (NHeLP)
- National Hispanic Media Coalition (NHMC)
- National Immigration Forum
- National Immigration Law Center (NILC)
- National Korean American Service and Education Consortium (NAKASEC)
- National Latina Institute for Reproductive Health
- National Lawyers Guild (NLG)
- National Legal Aid & Defender Association (NLADA)
- National Low Income Housing Coalition (NLIHC)
- National Organization for Women (NOW)
- National Partnership for Women & Families
- National Parent Teacher Association (PTA)
- National Senior Citizens Law Center
- National Sorority of Phi Delta Kappa, Inc.
- National Urban League (NUL)

- National Women's Law Center (NWLC)
- National Women's Political Caucus (NWPC)
- Native American Rights Fund (NARF)
- Newspaper Guild
- OCA (formerly known as Organization of Chinese Americans)
- ORT America
- Office of Communication of the United Church of Christ, Inc. (OC Inc.)
- Omega Psi Phi Fraternity, Inc.
- Open Society Policy Center (OSPC)
- Outserve-SLDN
- Paralyzed Veterans of America (PVA)
- Parents, Families and Friends of Lesbians and Gays (PFLAG)
- People For the American Way (PFAW)
- Phi Beta Sigma Fraternity, Inc.
- Planned Parenthood Federation of America, Inc. (PPFA)
- PolicyLink
- Poverty & Race Research Action Council (PRRAC)
- Presbyterian Church (U.S.A.)
- Pride At Work
- Prison Policy Initiative
- Progressive National Baptist Convention (PNBC)
- Project Vote
- Public Advocates Inc.

- Religious Action Center of Reform Judaism (RAC)
- Retail, Wholesale and Department Store Union (RWDSU)
- Secular Coalition for America
- Service Employees International Union (SEIU)
- The Sierra Club
- Sigma Gamma Rho Sorority, Inc.
- Sikh American Legal Defense and Education Fund (SALDEF)
- Sikh Coalition
- South Asian Americans Leading Together (SAALT)
- Southeast Asia Resource Action Center (SEARAC)
- Southern Christian Leadership Conference (SCLC)
- Southern Poverty Law Center (SPLC)
- Teach for America
- TransAfrica Forum
- Union for Reform Judaism (URJ)
- Unitarian Universalist Association (UUA)
- UNITE HERE!
- United Brotherhood of Carpenters and Joiners of America (UBC)
- United Church of Christ Justice and Witness Ministries (JWM)
- United Farm Workers of America, AFL-CIO (UFW)

- United Food and Commercial Workers International Union (UFCW)
- United Methodist Church-General Board of Church & Society
- United Mine Workers of America, AFL-CIO (UMWA)
- United States International Council on Disabilities (USICD)
- United States Students Association (USSA)
- United Steelworkers of America (USW)
- United Synagogue of Conservative Judaism (USCJ)
- Workers Defense League
- Workmen's Circle
- YMCA USA
- YWCA USA
- Zeta Phi Beta Sorority, Inc.

APPENDIX B

INTERESTS OF ORGANIZATIONS JOINING AS SIGNATORIES

9to5. 9to5 is a multi-racial national membership organization of women in low-wage jobs working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by sex and other forms of discrimination. Our 40 year-old organization has a long-standing commitment and history of work to promote equal opportunity in employment, education and business. The issues of this case are directly related to 9to5's work to end discrimination, promote equal opportunity, and strengthen women's ability to achieve economic security. The outcome of this case will directly affect our members' and constituents' access to equal opportunity, as well as their long-term economic well-being and that of their families.

American Association for Affirmative Action. Founded in 1974, AAAA is a national nonprofit association of professionals managing affirmative action, equal opportunity, diversity, and other human resource programs. AAAA has approximately 1,000 organizational and individual members throughout the United States including members employed in higher education, the private sector, federal, state, and local government, business, social services, the legal profession, and human resources. Approximately one-half of the current membership works for institutions of higher education. AAAA is dedicated to the promotion of affirmative action as an instrument to fulfill the nation's promise of equal opportunity. Its mission is to nurture understanding

of and offer advice on affirmative action to enhance access, equity, and diversity in employment, economic, and educational opportunities. AAAA is, therefore, uniquely suited to opine on the importance of diversity programs and, given its mission and the composition of its membership, has an exceptional understanding of both (1) the need for diversity on campus in order to ensure that students receive the best possible education and graduate with the skills and experiences necessary to succeed as citizens, workers, and leaders and (2) the importance of diversity on campus to employers who, in order to remain competitive, must hire qualified workers reflecting the increasingly diverse communities and markets in which their businesses now operate.

American Association of University Women. In 1881, the American Association of University Women was founded by like-minded women who had defied society's conventions by earning college degrees. Since then, AAUW has worked to increase women's access to higher education through research, advocacy, and philanthropy of over $90 million supporting thousands of women scholars. Today, AAUW has approximately 165,000 bipartisan members and supporters, approximately 1000 branches, and approximately 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and chief among them is increased access to higher education. In adherence to our member-adopted Public Policy Program, AAUW supports affirmative action programs that establish equal opportunity for women and minorities and improve gender, racial, and ethnic diversity in educational institutions.

American Citizens for Justice/Asian American Center for Justice. American Citizens for Justice/Asian American Center for Justice is a nonprofit organization dedicated to the education, protection, and advocacy of the civil, political, economic and religious rights of Asian Americans and all Americans. It was founded in 1983 after the racially-motivated baseball bat beating death of Vincent Chin and the lenient punishment the perpetrators of that crime received. Throughout its history, American Citizens for Justice has sought to promote diversity in the legal profession as a means of providing Asian Americans access to legal professionals who would help protect and enforce those rights.

Asian Americans Advancing Justice-AAJC (Advancing Justice-AAJC). Advancing Justice-AAJC is a national, non-profit, non-partisan organization based in Washington, D.C., whose mission is to advance civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. Founded in 1991, Advancing Justice-AAJC uses litigation, public policy advocacy, community education, and community mobilization to address a range of issues of importance to Asian Americans, including equal access to the political process. Advancing Justice-AAJC has also filed amicus curiae briefs underscoring the benefits of policies that promote racial diversity in education, most recently in *Fisher* v. *University of Texas*.

Asian Americans Advancing Justice - Los Angeles (Advancing Justice - LA). Advancing Justice - LA is the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (NHPI). Advancing Justice-LA has filed amicus curiae briefs in cases in

this Court and other courts supporting race-conscious programs, including an amicus curiae brief in *Fisher* v. *University of Texas*. Advancing Justice- LA is committed to supporting the use of admissions policies by educational institutions that ensure equal opportunities for women and minorities and diversity in education.

The Asian American Legal Defense and Education Fund (AALDEF). AALDEF, headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF's Educational Equity Program promotes the rights of Asian American students in K-12 and higher education. AALDEF has an interest in this litigation because its work with community-based youth advocates across the country reveals that Asian American students benefit from individualized race-conscious admissions policies, as well as diverse educational settings. Furthermore, AALDEF worked with a coalition of Michigan-based Asian American community groups in Michigan to fight the passage of Proposal 2 in 2006 and conduct educational outreach on the initiative's detrimental impact on Asian Americans in Michigan.

American Federation of State, County and Municipal Employees (AFSCME). AFSCME is a labor organization with 1.6 million members in hundreds of occupations who provide vital public services in 46 states, including Michigan, and the District of Columbia and Puerto Rico. AFSCME has a long history of advocating for minority rights.

Chinese for Affirmative Action (CAA). Chinese for Affirmative Action was founded in 1969 to protect the civil and political rights of Chinese Americans

and to advance multiracial democracy in the United States. Today, CAA is a progressive voice in and on behalf of the broader Asian and Pacific American community. We advocate for systemic change that protects immigrant rights, promotes language diversity, and remedies racial injustice. CAA combats multiple forms of racism and racial hierarchy. This includes speaking out against harmful stereotypes, identifying and addressing discrimination, and advancing policies that promote racial and ethnic inclusion and equity.

Chicago Lawyers' Committee for Civil Rights Under Law. The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. is the public interest law consortium of Chicago's leading law firms. The Committee is operated to bring the prestige and resources of the private bar to bear on the problems of poverty and discrimination, including in particular issues involving civil rights. Each year, over 15,000 hours of donated professional legal services, with a value of over $6 million, are directed to challenge discrimination and other violations of civil rights in both the public and private sectors.

Dēmos. Dēmos is a national, non-partisan public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. Increasing diversity in public and private institutions is critical to Dēmos' mission. We acknowledge the role that public policy has played in fostering racial disparities, and therefore support robust policies, from diversity considerations in admissions to debt-free college, to ensure that higher education remains a pathway to a diverse middle class in America.

Disability Rights Legal Center (DRLC). The DRLC is a non-profit legal organization that was

founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity, and lack of legal protection in their endeavors to achieve fundamental dignity and respect. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), Individual with Disabilities Education Improvement Act (IDEA), and other federal and state laws. The DRLC is now recognized as an expert in the field of disability rights.

The Equal Justice Society (EJS). EJS is a national legal organization that promotes equality and an end to all manifestations of invidious discrimination and second-class citizenship. Using a three-pronged strategy of law and public policy advocacy, building effective progressive alliances, and strategic public communications, EJS's principal objective is to combat discrimination and inequality in America.

Equal Rights Advocates (ERA). ERA is a national civil rights advocacy organization dedicated to protecting and expanding educational access and economic opportunity for women and girls. Since its inception in 1974, ERA has litigated high-impact cases, engaged in policy and legislative advocacy, conducted public education and community outreach, and provided advice and counseling to thousands of women and girls concerning their legal rights at work and in school. ERA has filed hundreds of suits and appeared as amicus curiae in numerous cases to enforce civil rights in state and federal courts, including the United States Supreme Court. ERA is committed to ensuring equal access to the political

process and to education, including institutions of higher learning, and has worked to promote affirmative action as a means of ensuring equal opportunity for all.

Haas Institute for a Fair and Inclusive Society. The Haas Institute for a Fair and Inclusive Society at UC Berkeley supports the use of race-conscious admissions policies that are designed to promote a more diverse and inclusive student body and enriching educational environment.

Lambda Legal. Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and public policy work. The minority groups Lambda Legal represents have been the frequent targets of voter initiatives seeking to impair their rights and curtail their participation in the political process. Lambda Legal has participated as counsel or amicus in a number of cases involving issues relevant to this case, including *Romer* v. *Evans*, 517 U.S. 620 (1996).

LatinoJustice PRLDEF. LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Our continuing mission is to protect the civil rights of all Latinos in the United States and Puerto Rico. Since our founding over forty years ago, our precedent setting impact litigation has profoundly improved the lives of the greater pan-Latino community. In our first lawsuit, *Aspira* v. *New York City Board of Education*, we helped establish the right to bilingual education in New York, and have since then combated the forced segregation of Latino children in Connecticut, Delaware, Pennsylvania and Massachusetts. In addition to creating pathways for

success for Spanish-speaking children in public schools, our Education Division has over thirty years thirty years of experience increasing the cadre of Latinos entering law school and the legal profession through our innovative pipeline pre-law programming including LSAT test preparation, LAW Day and LAWBound, in addition to providing one-on-one pre-law counseling and mentoring.

Lawyers' Committee for Civil Rights of the San Francisco Bay Area. The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee") is a civil rights and legal services organization, established in 1968 by leading members of the private bar in San Francisco, and dedicated to advancing, protecting and promoting the rights of communities of color, immigrants and refugees, and other underrepresented persons. The Lawyers' Committee works to protect communities of color from discrimination and to enforce the guarantees of Equal Protection.

Legal Momentum. Legal Momentum, the Women's Legal Defense and Education Fund, is a leading national nonprofit civil-rights organization that has used the power of the law to define and defend women's rights for over forty years. It has participated as counsel and as amicus curiae in numerous cases in support of affirmative action. Legal Momentum is interested in these cases because of the positive impact affirmative-action programs have in promoting equality and eliminating barriers for women, particularly for women of color, and for racial minorities.

Mexican American Legal Defense and Educational Fund (MALDEF). MALDEF is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation,

advocacy, and education, the civil rights of Latinos living in the United States.

National Association for Equal Opportunity in Higher Education (NAFEO). NAFEO is the 501(c)(3), tax-exempt, not-for-profit membership association of the presidents and chancellors of the nation's black colleges and universities: public and private, two-year, four-year, graduate and professional, Historically Black Colleges and Universities (HBCUs) and Predominately Black Institutions (PBIs). NAFEO was founded in 1969 at a time when the nation had before it overwhelming evidence that educational inequality in higher education remained manifest. NAFEO was founded to provide an international voice for the nation's HBCUs; to place and maintain the issue of equal opportunity in higher education on the national agenda; to advocate policies, programs and practices designed to preserve and enhance HBCUs and the communities they serve; and to increase the active participation of blacks and other low-income students and families and those of least advantage at every level in the education pipeline. As "the voice for blacks in higher education," NAFEO has served as amici in every higher education affirmative action case. The voice of NAFEO is especially important because of the leading role the association and its president and CEO have played in national and state policy debates and in litigation involving affirmative action for the past three decades, and because of the successes member institutions have had in attaining and sustaining student and faculty diversity, including at the graduate and professional schools.

National Association of Latino Elected and Appointed Officials (NALEO). NALEO Educational Fund is the leading nonprofit

organization that facilitates full Latino participation in the American political process, from citizenship to public service. Its constituents include more than 6,000 Latino elected and appointed officials nationwide—Republicans, Democrats, and Independents—who serve at every level of government. The NALEO Educational Fund is committed to strengthening the vitality and responsiveness of our democracy by ensuring that all of our nation's residents can become active contributors to our civic life. Equal access to quality education is the foundation of broad civic engagement, and attaining it often requires proactive recruitment and training efforts directed at those historically denied opportunity.

The National Black Law Students Association (NBLSA). NBLSA is a membership organization formed in 1968 to promote the educational, professional, political, and social objectives of Black law students. Today, NBLSA is the largest student-run organization in the United States, with nearly 6,000 members, over 200 chapters in our nation's law schools, a growing pre- law division, and 6 international chapters or affiliates. NBLSA has an interest in this case because one of the purposes of NBLSA is to utilize the collective resources of the member chapters to influence the legal community by bringing about meaningful legal and political change that addresses the needs and concerns of the Black community. Michigan's Proposal 2 rigged the political process against students and universities that support diversity. All law students benefit from attending school in a more diverse environment. Our nation is a better place when the doors of opportunity are open to all. NBLSA urges the Supreme Court to uphold the judgment of the Second Circuit Court of

Appeals and find that Proposal 2 violates the Constitution's equal protection guarantees.

National Council of Jewish Women (NCJW). NCJW is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles state that "a democratic society and its people must value diversity and promote mutual understanding and respect for all." Further, NCJW's Resolutions state that we endorse and resolve to work for "equal opportunity for all in the public and private sectors through programs such as affirmative action."

National Council of La Raza (NCLR). NCLR—the largest national Hispanic civil rights and advocacy organization in the United States - works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations (CBO's), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR works through two primary, complementary approaches: (1) Capacity-building assistance to support and strengthen Hispanic CBO's—especially those that serve low-income and disadvantaged Latinos; and (2) Applied research, policy analysis, and advocacy to encourage adoption of programs and policies that equitably serve Hispanics. For nearly 50 years, a corner stone of its work has centered on education, which it thinks is one of the best ways to create opportunities for people to succeed in this country. NCLR strongly believes that providing equal opportunities in higher education is critical for preparing students to work in an increasingly

multicultural society, enhancing our country's ability to economically compete in global markets, and preparing young people to thrive in a country made up of people from all walks of life. Its work in Michigan through Affiliates reflects that belief. If the ban is upheld could hinder all the benefits that flow from diversity in higher education in that state.

National Urban League. Established in 1910, the National Urban League is the nation's oldest and largest community-based movement devoted to empowering African-Americans and other disadvantaged people to enter the economic and social mainstream. The mission of the National Urban League movement is to enable African-Americans and other disadvantaged people to secure economic self-reliance, parity, power, and civil rights. Today, the National Urban League, headquartered in New York City, spearheads the non-partisan efforts of 95 local affiliates in 36 states to deliver services and resources in underserved communities. The organization has long recognized that education is the key pipeline opportunity to full economic participation by its disadvantaged constituents. In identifying the underlying causes of economic disparity, the National Urban League finds that there is unequal access to quality education for communities of color. Affirmative action policies such as those adopted by Michigan universities in the wake of *Grutter* v. *Bollinger* have been crucial to reducing gaps in educational attainment over the past 50 years. Thus, the National Urban League believes that the Court's decision in this matter will directly affect the ability of African-Americans to participate fully in our nation's economic life without facing the invidious barriers of discrimination.

National Women's Law Center. The National Women's Law Center is a nonprofit legal organization that is dedicated to the advancement and protection of women's legal rights and the expansion of women's opportunities. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. The Center has participated in numerous cases involving race and sex discrimination before this Court and the federal courts of appeals.

National Organization for Women (NOW). The National Organization for Women (NOW) Foundation is a 501 (C) (3) entity, founded in 1987, to further the rights of women through education and litigation. It is affiliated with the National Organization for Women which is the nation's largest feminist activist organization, with chapters in every major city and in all 50 states and in Washington, D.C. Since its founding in 1966, NOW and later NOW Foundation have been committed to promoting diversity in higher education and to the use of Affirmative Action initiatives to assure a strong diverse representation of women and communities of color in our nation's colleges and universities .

UNC Center for Civil Rights. The UNC Center for Civil Rights is committed to assisting excluded communities transcend institutionalized boundaries of race, class and place. Through legal representation, outreach, research, and litigation, the Center has implemented strategies to address the discrimination that limits opportunities for African Americans and low wealth individuals, families, and communities. While the Center's work is primarily directed toward providing legal support for grassroots advocacy, it is also designed to achieve broad impact by

concentrating on the connections between these critical issues at the local, state, and national levels. The Center is recognized nationally as one of the principal, university-based hubs of civil rights advocacy in the South, and has long advocated for increasing racial diversity in education and against measures that would lead to segregation and resegregation of students.

Union for Reform Judaism, Central Conference of American Rabbis and Women of Reform Judaism. The Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews, the Central Conference of American Rabbis (CCAR), whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism which represents more than 65,000 women in nearly 500 women's groups in North America and around the world share a deep commitment to the prophetic imperatives of our tradition and the creation of justice for all the people of our country. We are particularly sensitive to the dangers that we face in a society where inequity, including racial inequity, is allowed to persist. The long-range interests of all Americans are best served by the creation of a society that is truly just.

YWCA USA. The YWCA USA is a national organization dedicated to eliminating racism, empowering women and promoting peace, justice, freedom and dignity for all. In over 1300 locations nationwide, YWCA's offer women job training, housing, anti-violence and recovery programs, and more. Our clients are women of all ages and backgrounds, including the elderly, survivors of domestic and sexual violence, military veterans and low-income and homeless women and their families. The YWCA is committed to promoting equal

opportunity in housing, employment, and education and seeks to uphold laws to protect people from discrimination on the basis of race and gender. The issues of this case are directly related to the YWCA's advocacy to support policies of college affordability, equal access to services and opportunities, and inclusivity of women and communities of color in all aspects of life.

AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
FILED
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SUPREME COURT

No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) ET AL.,

AND

CHASE CANTRELL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* MICHIGAN CIVIL RIGHTS COMMISSION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race and sex-based discrimination or preferential treatment in public-university admissions decisions.

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INTEREST OF *AMICUS CURIAE*[1]

The Michigan Civil Rights Commission (MCRC) is an independent body created by Art. V, § 29 of the Michigan Constitution of 1963, for the purpose of protecting persons from discrimination and ensuring fair and equal access to employment, education, and economic opportunities.[2]

The Michigan Constitution charges MCRC with investigating alleged discrimination and "to secure the equal protection of such civil rights without such discrimination." Mich. Const. art. V, § 29. MCRC

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[1] Pursuant to U.S. Supreme Court Rule 37.6 amicus curiae affirms that no counsel for any party authored this brief in whole or in part and no counsel, party, person or entity other than amicus curiae made a monetary contribution intended to fund the preparation or submission of this brief. This brief is being filed pursuant to U.S. Supreme Court Rule 37.3(a), all parties having filed blanket letters of consent with the Clerk of this Court.

[2] The Michigan Department of Civil Rights is the statutorily created body "responsible for executing the policies of MCRC." Mich. Comp. Laws 37.2602(a). The Michigan Attorney General would normally provide counsel and represent the Michigan Civil Rights Commission in matters before this Court (Mich. Comp. Laws 37.2602(b) provides "(t)he attorney general shall appear for and represent the [civil rights] department or the [civil rights] commission in a court having jurisdiction of a matter under this act.") However, because the Attorney General is a party, and in recognition of MCRC's constitutional independence, the Attorney General has appointed the Department's Director of Law and Policy as a Special Assistant Attorney General to represent MCRC's interests in this case. The contents of this brief represent the opinions and legal arguments of the Michigan Civil Rights Commission and do not necessarily represent the opinions of any other person or entity within Michigan's government.

enforces Michigan's two anti-discrimination statutes, the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws 37.2101 *et seq.*, and the Persons with Disabilities Civil Rights Act, Mich. Comp. Laws 37.1101 *et seq.* MCRC therefore has a strong interest in ensuring Michigan's residents and visitors receive equal protection under the law.

MCRC held four public hearings in 2006 investigating allegations of fraud perpetrated by proponents of what was then Proposal 2 (and became Mich. Const. art. I, § 26). After hearing dozens of individuals testify and reviewing over five hundred affidavits, MCRC reported its findings to the Michigan Supreme Court on June 7, 2006. *Report on the Use of Fraud and Deception in the Gathering of Signatures for the Michigan Civil Rights Initiative.*[3] The report concluded that Proposal 2 reached the ballot via fraudulently obtained signatures. *Report* at 4. MCRC determined the fraud was part of "a highly coordinated, systematic strategy involving many circulators and, most importantly, thousands of voters." *Report* at 12.

MCRC's findings have been widely accepted, including by the Circuit Court below in *Operation King's Dream* v. *Connerly*:

> The record and the district court's factual findings indicate that the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception. . . .

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[3] Available at *http://www.michigan.gov/documents/Petition Fraudreport_162009_7.pdf.*

> By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes. [*Operation King's Dream* v. *Connerly*, 501 F.3d 584, 591 (6th Cir. 2007).]

The District Court in *Operation King's Dream* specifically recognized the role played by, and the unique interest of, MCRC during the period surrounding the vote on Proposal 2 and adoption of the provision of Michigan's Constitution now at issue:

> With the exception of the Michigan Civil Rights Commission, the record shows that the state has demonstrated an almost complete institutional indifference to the credible allegations of voter fraud raised by Plaintiffs. If the institutions established by the People of Michigan . . . had taken the allegations of voter fraud seriously, then it is quite possible that this case would not have come to federal court. [*Operation King's Dream* v. *Connerly*, 2006 U.S. Dist. LEXIS 61323 (E.D. Mich. Aug. 29, 2006).]

At the direction of Michigan's Governor shortly after Proposal 2 passed, MCRC assessed the effects of adding §26 to Michigan's Constitution. *"One Michigan" at the Crossroads: An Assessment of the Impact of Proposal 06- 02.*[4] Among the many findings and recommendations in the March 27, 2007 report

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[4]Available at *http://www.michigan.gov/ documents/mdcr /FinalCommissionReport3-07_1_189266_7.pdf*

was MCRC's conclusion that §26 violated the Equal Protection Clause. "*One Michigan*" at 16.

MCRC also submitted briefs *amicus curiae* in this matter to the Sixth Circuit Court (by leave granted) during both the panel and en banc stages of its review.

INTRODUCTION AND SUMMARY OF ARGUMENT

What Petitioner urges upon this Court is not colorblindness – but color blinders, a deliberate and selective effort to shield the obvious from view.

Michigan has a long and extensive history of recognizing the need to respect and constitutionally protect the political independence of public universities and their ability to make decisions related to issues like admissions free from political influence and focused only on the interests of the academic institution and its students.

Michigan's universities, and in particular the University of Michigan, while acting in the interests of students came to the same conclusion that most of America's corporate and government leaders have reached: university students who learn in diverse student environments are better prepared for what comes next when they graduate. The schools thus put admissions policies in place that sought to ensure a broadly diverse student body by considering all the attributes of each qualified applicant, including race, and favoring applicants who offered

something to the student body as a whole that was different than what was already there.

These admissions policies do not start out with any preferences for particular attributes. A music school that, three-quarters of the way through the admissions process finds it has four oboists for every clarinetist, might look more favorably upon those in a pool of equally qualified applicants who play clarinet. If it does so, it is not because it wants to help clarinetists, nor does it have a 'preference' for clarinets. It does so because it will make its orchestras sound better. Diversity is about the whole, not the individual.

Broad diversity policies do not favor any particular race(s) over others, nor do they favor race any more than other attributes. They favor only whatever is different from that which already exists, and thus select from the pool of qualified applicants the particular individual that is the best addition to the class.

Applicants who felt the policies prevented their admissions sued, alleging discrimination. Those cases led to this Court's decisions in *Gratz*, finding that the automatic provision of special admissions consideration to underrepresented minorities was discrimination and violated the Equal Protection Clause, and *Grutter*, finding a broad-based diversity policy that considered all the ways each qualified applicant could contribute to the student body as a whole was permissible even though one of those ways is race.

Following the decisions, a ballot initiative was launched by some who were unhappy this Court found universities could continue seeking diversity without violating the Equal Protection Clause. It eventually led to Proposal 2-06 being passed and Article I, § 26 added to Michigan's Constitution. (*Amicus* MCRC will use the terms Proposal 2 and §26 interchangeably.)

Considering race as one factor among all others, in an effort to achieve a broadly diverse student body, is neither preferential treatment for, nor discrimination against, any race. It doesn't treat applicants of color differently than others, it treats all applicants the same, considering any way each might add to the student body as a whole.

In *Grutter,* this Court held that considering race in this way does not violate the Equal Protection Clause because it does not unjustifiably discriminate. Section 26 purports to ban the practice by adding a prohibition of "preferential treatment", but legal usage of the term should apply only to automatic preferences given to a particular group in a way that constitutes discrimination. Strictly interpreted, the prohibition of preferences is redundant to the prohibition on discrimination.

However, we are here today because §26 is being enforced based upon its intent to prohibit precisely what *Grutter* permitted. Thus, §26 is read to prohibit any consideration of race by universities, even as but one factor among all others in a diversity admissions program. While it may be constitutionally permissible to prohibit diversity entirely and limit admissions policies to only measurable factors

directly related to academics -- prohibiting only consideration of race is not.

Doing so treats race differently than it treats every other facet of who an individual is and how he or she is assessed for possible admission. State requirements that compel universities to treat race differently in this fashion violate the Equal Protection Clause.

Finally, even if §26 is itself found to be permissible, the process created is not. Issues involving minority interests cannot be made subject to a separate and more difficult majoritarian political process. Section 26 does so and thereby violates the Equal Protection Clause.

Two final introductory observations:

First, the benefits of diversity are not the wild imaginings of ivory tower academics, "American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter* at 330. Similar feelings about the very real importance of academic diversity are expressed by amici of "high-ranking retired officers and civilian leaders of the United States military." *Id.* at 331.

Second, too often people view this important issue as though a son, daughter or other loved one is an applicant awaiting a decision from his or her university of choice, frequently assuming they are one of the last to be admitted or denied. MCRC respectfully suggests the more appropriate viewpoint

is to assume the loved one has already been admitted. Once admitted, we all want universities to provide our loved ones the best educational environment possible. Knowing future employers prefer to hire graduates from universities with broadly diverse student bodies, we would be upset of the school didn't try to be one.

Perspective changes significantly when one's focus is on students, rather than on applicants. What better argument can there be for leaving the admissions process in the control of the universities themselves?

ARGUMENT

I. Because "preferential treatment" as a legal term should be legally defined by this Court to apply only to race specific 'affirmative' or other actions which are also "discrimination," its prohibition does not interfere with university admissions policies in which race is but one of many equal factors considered as part of an effort to achieve broadly based diversity, and neither the prohibition nor the policy violates the Equal Protection Clause.

A. Answering the question presented by this Court requires first defining the term "preferential treatment."

Proposal 2 appeared on the ballot through a campaign of deception in which its proponents repeatedly misled the public about what the

constitutional amendment would do. Defenders of §26 now seek to perpetuate this sleight of hand by blurring the definitions of, and distinctions between, critical terms and concepts including "affirmative action," "diversity," "discrimination," "reverse discrimination," and most important, "preferential treatment." This Court should not attempt to resolve this case and the question it has presented, without first providing a clear understanding of how the Court is interpreting these terms.

The question presented: "Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race and sex-based discrimination or preferential treatment in public university admissions decisions," is a difficult one to answer in the context of this case, and the issues it presents. As the sole question presented by this Court, its answer is also presumed determinative of whether §26 violates the Equal Protection Clause.

Amicus curiae MCRC, suggests the constitutionality of such prohibitions is entirely dependent upon the answer to a slightly different question: What does it mean to prohibit race and sex-based "preferential treatment" in public university admissions decisions?

Ironically, preferential treatment, affirmative action, and diversity, the terms at the center of this case about how we treat color, have themselves been chameleon-like. Their meanings seem to change, allowing them to appear to belong where they do not.

Supporters of what was then Proposal 2 described it differently to different audiences. It was

often described as a straightforward effort to nullify *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) and foreclose any ability for universities to consider race within a broad diversity effort. To others it was represented as 'only' forbidding affirmative action like that deemed unconstitutional in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003). Whether the language entirely forbids consideration of race seemingly depended upon what a particular audience wanted to hear. Petitioner and *amicus curiae* supporting §26, now offer arguments that perpetuate this confusion.

Having failed in *Grutter* to establish that diversity in admissions policies is discrimination, Petitioner now asks this Court to simultaneously accept that the sole intent and effect of §26 is the prevention of discrimination, but that the sole way it does so is by ending the very same policies found not to be discrimination.

Petitioner's central premise, that §26 does not violate the Equal Protection Clause, but it does prohibit what *Grutter* permitted, requires placing the importance of semantic structure over that of reason and constitutional principle -- first assessing the language while ignoring its intent, and later enforcing its intent without considering what meaning the language was given. This circular reasoning illustrates an important point. This Court must begin by providing a clear legal definition of what conduct prohibiting "preferences" includes.

Section 26 does not state anything not already decided in *Grutter*, merely rewrapping a failed argument in a new and more aesthetically pleasing

package. Its purpose, however, was *Grutter*'s annulment. It is imperative that this case not be reviewed based upon an understanding of what the term has meant, only to have the provision enforced based upon what the proponents of §26 intended it to mean.

B. "Preferential treatment" occurs when a university admissions process affirmatively provides an applicant or group of applicants with a benefit based on race in a way that unlawfully discriminates against others.

In determining what it means to say it is illegal to "grant preferential treatment to...," it is helpful to note what it means to say that it is illegal to "discriminate against." Literally, the term "discriminate" means to differentiate or make a distinction,[5] but it is clearly understood that such statutory language applies only to unjustifiable discrimination, which is to say differentiating without legally sufficient justification. Nowhere is it seriously argued that any legal definition of discrimination bars all differentiating.

Similarly, a legal prohibition of preferential treatment should be read as banning only that which is determined to be illegal or unjustified. Otherwise a university theater department would be prohibited from 'preferring' race, national origin, and even sex, when casting the lead for a production of Abe Lincoln in Illinois.

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[5] see e.g., Dictionary.com, available at http://dictionary.reference.com/browse/discrimination?s=t

Black's Law Dictionary does not contain a definition for "preferential treatment." Interestingly, the term does appear under the definition of "discrimination" where, under the subheading of "reverse discrimination," it provides:

> *Reverse discrimination.* (1964) Preferential treatment of minorities, usu. through affirmative-action programs, in a way that adversely affects members of a majority group. See affirmative action." [Black's Law Dictionary (9th ed. 2009).]

In addition to making clear the association between the concepts of preferential treatment and affirmative action programs, the term's inclusion as part of the definition of reverse discrimination is particularly telling. Whatever 'preferential' treatment means, it must be a form of 'unequal' treatment.

It should be recognized that, like reverse discrimination, preferential treatment has been used to refer to discrimination against non-minorities on the basis of race. Like reverse discrimination, some may find the term a useful way of examining the fairness of affirmative action programs, but it does not provide a separate cause of action or change the standards for judicial review. Application of the Equal Protection Clause "is not dependent on the race of those burdened or benefited by a particular classification." *Gratz* at 270 (emphasis added). "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not

equal." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 289-90 (1978).

Universities are already prohibited from providing an automatic benefit, bonus, or other affirmative advantage to prospective students based upon their race. Such preferences have been held to violate the Equal Protection Clause because they are seen to unjustifiably discriminate against those not eligible to receive them. To date, the term has been directly applied, at least by this Court, in reference to affirmative and/or remedial actions and preferences that were found to be discriminatory.

"Preferential treatment" is a form of reverse discrimination. It is an affirmative act and refers to the sorts of discrimination *Gratz* prohibits. Treatment becomes legally preferential for someone or some group at the same moment it becomes discrimination against another. At core, §26's separate prohibitions of "discrimination" and "preferential treatment" are redundant.

This tautology is most clearly seen in this Court's first recognitions of the value of broad base diversity to a university education. *Bakke* made very clear that remedial actions could not be an acceptable part of an admissions process. Universities cannot and indeed "are not competent to make" the decisions necessary to launch a "remedial action" that "aids persons perceived as members of relatively victimized groups." *Bakke* at 308. Determining that absent "findings of constitutional or statutory violations it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." *Id.* at 308-309.

It is only "[a]fter such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated." *Id.* at 307.

C. "Preferential treatment" is best understood by looking at the difference between the kind of 'affirmative' policies found to be unjustified discrimination/preferences in *Gratz* and the broad inclusive diversity policy approved in *Grutter*.

After first finding that a separate and less rigorous, disadvantaged minority admissions process admitting minority applicants to reserved admissions spots violated the Equal Protection SClause, Justice Powell observed:

> It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated -- but no less effective -- means of according racial preference than the [separate admissions] program. A facial intent to discriminate, however, is evident in [that] preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements -- in the selection process. *Bakke* at 318.

Confusion between the goals and applications of 'affirmative action' and 'diversity' based admissions

policies have resulted in the temptation to apply the prohibition on preferring applicants of a particular predetermined race, to the process of preferring diverse applicants including those of different races. The first 'prefers' one race, the second 'prefers' all races.

Affirmative action focuses on a particular group. It posits that the group's underrepresentation in the student body is the result of current or past discrimination. It concludes that the appropriate remedy is to try to affirmatively place members of the group where they would have been, if not for discrimination. The school selects the more deserving, not the better, applicant.

Diversity focuses on the student body as a whole. It recognizes that what each student will get out of the process depends in part on who the other members of the class are. It sees the student body as a team.

A university could base all admissions decisions upon nothing but a standardized test score. Admitting applicants based upon the one criterion alone would certainly result in a student body that is qualified – but few if any would argue universities should be required to do so. It is recognized this would not be in the best interests of the university or its admitted students.

Universities also factor in numerous other 'non-academic' considerations. A legacy applicant might be given favorable consideration, as might an athlete. This is done for the benefit of the school, not the student. Diversity is similarly not done to benefit

the applicant, but rather to benefit all others in the student body.

D. A university's primary responsibility is to its student body and a policy that benefits all students, (especially one providing the greatest benefits to students belonging to well represented racial groups), should not be considered discriminatory simply because it also benefits minority applicants.

Implied throughout the various arguments in support of Proposal 2 and §26, is the deliberate deception that promoting "diversity" is synonymous with granting a "preference" to one group in particular. Equating the terms requires an assumption that diversity efforts will invariably aid the same groups time after time. Diversity in admissions must really be a preference for African-Americans, it is argued, "Come on, just look at it."

The never stated, but necessarily implied and patently false, assumption underpinning any argument that diversity is 'unfair' because it "prefers" African-Americans is that the playing field is level. Worse, the underlying premise that it will always benefit African-Americans is either a belief that they could not compete on a level playing field (racist), or that society will never level the playing field (fatalist), neither of which this Court should countenance.

MCRC asserts that no matter how hard we might want to pretend otherwise, it is only because the playing field is not level, that certain minority

groups are predictably underrepresented. Were our educational system truly equal, standardized testing completely fair, historical discrimination's effects properly addressed, and societal prejudices eliminated, diversity efforts would not be seen to "prefer" African-Americans any more than diversity could now be said to "prefer" clarinetists over oboists. Simply put, the belief that diversity in university admissions policies will always benefit the same group(s) is racially prejudiced, because it relies upon the false premise that these groups have been provided equal opportunities but are somehow intellectually inferior.

The fact that diversity efforts may in some respects have predictable implications is not the result of either the purpose or process of the diversity efforts themselves.

Predictability should not be confused with preference, and efforts to do so should be rejected by this Court. Condemning predictability as representing a "preference" is factually inaccurate, deliberately misleading. It punishes those who have been denied equal opportunities, exacerbating previous discrimination by discounting as irrelevant both its cause and effect.

A university's primary focus should be the academic interests of its students. It should select for admission those applicants who will make the student body the best it can be with this primary focus in mind. A university that pursues diversity in the interests of providing its white student majority with better educational opportunities cannot be said

to be ignoring the interests of whites generally, only of putting the interests of students before applicants.

Diversity efforts are not undertaken in order to benefit minority applicants and prohibiting diversity because it has that effect denies equal protection.

A university that seeks diversity by considering a broad array of qualifications and characteristics of which race is "but a single though important element" does not run afoul of the Equal Protection Clause.

> This kind of broad [diversity] program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment. [*Bakke* at 318.]

Legal prohibitions of preferential treatment should only be applied to "preferences" that legally discriminate. So long as they are, they do not violate the Equal Protection Clause.

II. Prohibiting universities from considering race while also permitting them to consider all other facets of the broad diversity that best serves the educational interests of all students, especially where the other factors to be considered themselves have disparate racial impact, discriminates against students for whom race is part of the diversity they could bring to the student body; it treats race differently than all other factors including religion; and it violates the Equal Protection Clause.

A. While we may believe color-blindness is a laudable goal and that a person's race shouldn't matter . . . at present, race does matter and using the Equal Protection Clause as a vehicle to impose color-blinders on universities is unconscionable.

If Petitioner succeeds in persuading this Court to expand the term "preferential treatment," permitting the *Grutter* decision to be read as holding the diversity admissions policy at issue was not discriminatory - but was preferential treatment, then §26 and similar prohibitions would prohibit schools from considering race as part of a diversity policy. However, because §26 selectively prohibits only race and sex for different treatment, it would still violate the Equal Protection Clause. The prohibition read this broadly unconstitutionally discriminates against minority applicants because it denies them the opportunity to be evaluated in the same holistic way as everyone else.

Race matters.

Maybe it shouldn't. Maybe someday it won't. But, today, race matters.

One cannot credibly argue that the color of one's skin makes no difference that who a person is, how they perceive the world around them, how the world treats them, are completely unrelated to the color of their skin.

Race affects how others view us, and thus how they interact with us. As a result it affects our experiences. How could it not then affect how we view others?

Is it possible to think about Trayvon Martin, Henry Lewis Gates, Amadou Diallo, the Jena 6, OJ Simpson, or Rodney King without recognizing that skin color has something to do with how we perceive events around us, with how others view us, with who we are and how we view ourselves?

Race matters. It may no longer determine outcomes the way it did before the many successes of the civil rights movement, but it continues to effect experience.

"The freedom of a university to make its own judgments as to education includes the selection of its student body." *Grutter* at 329, quoting *Bakke* at 312.

The University of Michigan Law School policy at issue in *Grutter* was intended to "assembl[e] a class that is both exceptionally academically qualified and

broadly diverse," *Grutter* at 329, using a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id.* at 337. The Court noted the policy

> makes clear "there are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic--e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." All applicants have the opportunity to highlight their own potential diversity contributions . . . describing the ways in which the applicant will contribute to the life and diversity of the Law School. [*Id.* at 338-339 (citations omitted).]

Defenders of §26 instead suggest it should remain proper for a university to consider the uniqueness of those who have overcome a personal adversity -- unless it has to do with race. That it should be permissible for a graduate school to consider that an applicant from a northern state attended an undergraduate school in the south, but

illegal to equally factor that another applicant was one of only a few white students attending an historically black college in his or her own state. Equal protection does not allow for such divergent treatment.

The U of M Law School admissions policy in *Grutter* focused upon each prospective student's "academic ability coupled with a flexible assessment of their talents, experiences, and potential." *Grutter*, 539 U.S. at 319. Prohibiting any consideration of race would prevent universities from even considering instances where evidence shows the grades black students receive in white suburban schools reflect cultural or testing biases or even outright prejudice. The rule against consideration of race thus prevents full assessment of even academic ability.

Certainly, race standing alone does not establish the existence or non-existence of adversities or disadvantages. However, keeping race entirely off the table denies minority students the ability to have their unique experiences equally considered.

B. Many of the 'race-neutral' diversity considerations universities will continue to employ aren't racially neutral, they tacitly favor some racial groups over others and schools cannot be prohibited from recognizing such unintended discriminatory affect.

A university prohibited from considering race as part of its diversity policy will continue to seek diversity in other ways, because diversity is not

about any one characteristic. Applicants may stand out based on athletics, legacy, religion, debate team membership, musical ability, attending certain select schools, and hosts of other 'plus' factors. While each factor may be appropriate when looked at in concert with all the others including race, excluding race from the picture actually prevents neutrality.

Athletics presents many such examples. Looking beyond just the "major" sports, one can quickly see how such preferences benefit the advantaged. A university's consideration of diverse sports might include lacrosse enthusiasts, fencers, equestrians, gymnasts, archers, or skiers each of which are likely to have disparate racial impact. Many such sports require club membership and/or expensive equipment. Even sports like competitive swimming or skating require relatively exclusive access to a pool/rink. Local school cuts may make art, music, and theater programs less available to some than others.

While universities do, and should be permitted to, consider each of the above as possible factors when looking at a prospective student, each also provides a tacit racial advantage that favors the historically privileged at the expense of racial minorities. Permitting universities to look at every factor, including race, enables them to look at each individual in a race-neutral (though race-conscious) way. It creates an overall balance even though individual considerations may have disparate impacts on others. It also recognizes the relative uniqueness of a white student who plays an

American-Indian flute, or an African-American woman who plays ice hockey.

Allowing such "race-neutral" policies to remain in place in spite of their disparate negative impact on applicants of color, while also making color the only characteristic that cannot be considered at all, denies equal protection.

C. Implementing race-neutral methods in order to obtain racial diversity is not only of questionable integrity, it attains racial diversity at the expense of the broad diversity that better serves all students, and it sacrifices academic quality.

Those seeking to outlaw any consideration of race in university admissions procedures argue that universities can achieve racial diversity by other means. They suggest that implementation of Texas-style 10% rules, other "percentage plus" rules, consideration of economic or geographic status, or some other race neutral means should be implemented for the express purpose of achieving a diverse student body.

MCRC finds repugnant any suggestion the United States Supreme Court should condone university admissions policies chosen specifically because they are discriminatory (or at least disparate) in operation, simply because the policies are facially neutral. In addition to the offensive intellectual and moral dishonesty of condoning by ruse what is pretended to be prohibited by rule, "these alternatives would require a dramatic

sacrifice of diversity, the academic quality of all admitted students, or both." *Grutter*, 539 U.S. at 340.

Defenders of §26 are unconcerned that a university which adopts a particular facially neutral policy (like a 10% plan), would do so only for the purpose of achieving racial diversity. They do not acknowledge that seats filled in this manner make it impossible for the university to consider many other valuable diversity elements, or that they harm academic quality. A 10% plan may be good public policy, but it does not select applicants based on the interests of the school or student body. It is more akin affirmative action than diversity.

Most tellingly, when arguing for such race-neutral ways to achieve racial diversity, defenders of 26 ignore how it places the focus on elements unrelated to a university's academic environment. Indeed, many who argue against diversity being an admissions factor seem to regard any lowering of a university's overall academic standards as a victory for their cause and refuse to recognize it as a loss for the university or its student body. They have become so concerned with whether they will be admitted they have forgotten why they want to be admitted, which presumably has something to do with the quality of the institution and the educational experience it provides to its students.

The disingenuous use of race neutral programs to achieve diversity is antithetical to the academic purpose for creating diversity in the first place. Asserting that the benefits of racial diversity can be achieved by economics or geography requires presupposing that all African-Americans, or all

members of other underrepresented minority groups, are interchangeable.

The *Grutter* opinion highlights the testimony of one of the trial experts who explained that; "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no "'minority viewpoint'" but rather a variety of viewpoints among minority students." *Grutter*, at 320. Similarly, admitting a dozen black applicants from the same disadvantaged inner-city school system would provide numerical minority representation, but not the broad diversity this Court approved of in *Bakke*, *Grutter* and most recently in *Fisher v. Univ. of Texas at Austin*, __ U.S. __, 133 S. Ct. 2411 (2013).

Supporters of §26 often question why a black applicant with rich parents living in a suburban school district should be looked at differently than the white applicant living next door. The question oversimplifies the breadth of diversity by offering too few factors about the applicants, and no indication of what the rest of the admissions class looks like. The fact an applicant is black cannot by itself justify his or her admission, but is it less relevant to academic diversity than the fact that a third neighbor collects butterflies? Is it significant that one had ancestors on the Mayflower, but not that the other's arrived on a slave ship?

Which applicant could offer a unique perspective to class discussions on ethnic profiling? Even the most privileged of African-Americans have an American experience that is different than that of their white neighbors.

III. A public referendum creating a separate and more difficult political process that requires majority votes only on policies that relate to minority interests violates equal protection.

Adding Article I, § 26 to the Michigan Constitution created two separate and unequal political processes for those wishing to bring about a change in a public university's admissions policy: 1) a very difficult and costly process in areas involving minority interests, and 2) a less difficult and far less costly process for those seeking change in any other area (including the suspect class of religion).

"But when the political process or the decision making mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485-86 (1982), and *Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969) (internal citation and quotation marks omitted). The *Hunter* and *Seattle* cases, in particular, establish the doctrine that providing a separate and unequal political process for changing policy distinctions based on race is constitutionally impermissible.

Petitioner does not dispute that §26 creates an almost impossibly difficult and purely majoritarian political process that applies only to those former powers of university boards related to admissions decisions from which minorities might benefit. They

instead rely on unfounded semantic distinctions to suggest that the elected boards from which the power was taken were not "political."

Nor does Petitioner dispute that §26 was intended to end a process that voters believed benefited minorities. They instead argue that because it prohibits favoring one race, instead of prohibiting disfavoring another, the provision shouldn't be considered racial.

Even if this Court determines that there is a legal difference between providing 'special treatment' to A based on a preference for A's race, and denying equal treatment to B based on B's race, it should reject the idea that only the latter is "racially conscious legislation." (*Seattle* at 485.)

The *Hunter*, *Seattle* doctrine should not be read so narrowly that its general principle is forgotten. It does not limit the voter's ability to change policy. The principle is not concerned with any particular political process or how it applies to general areas of law like university governance; it merely holds that a single process must be equally applied across the spectrum of the general area of law. Nor does the doctrine limit what burden may be placed upon voters to make future changes; it only prohibits "comparative burdens on minority interests." *Seattle* at 477 (emphasis added).

The semantic nit-picking of *Hunter*, *Seattle* and similar cases should not be permitted to cast aside the fundamental principle that the political process for racially conscious legislation cannot be both separate and equal protection.

A. Might doesn't always make right, and proponents of §26 should not be permitted to circumvent all substantive legal review by using the referendum (majority vote) process to determine equal protection (minority) related policy.

In *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and *Washington Seattle School District No. 1*, 458 U.S. 457 (1982), this Court disallowed legislation that, like Proposal 2, in a racially conscious way placed political hurdles in the way of some which did not exist for others. In particular, *Hunter* recognized that courts have a special duty to insulate minority rights from majority rule:

> In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process." [*Hunter* at 486, citing *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973), (emphasis added).]

MCRC submits that it is precisely this judicial responsibility to safeguard minority interests by protecting them from the majoritarian political process that faces this Court in the present case.

The importance of not just preserving but also respecting the judicial safeguards that shield the constitutional interests of minorities from what, in more extreme circumstances, is referred to as the

'tyranny of the majority,' highlights an under-noticed but particularly pernicious effect of the political process used here by supporters of §26. While any law that expressly changes how public universities deal with individuals "on the basis of race, sex, color, ethnicity or national origin" would be expected to be subject to strict scrutiny on judicial review, Petitioner is arguing that review of §26 should be limited to asking "was it possible for Michigan voters supporting §26 to have been motivated by any reason other than racial discrimination?" (Petitioner's brief at 15).

To be clear, Amicus MCRC, does not suggest that the people cannot or do not "retain for themselves the power over certain subjects" including the governance of public universities, only that doing so "furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." *Seattle* at 476, citing *Hunter* at 392.

While Amicus MCRC believes they would be horribly misguided to do so, Michigan voters could take the power to set public university admissions policy away from the independent boards that now have it. It would arguably even be permissible to use the referendum process to prohibit <u>all</u> diversity considerations and strictly limit the admissions process to only items that directly relate to an applicant's past academic performance. What is not permissible, and what this Court must not find to be permissible, is separating race or other minority

interests from the process that applies to everything else.

At its core, the doctrine established by *Hunter* and *Seattle* recognizes that the power to change the law, and the political process that enables it, is part of the people's protection against bad laws. Whatever protection is provided by the political process that applies to changing laws in a general area, the same process should apply to changing only those parts of the general law affecting minority interests. The protection cannot otherwise be equal.

B. By usurping the power to determine a university policy that had previously been politically vested in university governing boards, §26 reallocates Michigan's political structure for university governance.

Petitioner begins their "Statement of the Case" by noting: "The genesis for the Article 1, §26 ballot initiative was a recognition that the public-university admissions process was insulated from political accountability to the public—it could not be affected by those who wanted public universities to move away from race-and sex-conscious policies." They then disingenuously argue that adoption of §26 wasn't about reallocating the political structure in Michigan. The first of these statements accurately describes the frustration that motivated supporters of §26 to change the existing political structure; the second should be rejected.

Laid bare, Petitioner's argument is that passage of §26 did not reallocate Michigan's political

structure because the process governing admissions prior to the referendum's passage wasn't political enough. Thus, Petitioner says, §26 'merely' moved control of that portion of university admissions dealing with race (and sex, color, ethnicity, or national origin) from a 'non-political' process to a political one.

Arguing that the governance of admissions policy in Michigan is non-political requires denying both that unused power is reserved not relinquished, and that this power is in fact used.

First, as noted by the Circuit Court, even if it were true that university boards had abstained from any involvement in admissions, Petitioner "provides no authority to support his contention that an unused power is a power abandoned." *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary* v. *Regents of Univ. of Michigan*, en banc opinion, 701 F.3d 466, 482 (6th Cir. 2012).

More to the point, the university boards' powers are not unused. Nothing is offered to refute the Circuit Court's findings that the boards continue to exercise ultimate authority in spite of having delegated the bulk of the decision-making to appointed bodies, that the university boards exercise this authority "with some frequency," and that "the elected boards of Michigan's public universities can, and do, change their respective admissions policies, making the policies themselves part of the political process." (*Coalition to Defend*, en banc opinion, at 482-3).

Most critically, Petitioner's characterization of the power to govern admissions as non-political ignores the extensive and explicitly political history of university governance in Michigan. The insulated political decision-making of universities and their admissions processes is the direct result of a very political process which deliberately reallocated these powers.

The process Petitioner now describes as being non-political because it is insulated from the traditional legislative process did not always exist. The history of control over Michigan's public universities was detailed by the Michigan Supreme Court in *Federated Publications Inc.* v. *Bd. of Trustees of Michigan State University*, 460 Mich. 75, 594 N.W.2d 491 (Mich. 1999):

> Long ago, the Legislature controlled and managed our first public university, The University of Michigan. This experiment failed, prompting extensive debate regarding the future of the university at the Constitutional Convention of 1850. Const 1850, art 13, § 8 emerged from these debates, divesting the Legislature of its power to regulate the university and placing control in an elected board." [*Id. at 496* (internal citations omitted).]

"The University of Michigan thrived under the leadership of its board of regents." *Id.* Insulation from the legislative process proved so successful that, "(r)ecognizing the importance of an independent governing board in managing state colleges and universities," the constitution of 1908 extended the

same political independence to what is now Michigan State University. Wayne State University gained the same political independence by constitutional amendment in 1959. Eventually, pursuant to the Constitution of 1963, Michigan's other public universities were granted similar self-determination, but through appointed rather than elected boards. *Id.* at 498.

The need for politically independent boards was discussed in more detail (and more contemporaneously) by the Michigan Supreme Court in *Sterling* v. *Regents of the Univ. of Michigan*, 110 Mich. 369, 68 N.W. 253 (1896). The Court described the deliberate creation of an independent political body and the intent to "place it beyond mere political influence." *Id.* at 254.

The Court, citing a select legislative committee report observed that; "When legislatures have legislated directly for colleges, their measures have been as fluctuating as the changing materials of which the legislatures were composed." *Id.* at 255. This fluctuation was clearly seen as a major part of the problem, and much attention is paid to the need to place governance into the hands of a body with the "oneness of purpose and singleness of aim" who "chosen for their supposed fitness for that very office, and who, having become acquainted with their duties, can and are disposed to pursue a steady course." [*Ibid.*]

Contrary to Petitioner's present characterization, the 1850 framers had no intent to remove university governance from the political process altogether, only to insulate it from political volatility by placing it in

a more insulated, long-serving, and specifically institution-focused group of elected officials.

> Obviously, it was not the intention of the framers of the constitution to take away from the people the government of this institution. On the contrary, they designed to, and did, provide for its management and control by a body of eight men elected by the people at large. They recognized the necessity that it should be in charge of men elected for long terms, and whose sole official duty it should be to look after its interests. [*Id.* at 256.]

Michigan, since 1850, has consciously and deliberately reserved the power to govern public universities to bodies that while political in structure and ultimately responsible to the people, are also carefully isolated from both the whims of change and the influence of those who have interests other than those of the specific institution at heart. Section 26 removes only a very small slice of this political power from control of the dedicated university boards. Furthermore, it treats the interests of each university as identical (though again for only this sliver of decision-making), as all other decisions are still to be left to the individual boards.

That Michigan voters would remove any portion of political power from the carefully structured, independent, and narrowly focused university boards is unwise. That the unabashed purpose of §26 is specifically to forbid consideration of what the university boards and this Court agree is a compelling state interest in diversity, proves the wisdom of the framers of Michigan's 1850

Constitution who created the universities' independent and narrowly focused political governance structure. Most significant, because the sliver of decision-making separated from all others is "racially conscious" and may otherwise have inured to the benefit of minority applicants, it is contrary the *Seattle* and *Hunter* decisions and it violates the equal protections guaranteed by the Fourteenth Amendment.

C. The argument that the principles of *Hunter* and *Seattle* do not prohibit a ban on preferences is based upon semantic distinction rather than actual difference.

The inherent weakness in this argument offered by supporters of §26 can be seen from the very outset of Petitioner's brief to this Court: "To begin, this Court has applied the political restructuring doctrine only to laws that impede protection against unequal treatment, never to laws that preclude preferential treatment." Petitioner's brief at 4. "Preferential treatment" may not be defined, but it defies reason to maintain it can occur without also being "unequal treatment."

Petitioner provides no legal justification for distinguishing acts of "preference for" one person from acts in "discrimination against" another. In *Seattle* this Court was similarly faced with referendum proponents who tried to distinguish their case from the *Hunter* decision based upon the specific way in which race was implicated. Nothing in the *Seattle* opinion suggests its application should be limited to the specific way "Referendum 503"

implicated race. To the contrary, *Seattle* flatly rejects the relevance of such factual contortions and determines that the *Hunter* doctrine is not about legislative drafting specifics; "It is the State's race-conscious restructuring of its decision making process that is impermissible" *Seattle* at 477, *fn* 29.

A close look at *Seattle* reveals that, although the word "preferences" was not used, the purposes of the referenda there and here are actually quite similar. In *Seattle*, schools sought to implement bussing in order to achieve the classroom diversity social segregation prevented. Unable to stop the bussing by any other means, a referendum was offered that purported to authorize bussing, but then limited it to any purpose other than desegregation. This Court had little difficulty seeing past the effort to distinguish political barriers erected to blocking anti-discrimination laws from similar barriers blocking anti-discrimination remedies:

> Certainly, a state requirement that "desegregation or antidiscrimination laws," and only such laws, be passed by unanimous vote of the legislature would be constitutionally suspect. It would be equally questionable for a community to require that laws or ordinances "designed to ameliorate race relations or to protect racial minorities," be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure. [*Id.* at 486-87, citing *Crawford* v. *Los Angeles Board of Education*, 458 U.S. 527, 539 (2008), emphasis added.]

Similarly, it is not constitutionally significant that §26 purports to prohibit preferences. Pursuant to §26 "the decision-making mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment," and thus "plainly rests on distinctions based on race." [*Seattle* at 485 (citations and quotation marks deleted.)]

D. Passage of Proposal 2 does not merely set the procedural hurdles higher for changing admissions policy in areas involving minority interests; it sets them at a level its proponents found impossible to reach without "deception and fraud".

Amicus MCRC, reminds this Court that Proposal 2 fraudulently obtained its place on the ballot. As such, the facts here are more compelling than even those requiring invalidation of legislation in *Hunter* and *Seattle* themselves.

Laying aside that the issue here is about minority interests, the one arguable saving grace of allowing university admissions policy to be changed by voter referendum would be the idea that the same referendum process would always be available to those wishing to change back. However, any suggestion by Petitioner that §26 met the burden it imposes on others is patently false.

The Sixth Circuit Court determined that "the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception" and that the

initiative "found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes." *Operation King's Dream at* 591 (referring in part to the findings of the Michigan Civil Rights Commission). Thus supporters of Proposal 2 now offer as the solution for those pursuing minority interests exactly the political process that even with substantial financing from outside the State of Michigan they were unable to meet without resorting to "fraud and deception."

Permitting a majority vote to erect a barrier for those seeking change in the way universities evaluate minority applicants violates the very concept of equal protection. That the barrier was erected through fraudulent means, and that it may now be impossible to remove by those unwilling to resort to fraud, underscores the need for judicial intervention.

CONCLUSION

Interpreted as drafted, Michigan Constitution, Article 1, §26's prohibition of preferential treatment does nothing to change the law as the term should not be applied to diversity admissions programs.

Interpreted as intended, Michigan Constitution, Article 1, §26 prevents minority applicants from being assessed in the same "holistic" manner considered as other applicants. It denies universities the academic freedom to create a student body that is in the best interests of the university itself or of its students, thereby denying those students the benefits of diversity. It requires universities to treat race differently than all other considerations about what make applicants unique individuals, and it violates the Equal Protection Clause.

Most dangerously, §26 creates a separate and very unequal political process for amending only university admissions policies, and specifically only those parts affecting minority interests. Allowing majority rule to reset minority rights in this manner is inconstant with not only the letter, but also the very spirit, of equal protection.

This Court should, by providing a clear definition for "preferential treatment," determine either that §26 merely restates existing federal equal protection law and thus does not violate the Equal Protection Clause. However, if this Court concludes a ban on preferential treatment is broader than a ban on discrimination then it should find §26 violates the Equal Protection Clause because it compels universities to discriminate by not considering the

attributes of minority applicants in the same holistic way as others it, and/or because it used majority rule to erect political roadblocks that apply only to issues and policies involving minority interests.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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In The
Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to the defense and preservation of individual liberty, the right to own and use property, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has sought to protect individual liberties and defend the guarantee of equal protection found in the Fifth and Fourteenth Amendments. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Concrete Works of Colorado v. City and County*

[1] The parties have consented to the filing of this amicus curiae brief by filing blanket consents with the Court. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

of Denver, 321 F.3d 950 (10th Cir. 2003); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

Especially relevant to this case is MSLF's work in *Adarand* and *Concrete Works of Colorado*, in which MSLF argued for the appropriate interpretation of the Equal Protection Clause in government contracting cases. MSLF brings a unique perspective to this case and believes that its amicus curiae brief will assist this Court in deciding the case. Based upon its experience and perspective, MSLF respectfully submits this amicus curiae brief in support of Petitioner.

STATEMENT OF THE CASE

In November 2006, 58% of voters in Michigan voted to amend Michigan's State Constitution to prohibit the granting of preferential treatment in public education, government contracting, and public employment based on race, sex, ethnicity, or national origin. *See* Mich. Const. art. I, § 26 ("§ 26"). In 2006, Coalition to Defend Affirmative Action challenged the constitutionality of the amendment in the United States District Court for the Eastern District of Michigan. The District Court entered a stipulation of preliminary injunction, which postponed the implementation of § 26 until after the next university admissions cycle. The Sixth Circuit, however, granted an emergency motion for a stay pending appeal, finding a "strong likelihood" that the preliminary

injunction would be reversed on the merits. The first Sixth Circuit panel to hear the case followed the Ninth Circuit's rulings in *Coalition for Economic Equality v. Wilson*, 122 F.3d 692 (9th Cir. 1997), and *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012) and rejected plaintiff's political restructuring claim. The political restructuring theory of equal protection provides that if an enactment: (1) has a racial focus, targeting a policy or program that "inures primarily to the benefit of the minority"; *Washington v. Seattle School District No. 1*, 458 U.S. 457, 485 (1982) ("*Seattle School District*"), and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process, the enactment violates the Equal Protection Clause. *Hunter v. Erickson*, 393 U.S. 385, 391 (1969).

On remand, the District Court upheld § 26 on the merits but was eventually reversed by a second Sixth Circuit panel. *See Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary v. Regents of the Univ. of Michigan*, 652 F.3d 607 (6th Cir. 2011) ("*CDAA I*").

The Sixth Circuit then granted en banc review, and in an 8-7 decision, struck down § 26 regarding public education, holding that § 26 violates the Equal Protection Clause of the Fourteenth Amendment by denying minorities a "fair political process." *Coalition to Defend Affirmative Action, Integration and Immigrant*

Rights and Fight for Equality By Any Means Necessary v. Regents of the Univ. of Michigan, 701 F.3d 466, 474 (6th Cir. 2012) (*"CDAA II"*). The Sixth Circuit rejected the Ninth Circuit's decisions in *Wilson*, 122 F.3d 692, and *Brown*, 674 F.3d 1128, and the majority purportedly relied on *Hunter*, 393 U.S. 385, and *Seattle School District*, 458 U.S. 457, in striking down § 26. The Sixth Circuit ruled that because § 26 forced racial minorities to "surmount procedural hurdles in reaching their objectives over which other groups do not have to leap," it necessarily violated the Equal Protection Clause. *CDAA II*, 701 F.3d at 487. Based on the extra procedural hurdles that minority students would be forced to overcome, the Sixth Circuit held that § 26 denied "equal access to the tools of political change," with respect to public university admissions. *Id.* at 470.

Judge Gibbons's dissent in *CDAA II* properly distinguished the cases relied upon by the majority. Judge Gibbons noted that in *Hunter* this Court was faced with the issue of the repeal, not the enactment, of a law requiring equal treatment of minorities in the relation to the sale or lease of real property. *CDAA II*, 701 F.3d at 495 (Gibbons, J., dissenting). Similarly, the policy, which was ultimately invalidated by this Court in *Seattle School District*, was related only to forced busing programs in the Seattle area. *Id.* The instant case involves a ballot initiative with a broad, state-wide focus. Judge Gibbons called the present amendment "a sea change in state policy, of a kind not present in *Seattle* or any other 'political

structure' case." *Id.* at 495 (citations omitted). Judge Gibbons further concluded that § 26 did not reallocate political power in a manner prohibited by *Hunter* or *Seattle School District*; it simply removed admissions policies from the hands of university admissions personnel, who are unelected and unaccountable to the public. *Id.* at 499.

The Attorney General for the State of Michigan petitioned the United States Supreme Court for review. This Court has agreed to hear this case and to decide whether the Michigan voters' decision to require equal treatment in public university admissions violates the Equal Protection Clause. *Schuette v. Coalition to Defend Affirmative Action*, 133 S.Ct. 1633 (Mar. 25, 2013).

SUMMARY OF THE ARGUMENT

This Court should reverse the Sixth Circuit's erroneous ruling, because § 26 does not violate the Equal Protection Clause. Indeed, this Court has ruled that States may expand upon the protections found within the United States Constitution. *See PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 81 (1980). Furthermore, this Court has determined that certain race-based admissions programs used by higher education institutions may ultimately violate the Equal Protection Clause. *See Fisher v. Univ. of Tex. at Austin,* 570 U.S. ___, 2013 WL 3155220, *15 (2013) ("If the Court were actually applying strict scrutiny, it

would require Texas either to close the University or to stop discrimination against applicants based on their race.") (Thomas, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 330, 334 (2003) (ruling that racial balancing in education is patently unconstitutional and ruling that race-based admissions programs must have an end date); *see also Palmore v. Sidoti*, 466 U.S. 429, 432 (1989) (ruling that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."). The voters of Michigan exercised their rights under the State's democratic system and voted to enact § 26, which expanded the protections provided by the Constitution and is in accord with this Court's precedent. The Michigan voters simply moved up the end date for preferential treatment based on race and ethnicity in public university admissions decisions, which does not violate the Constitution. As a result, allowing the Sixth Circuit's decision to stand would disrupt this Court's precedent in *Grutter*.

Moreover, allowing the Sixth Circuit's ruling to stand may cause devastating consequences for public contracting. Under this Court's holding in *Adarand*, public contractors have a right to expect consistency amongst government contracting decisions. 515 U.S. at 230. Contractors are also entitled to be judged against other contractors on an even playing field. *Northeastern Fla. Chapter, Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 667 (1993) ("*City of Jacksonville*"). The

Sixth Circuit's erroneous interpretation of the Equal Protection Clause invites future challenges regarding public contracting and public employment and will undoubtedly create confusion with respect to the permissible use of race and ethnicity in public contracting and public employment. Therefore, MSLF urges this Court to reverse the Sixth's Circuit decision.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE REQUIRES THIS COURT TO REVERSE THE SIXTH CIRCUIT.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The guarantee of equal protection found in both the Fifth and the Fourteenth Amendments requires State and federal governments to provide equal protection of the law to all persons, regardless of race or gender. *Schweiker v. Wilson*, 450 U.S. 221, 226 n.6 (1981) ("the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment"); *Weinberger v. Salfi*, 422 U.S. 749, 768-70 (1975).

If a law discriminates based upon an individual's race, the Court will strike it down unless it is narrowly

tailored to serve a compelling government interest (the "strict scrutiny test"). *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *see also Fisher*, 570 U.S. ___, 2013 WL 3155220 at *8 (Applying strict scrutiny to race-based public university admissions programs). Additionally, if a law discriminates against an individual without focusing on race or ethnicity, courts "will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [people's] actions were irrational" (the "rational basis test"). *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

It has long been established that "distinctions between citizens solely because of their [race or] ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Indeed, "racial characteristics . . . seldom provide a relevant basis for disparate treatment, and . . . classifications based on race are potentially . . . harmful to the entire body politic." *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 505 (1989) ("*Croson*"). Furthermore, "the equal protection principle," "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand*, 515 U.S. at 240 (Thomas, J. concurring). Indeed, discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong,

and destructive of a democratic society." *Croson*, 488 U.S. at 521 (Scalia, J. concurring). Finally, "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Crawford v. Board of Education of City of Los Angeles*, 458 U.S. 527, 535 (1982).

The Equal Protection Clause, by its own terms, must be applied to individuals uniformly. As this Court has provided, allowing the government to classify individuals differently based on race, ethnicity, or national origin can lead to harmful consequences for society. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.") (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (2007); *Brown v. Board of Education*, 347 U.S. 483 (1954)); *see also Hirabayashi*, 320 U.S. at 100 ("[D]istinctions between citizens solely because of their [race or] ancestry are by their very nature odious to a free people."). To reiterate their commitment to equality and to avoid the "illegal, immoral, unconstitutional, inherently wrong and destructive" results that can stem from discrimination, the majority of voters in the State of Michigan voted to enact § 26. *Id.* The Michigan Constitution has contained an equal protection guarantee since its amendment in 1963. *See* Mich. Const. art. I, § 2. This section states that "[n]o person shall be denied the equal protection

of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation." *Id.* Indeed, when the voters approved § 26, they were carrying out the intentions of the State Constitution's drafters by implementing appropriate legislation, reaffirming the State's commitment to equal protection. The voters were also reaffirming the Equal Protection guarantee found in the Fourteenth Amendment and as this Court pointed out in *Crawford*, it would be paradoxical to hold that the voters had violated the Equal Protection Clause by adding its principles to their State Constitution.

Although this Court has allowed public universities to continue considering race in admissions applications in certain limited circumstances, it has never held that race-based admissions programs are necessary to guarantee equal protection under the Constitution. *Compare Grutter*, 539 U.S. at 335 (considering race as one factor during a holistic review of each application is sufficiently narrowly tailored to pass strict scrutiny analysis), *with Gratz v. Bollinger,* 539 U.S. 244, 273-75 (2003) (automatically awarding points to minority applicants violates the Equal Protection Clause); *Bakke*, 438 U.S. 265 (holding that use of quotas in university admissions process violates the Equal Protection Clause); *see also Fisher*, 570 U.S. ___, 2013 WL 3155220 at *9 ("[I]t remains at all times the University's obligation to demonstrate,

and the Judiciary's obligation to determine, that the admissions processes ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.") (internal citations omitted). Because the Fourteenth Amendment "does not require what it barely permits," the Sixth Circuit's holding is erroneous. *Wilson*, 122 F.3d at 709.

In *Grutter*, this Court was asked to explore the constitutionality of considering race in public university admissions. 539 U.S. at 306. This Court applied the strict scrutiny analysis and upheld the University of Michigan Law School's admissions program because it was appropriately narrowly tailored. *Id.* at 334. Although the Law School used a "race-conscious admissions program," it did not utilize a quota system and considered race and ethnicity in a flexible manner. *Id.* at 336-37. Importantly, this Court held that it "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 343. This Court also provided that the nation continues to aspire to the goal of the Equal Protection Clause, which is to embody "a political system in which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

Although this Court declined to strike down the admissions program challenged in *Grutter* its opinion provided that the Equal Protection Clause demands that affirmative action programs play a limited role in public university admissions decisions. *Grutter* was decided in 2003, meaning that the Court imagined

that by 2028 race-based admissions programs would no longer be necessary. *Grutter*, 539 U.S. at 343. Following this Court's guidance, the majority of voters in Michigan recognized that race-based admissions programs must have an end date. These voters responded to this Court's direction and decided for themselves that they need not wait until 2028 to end race conscious admissions programs. Indeed, the voters have exercised their rights and taken the steps required by the democratic process to show that the government should stop giving preferential treatment based upon race, ethnicity, gender and national origin in public education, public employment, and public contracting. In fact, the actions of the voters in Michigan affirm the State's commitment to equal protection under the laws of the State and carry forward the goal set forth in *Shaw* – the goal of progressing toward a "political system in which race no longer matters." *Shaw*, 509 U.S. at 657. The Sixth Circuit's opinion cannot stand under the Equal Protection Clause. Striking down § 26 would undermine the sanctity of the democratic voting system and after all, a State "is free as a matter of its own law" to treat citizens of all races and nationalities equally. *Oregon v. Hass*, 420 U.S. 714, 718 (1975).

More recently, in *Fisher*, this Court again considered the constraints of the Equal Protection Clause in relation to public university admissions programs. 570 U.S. ___, 2013 WL 3155220. Petitioner in *Fisher* claimed that the University of Texas at Austin's race-based admissions program violated the Equal Protection

Clause. *Id.* at *5. Without overruling *Grutter*, this Court reiterated that if a public university chooses to consider race as a factor when considering admissions applications, it must demonstrate that "each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.* at *7 (citing *Grutter*, 539 U.S. at 337). Ultimately, this Court remanded the case back to the Fifth Circuit to consider whether the University of Texas at Austin's race-based admissions policy passes a strict scrutiny analysis; however, Justice Thomas wrote a separate concurring opinion expressing his belief that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." *Id.* at *11.

In his concurrence, Justice Thomas characterizes *Grutter* as a "radical departure from [Supreme Court] strict-scrutiny precedents." *Id.* at *13. Justice Thomas argues that this Court misapplied its strict-scrutiny analysis in *Grutter* by deferring to the University's determination that the benefits that result from diversity amongst the student body were "sufficiently compelling to justify racial discrimination." *Id.* Justice Thomas's concurrence makes clear that "the pursuit of diversity as an end is nothing more than impermissible 'racial balancing.'" *Id.* at *14 (citing *Grutter*, 539 U.S. at 329-30). Furthermore, there is no "principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation

yielded those same benefits." *Id.* at *18. As such, Justice Thomas maintains that no compelling interest can justify racial discrimination in the university admissions process and, therefore, because the "Equal Protection Clause strips States of all authority to use race as a factor in providing education," race-based admissions programs violate the Constitution. *Id.*

Because the Equal Protection Clause does not guarantee an individual the right to preferential treatment, this Court should reverse the Sixth Circuit's decision and uphold § 26.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT PROHIBITING RACE-BASED ADMISSIONS PROGRAMS IS CONSTITUTIONAL.

Voters in the State of California passed Proposition 209 ("Prop. 209") on November 5, 1996. *Wilson,* 122 F.2d 692 (9th Cir. 1997). Prop. 209 is textually identical to § 26. *Compare* Cal. Const. art. I, § 31(a), *with* Mich. Const. art. I, § 26. Despite multiple challenges in both State court and federal court, Prop. 209 has remained a part of California's Constitution. The Ninth Circuit considered Prop. 209 in *Wilson,* 122 F.2d 692, and in *Brown*, 674 F.3d 1128, and upheld it in both cases. In *Wilson,* the Ninth Circuit held "as a matter of law, Proposition 209 does not violate the United States Constitution." 122 F.2d at 711. The court in *Wilson* considered substantially the same arguments as the Sixth Circuit in the instant case

and concluded that "[w]hen the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender." *Wilson*, 122 F.3d at 702. Furthermore, the Ninth Circuit correctly held that legislation prohibiting "the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense." *Id.* Finally, the Ninth Circuit held that "[w]hile the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms." *Id.* at 708. Thus, the Ninth Circuit found no violations of the Equal Protection Clause under the political-structure analysis. *Id.* at 704-09. Later in *Brown*, a second group of plaintiffs challenged Prop. 209, but the Ninth Circuit again upheld the constitutionality of the amendment. 674 F.3d at 1135.

The Ninth Circuit's reasoning for upholding Prop. 209 is equally applicable to § 26. If this Court upholds the Sixth Circuit's ruling, it will essentially abrogate Prop. 209, which has lawfully existed for the past sixteen years. While the United States Constitution expressly prohibits discrimination and unequal application of the law, it certainly does not require that States grant preferential treatment to minorities. *See Adarand*, 515 U.S. at 240 (Thomas, J. concurring) ("Government cannot make us equal; it can

only recognize, respect, and protect us as equal before the law."). Moreover, merely reiterating the federal Constitution within a State Constitution to extend Constitutional protections is permissible. *See Prune-Yard Shopping Center*, 447 U.S. at 81 (Acknowledging a State's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."). As a result, this Court should reverse the Sixth Circuit and adopt the superior Ninth Circuit reasoning.

III. SECTION 26 DOES NOT VIOLATE THE POLITICAL RESTRUCTURING DOCTRINE.

Legislation violates the political restructuring doctrine if it: (1) has a racial focus that targets a policy or program that "inures primarily to the benefit of the minority"; *Seattle School District,* 458 U.S. at 485, and (2) reallocates political power or reorders the decision making process in a way that places special burdens on a minority group's ability to achieve its goals through that process. *See Hunter,* 393 U.S. at 391. In the instant case, the Sixth Circuit misinterpreted this Court's reasoning in both *Hunter* and *Seattle School District* to strike down § 26.

In *Hunter*, the city of Akron, Ohio amended its city charter to prevent the city's fair housing ordinance from being applied until a majority of the city's voters voted to approve the amendment. 393 U.S. at 387. Despite the fact that the city council had enacted a fair housing ordinance in 1964, the city argued that

the ordinance was not effective because it had not yet been enacted by a majority of the city's voters. *Id.* This Court held that Akron's amendment to its city charter violated the Fourteenth Amendment because it clearly "discriminated against minorities, and constitute[d] a real, substantial, and invidious denial of the equal protection of the laws." *Id.* at 561-62.

In *Seattle School District*, the State approved an initiative that banned busing programs between school districts by prohibiting school boards from requiring students to attend schools other than the public school geographically nearest to the student's residence. 458 U.S. at 462. Although the initiative contained a number of broad exceptions, this Court struck down the ordinance and found that it violated the equal protection guarantees within the Constitution by imposing "substantial and unique burdens on racial minorities." *Id.* at 470. This Court found that the racial focus of the legislation "trigger[ed] application of the *Hunter* doctrine and unfairly burdened minorities." *Id.* at 474.

In this case, the Sixth Circuit found that § 26 placed special burdens on minorities, making it more difficult for minorities to "achieve beneficial legislation." *CDAA II*, 701 F.3d at 474. In applying a two-part test derived from *Hunter* and *Seattle School District*, the Sixth Circuit found that: (1) programs targeting classroom diversity have a racial focus; and (2) the "comparative structural burden" placed upon minorities by § 26 impermissibly reorders the political process. *Id.* at 478, 484. The Sixth Circuit's

analysis is flawed because it necessarily assumes that minorities have the right to preferential treatment in the university admissions program. Neither *Hunter* nor *Seattle School District* ever considered a minority's right to preferential treatment. Instead, both *Hunter*, 393 U.S. at 562, and *Seattle School District*, 458 U.S. at 487, considered only the Constitution's guarantee of equal protection to all citizens. Despite this Court's holding in *Grutter*, which upheld the consideration of race, when considered as part of a holistic review of applicants to the University of Michigan Law School, 539 U.S. at 309, such a holistic review is neither required nor guaranteed by the Equal Protection Clause. It has long been held that the Equal Protection Clause "is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *CDAA II*, 701 F.3d at 511 (Sutton, J. dissenting) (citing *Crawford*, 458 U.S. at 538-39). Because the Equal Protection Clause does not guarantee racial minorities any right to preferential treatment, § 26 cannot violate the political restructuring doctrine, and as such, the Sixth Circuit's ruling must be reversed.

IV. UPHOLDING THE SIXTH CIRCUIT'S DECISION WOULD HAVE DEVASTATING CONSEQUENCES ON PUBLIC CONTRACTING.

A. Allowing The Sixth Circuit's Erroneous Ruling To Stand Invites Future Litigation Regarding Public Contracting.

The majority's holding in the instant case is "limited to 'racial minorities' and our court's declaration '[f]inding those provisions of [§ 26] affecting Michigan's public colleges and universities unconstitutional. . . .'" *CDAA II*, 701 F.3d at 514 (Griffin, J. dissenting). Although the language of § 26 applies to public education, public contracting and public employment, the Sixth Circuit's holding is limited to the application of § 26 to public university admissions decisions. The present action began in November 2006. *CDAA II*, 701 F.3d at 471. Now, over six years later, litigation continues. Affirming the Sixth Circuit's erroneous ruling may open the door to future lawsuits challenging § 26 as it pertains to public contracting or public employment. Litigation of this sort would be duplicative, time consuming, and costly. Forcing the federal judicial system to utilize its limited resources to re-hear such a substantially similar case would be burdensome and inefficient. The principles of judicial efficiency are not served by the Sixth Circuit's ruling. Therefore, this Court should emphatically reverse the Sixth Circuit's decision and uphold the constitutionality of § 26.

B. Allowing The Sixth Circuit's Ruling To Stand Would Conflict With Other Rulings Regarding Preferential Treatment In Public Contracting.

This Court has held that a racial classification is "a line drawn on the basis of race and[/or] ethnic status," and that the Constitution's guarantee of equal protection is violated if persons of different races "are not accorded the same protection." *Bakke*, 438 U.S. at 289. Indeed, the Constitution forbids States from discriminating against citizens based on their race. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (Holding "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the States, against any citizen because of his race."); *see Adarand*, 515 U.S. at 230 (Finding that an "individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be. This Court clearly stated that principle in *Croson*." (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94; 520-510)).

Both "the Fifth and Fourteenth Amendments protect persons, not groups." *Adarand*, 515 U.S. at 201; *see also Missouri v. Jenkins*, 515 U.S. 70, 120-21 (1995) (Thomas, J. concurring) ("At the heart of . . . the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."). The issue of consistency is frequently

raised in regard to Equal Protection claims and the principle recognizes "that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race." *Wilson*, 122 F.2d at 702, (citing *Adarand*, 515 U.S. at 230). "The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S. at 230. An injury is also suffered when a "discriminatory classification prevent[s] the plaintiff from competing on equal footing." *City of Jacksonville*, 508 U.S. at 667.

Regardless of which group is benefited by a law, such a benefit is impermissible under the Equal Protection Clause. Therefore, § 26 should be upheld in all regards because it protects individuals and ensures equal treatment of all the State's citizens. Upholding the present challenge to § 26 would indicate that individuals engaged in applying for university admissions somehow have different rights than individuals applying for public employment or bidding for a public contract. Contractors bidding for government jobs are protected as individuals under the federal Constitution and as such: (1) they are entitled to be treated consistently by the government, *Adarand*, 515 U.S. at 230; and (2) they are entitled to compete on equal footing with other contractors. *City of Jacksonville*, 508 U.S. at 667. Section 26 ensures that contractors in the State of Michigan will be treated

fairly and each considered based on individual merits, not at an advantage or disadvantage because of racial or ethnic characteristics.

In *Adarand*, a sub-contractor challenged the federal government's policy of offering financial incentives to general contractors who chose to employ "socially and economically disadvantaged individuals." 515 U.S. at 204. This Court held that strict scrutiny is the appropriate standard of review to apply whenever racial classifications are analyzed by a court, no matter whether they were imposed by the federal, State, or local government. *Id.* at 227. Although this Court remanded the case to the lower court for a final decision, it guided the lower court's decision by providing that the Equal Protection Clause does not permit the government to treat individuals differently under the law or disadvantage individuals based upon their race or ethnicity. *Id.* at 230.

Bearing this important holding in mind, a future challenge to § 26's protection of contractors would not be trivial. In fact, if the Sixth Circuit's ruling in the instant case were upheld, a future challenge to § 26 could threaten the constitutional rights of contractors bidding and working in the State of Michigan and would also contradict this Court's rulings regarding the correct application of the Equal Protection Clause in many public contracting cases. *Adarand,* 515 U.S. 200; *Croson*, 488 U.S. 469; *City of Jacksonville*, 508 U.S. 656. Just as Respondents in the instant action argued that § 26 unfairly disadvantages racial

minorities in the public university admissions process, minority contractors may claim they too are disadvantaged by the application of § 26 to public contracting bids. The Fourteenth Amendment's protections should not be distinguished between student and contractor, or between student and employee. The Fourteenth Amendment necessarily guarantees that the law will treat all individuals equally. *Adarand,* 515 U.S. at 229-30 ("[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."); *see also id.* at 240 (Thomas, J. concurring) ("Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law."). Because of the potentially devastating effects a challenge to § 26's applicability to public contracting may have, and to maintain consistency with previous public contracting rulings, this Court should reverse the Sixth Circuit's erroneous ruling.

CONCLUSION

For the foregoing reasons, this Court should reverse the Sixth Circuit's ruling and emphatically rule that § 26 is constitutional.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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IN THE

Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
Petitioner,
v.
COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals For the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, MICHIGAN EDUCATION ASSOCIATION, AND SERVICE EMPLOYEES INTERNATIONAL UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

This brief *amicus curiae* is submitted on behalf of the National Education Association ("NEA"); the Michigan Education Association ("MEA"), an affiliate of NEA; and the Service Employees International Union ("SEIU").[1]

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. MEA is the largest single public employee union in Michigan, and the third largest education association in the United States, representing more than 140,000 K-12 teachers, higher education faculty, professional education staff, educational support staff, and retired school employees throughout the State of Michigan. SEIU represents 2.1 million men and women working in health care, property services, and public services, including educators and support personnel in public schools, universities, and early education settings.

Amici are dedicated to furthering the goals and employment interests of their members, and believe that every citizen has the absolute right to participate—free of racially motivated distortions or burdens—in the political processes used to shape our nation's public educational institutions. *Amici* also

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[1] Letters of consent from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

have a deep and abiding commitment to equal opportunity in all aspects of our society and believe that racial integration and ethnic diversity in our institutions of public education serve legitimate and compelling societal interests.

SUMMARY OF ARGUMENT

Proposal 2 creates a distinct and more onerous political process for those advocating for constitutionally permissible race-conscious admissions policies at public universities in Michigan. While those seeking different, non-race-based changes to university admissions policies—including legacy preferences or geographic set-asides—may use a variety of political channels to pursue their goals, citizens who propose that public universities consciously promote the benefits of a racially diverse student body through the kinds of programs this Court has held to be constitutionally permissible have but one option that is arduous, time consuming, and prohibitively expensive: amending the Michigan Constitution. As this Court has recognized in prior cases, this kind of racially motivated restructuring and distortion of the political process violates the Equal Protection Clause of the Fourteenth Amendment.

Prior to the enactment of Proposition 2, there existed a well-functioning, longstanding political process for determining the policies and objectives that would be pursued by public universities in Michigan, including those policies that affected admission criteria for prospective students. As is the case in many states, Michigan makes the governing bodies of its public universities directly politically accountable to its citizenry. These bodies are en-

trusted to make judgments about educational policy that go to the heart of a public education institution's mission.

Whether to consider race as a constitutionally permissible factor in admission policies is precisely the kind of educational policy judgment that has traditionally been exercised by these politically accountable bodies. As part of their mission to provide students with the skills and knowledge necessary to realize their full potential, as well as to instill in them the values on which our society rests, educational institutions may—consistent with the Fourteenth Amendment—seek to obtain the educational benefits that flow from an ethnically diverse student body. Those benefits include promoting cross-racial understanding, fostering more enlightening classroom discussion, promoting better learning outcomes, and preparing students for an increasingly diverse workforce and society.

It is clear that admissions policies in Michigan's public universities have been and will—with the exception the subjects removed by Proposition 2—continue to be part of a political process. But with particular regard to the key issue of whether race may be considered as a constitutionally-permissible factor in admissions decisions, Proposal 2 has completely restructured that process by prohibiting those who are in favor of such policies from lobbying elected officials for changes that they desire. Proposal 2 therefore imposes a special, racially motivated burden on minorities by creating two different political processes for advocating for changes in admissions criteria. Based on the precedent laid down by this Court,

Proposal 2 must be held to violate the Fourteenth Amendment, for the State has neither offered a compelling justification in support of Proposition 2 nor endeavored to argue that the measure is narrowly tailored to advance such a justification.

ARGUMENT

Proposal 2 violates the Equal Protection Clause insofar as it purports to keep one group—those advocating for constitutionally permissible race-conscious admissions policies at public universities in Michigan—from using the same multiple political channels available to others who seek different, non-race-based changes to those same admissions policies. Although a majority may generally defeat a minority's political proposals simply because it *is* the majority, Proposition 2 falls into the limited category of government action that the Equal Protection Clause forbids absent a showing that the action is narrowly tailored to advance a compelling state interest. Because race is the predominant factor that explains Proposition 2's creation of a distinct and more onerous political process, Proposition 2 is a governmental action that creates a suspect racial classification subject to strict scrutiny. And because the state has not suggested—much less proven—that Proposition 2 survives the rigors of strict scrutiny, the enactment must be held unconstitutional.

A. A State's Racial Gerrymander of an Existing Political Process is Subject to Strict Scrutiny Under the Equal Protection Clause

This Court's cases make clear that the Equal Protection Clause protects the ordinary mechanisms

of governmental decisionmaking against intentional efforts to rig or skew the political process against particular policies simply because of their racial subject matter.

This principle was first clearly enunciated in *Hunter v. Erickson*, 393 U.S. 385 (1969), when this Court struck down a charter amendment enacted by a white majority in Akron, Ohio that sought to sustain *de facto* segregation by requiring that fair housing ordinances be subject to a referendum vote. In striking down the amendment, this Court declared that the "State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393. The rights protected by *Hunter* were defined broadly to include the right of a racial minority to equal political procedures when it sought "to enact legislation in its behalf." *Id.*

This Court reaffirmed *Hunter*'s political-restructuring rationale in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), when it struck down Initiative 350, a Washington state constitutional amendment that attempted to maintain *de facto* segregation of Seattle's schools by giving local school boards the power to use busing for any purpose *except* racial integration. Relying on *Hunter*, this Court held that the amendment violated the Equal Protection Clause because it imposed an unequal political process on those seeking to end school segregation. As this Court noted, "the practical effect of Initiative 350 is to work a reallocation of

power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474. Although *Seattle* explicitly stated that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action," it clarified that when legislation "allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process," it violates the Equal Protection Clause. *Id.* at 470 (emphasis in original).

The political-restructuring doctrine laid down in *Hunter* and *Seattle* applies only in a limited set of circumstances—*viz*, those rare instances in which race is the predominant factor in the creation of a distinct and more onerous political process. Yet, the doctrine remains an essential component for the complete vindication of the rights protected by the Fourteenth Amendment. By ensuring that decisions as to the constitutionally permissible consideration of race in the provision of government services or benefits are made through an undistorted political process, the doctrine prevents one side of the debate over such policies from permanently entrenching its preferences and thereby "contributing to an escalation of racial hostility and conflict." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (plurality opinion) (internal quotation marks omitted).

B. Prior to the Enactment of Proposition 2, University Admissions Policies Were Subject to a Long Established and High-Functioning Political Process, and Determinations Concerning the Constitutionally Permissible Use of Race as a Factor in Admissions Were Properly Made by Publicly Accountable Governing Boards in the Context of the University's Educational Mission

Prior to the enactment of Proposition 2, there existed a well-functioning, longstanding political process for determining the policies and objectives that would be pursued by public universities in Michigan, including those policies that affected admission criteria for prospective students. This process has functioned effectively over the years to place in the hands of the publicly accountable governing boards the educational policy judgments over the conduct of the university, including the question of whether to engage in constitutionally permissible consideration of race as a factor in university admission.

1. As is the case in many states, Michigan makes the governing bodies of its public universities directly politically accountable to the citizens of the state. Indeed, reflecting the importance of the public universities in the state, Michigan's constitution recognizes its public universities' governing boards as separate constitutional entities that are directly responsible to the people. *See* Mich. Const. art. 8, § 5; Mich. Const. of 1908 art. 11, § 3; Mich. Const. of 1850, art. 13, §§ 8-9. By so doing, the people of Michigan chose to remove the public university system from the

direct control of the legislature and, instead, "to intrust" its operations to elected governing boards who are "directly responsible and amenable to the people." *Sterling v. Regents of the Univ. of Mich.*, 68 N.W. 253, 254 (Mich. 1896). This judgment, as the record of the state constitutional convention of 1850 reflects, was to establish a very specific political process rendering the state's institutions of higher education accountable to the citizenry of the state: "[R]egents will be distributed over every part of the state, and the public will thus obtain a knowledge of this institution . . . . They will obtain very important knowledge in regard to the establishment, and the people among whom they live will become informed as to the nature of this institution, and will become interested in it." *Id.* (quoting Mich. Const. Debates, 782 (1850)).[2]

The resulting governing boards of each university have plenary authority to change any governance policy of the university, as well as the composition and authority of the administrative units they oversee. The Michigan Constitution empowers each board with "general supervision of its institution." *See* Mich. Const. art. 8, § 5. In addition, state statutes

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[2] Michigan undoubtedly imbued its public universities with direct political accountability to the citizenry with a full understanding that those institutions would be central to the state's economy and the overall wellbeing of its citizens. *See generally* SRI International, *The Economic Impact of Michigan's Public Universities* (May 2002) (discussing the many social and economic contributions that Michigan public universities make within the state), *available at* http://www.michiganbusiness.org/cm/Files/Reports/univimpactreport.pdf.

give each board complete governing authority over the university, including the power to "enact ordinances, by-laws and regulations for the government of the university." *See* Mich. Comp. Laws. §§ 390.1-.23; *see also id.* §§ 390.101-.123; 390.641-.649. With that authority necessarily comes the power to influence changes to a wide variety of governance policies—including admissions policies.

Along with the authority granted by the Michigan Constitution and Michigan statutes, the governance documents for each public university in Michigan establish that their governing boards have the power to revise admissions policies as they see fit. Accordingly, the Bylaws of the University of Michigan provide that "[t]he faculty of each school and college shall from time to time recommend to the Board for approval . . . requirements for admission and graduation."[3] Similarly, the Bylaws of Michigan State University's Board of Trustees provide, "Upon the recommendation of the President the Board may determine and establish the qualifications of students for admission at any level . . . ."[4] So too, Wayne State's University Statutes establish the admission standards for graduates and undergraduates.[5]

Not surprisingly, these publicly elected boards have been responsive to public influences, and have been particularly influenced by the opinions of stu-

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[3] Sec. 5.03, *available at* http://www.regents.umich.edu/bylaws/bylaws.pdf.

[4] Art. 8, *available at* http://www.trustees.msu.edu/bylaws.

[5] *See* WSU Statutes 2.34.09, 2.34.12, *available at* http://bog.wayne.edu/code.

dents and faculty. Because they are popularly elected, candidates for positions on these boards routinely include their views about a number of university-related policies when they are seeking office. Indeed, board candidates regularly include their views on race-conscious admissions policies in their platforms when running for election.[6] Once elected, board members have the authority to amend the governing documents and policies of the applicable public university by way of changing any of the delegations of authority to the various committees that make university policy, including admissions policies.

2. It is the mission of educational institutions like the public universities in Michigan to provide students with the skills and knowledge necessary to realize their full potential, *see Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972), as well as to instill in them "the values on which our society rests," *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). The fostering of a diverse student body though admission criteria is a central feature of that mission because, particularly in this era of ever-expanding globalization, nothing less than the "nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (citation and

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[6] *See* Pet. App. 33a (*citing* League of Women Voters, 2005 General Election Voter Guide, *available at* http://www.lwvka.org/guide04/regents.html (noting that a candidate for the Board of Regents pledged to "work to end so-called 'Affirmative-Action,' a racist, degrading system")).

internal quotation marks omitted). As this Court has recognized, racial diversity in higher education promotes "'cross-racial understanding,' helps to break down racial stereotypes," precipitates "more enlightening" classroom discussion, promotes better "learning outcomes," and "better prepares students for an increasingly diverse workforce and society." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal quotation marks omitted).

Thus, while this Court has been unyielding in its insistence that any use of racial classifications in such decisions must satisfy "strict scrutiny," *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995), so as to "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), this Court has been equally clear that diversity in schools and classes, including racial and ethnic diversity, is "a goal important enough" to warrant consideration of race in making such decisions. *Parents Involved*, 551 U.S. at 722 (recognizing that the government can have a "compelling" interest in "student body diversity" at the higher education level); *id.* at 782 (recognizing that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue") (Kennedy, J., concurring); *Grutter*, 539 U.S. at 325; *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417-19 (2013).

A public university's interest in "obtaining the educational benefits that flow from an ethnically diverse

student body," *Bakke*, 438 U.S. at 306, is as compelling today as it was when this Court decided *Bakke* and *Grutter*. Because of the changing demographics of American society, the ability of an individual to function in a racially and ethnically diverse environment is increasingly important. By 2025, the year in which children who are entering first grade this year will graduate from high school, over half of all children will be Black, Hispanic, American Indian, Native Hawaiian, or multiracial, and over 42% of the overall population will be descended from these historically minority racial and ethnic groups.[7] These demographic shifts reflect an ongoing trend in which "[t]he country as a whole and the workforce in particular is becoming more, not less [racially] diverse."[8]

Yet, at the same time that American society is becoming more racially diverse, the nation's schools remain highly segregated. A student's race is, by itself, largely predictive of the racial composition of the elementary and secondary schools he or she will attend. The most serious segregation affects Black and Hispanic students: "in both of these populations about two of every five students attend intensely seg-

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[7] U.S. Dep't of Educ., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC MINORITIES 7 (July 2010); U.S. Census Bureau, *An Older and More Diverse Nation by Midcentury* (Aug. 14, 2008), *available at* http://www.census.gov/newsroom/releases/archives/population/cb08-123.html.

[8] Julie F. Mead, *Conscious Use of Race As a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 134-35 (2002).

regated schools."[9] The trend toward higher levels of concentrated segregation for Black and Hispanic students has ramifications beyond the mere fact of racial isolation. Nearly nine times out of ten, segregated schools with high percentages of students of color are also high poverty schools.[10] The result of this pervasive segregation is all too predictable. Students who attend high-poverty, minority-segregated primary and secondary schools have poorer educational outcomes and are often not as well equipped to enter institutions of higher education or the workforce.[11] Not only are these inequities growing worse

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[9] Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* 12 (Jan. 2009), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf.

[10] Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 16 (2005), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf.

[11] U.S. Dep't of Educ., THE CONDITION OF EDUCATION 2012 240 (June 2009) (In 2010, the dropout rate was 15.1% for Hispanic students and 8.0% for Black students, as compared to 5.1% for White students.); U.S. Dep't of Educ., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS, 121 (July 2010) (In 2008, about 44% of White 18 to 24-year-olds were enrolled in colleges and universities, as compared to 32% of Blacks and 26% of Hispanics in the same age cohort.); U.S. Census Bureau, *School Enrollment in the United States: 2008* 14 (June 2011), *available at* http://www.census.gov/prod/2011pubs/p20-564.pdf (in 2008, 45% of Hispanic college students and 36% of

nationally,[12] but Michigan is falling even further behind other states. Along with New York and Illinois, Michigan consistently ranks as one of most segregated states for Black students.[13] Moreover, college completion rates among Black students in the state are dropping: between 2002 and 2010, the rate for four-year public colleges fell by 5.1%, and the rate for two-year colleges fell by 8.5%.[14]

In the face of this grim portrait of enduring racial disparity and *de facto* segregation, educational institutions confront a choice. They can ignore the persistent inequalities in the education systems that segregate students by race, depriving all students of an education enriched by exposure to diversity. Or, they can take that reality into account in some limited and

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Black college students were enrolled in 2-year colleges, while just 28% of White college students were enrolled in such programs).

[12] THE CONDITION OF EDUCATION 2012, *supra* note 11, 114-15 (Between 1980 and 2011, the gap between Blacks and Whites in the percentage of 25- to 29-year-olds who had attained a bachelor's degree or higher increased by 6 percentage points, from 13% to 19%; and the gap between Whites and Hispanics increased by 9 percentage points, from 17% to 26%.).

[13] *See* Gary Orfield et al., *E Pluribus . Separation: Deepening Double Segregation for More Students* 44 (2012) (noting that more than a third of Black students in the state attend schools where less than 1% of the student body is white), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students.

[14] *See* Chronicle of Higher Educ., College Completion – Michigan, *available at* http://collegecompletion.chronicle.com/state/#state=mi&sector=public_four/.

measured way by, for example, considering racial and ethnic background as one of many factors used in admitting a truly diverse student body.

The decision whether or not to enact admission policies that promote racial diversity is inseparable from the underlying mission of educational institutions. A substantial body of empirical evidence indicates that learning in a racially diverse setting furthers students' cognitive and intellectual development, thus providing an important educational benefit to students of every race. Diverse classrooms also teach students to judge others as individuals, rather than according to stereotypes and prejudices. These benefits provide a powerful catalyst toward integration over the course of a student's lifetime.

Over the past two decades, social science research has become increasingly sophisticated in its ability to isolate and identify the educational detriments of segregation and the concomitant benefits of integration. As a whole, this body of research unambiguously finds that racial diversity in classrooms positively affects minority students' math and verbal achievement, and, conversely, that racial segregation negatively affects their performance.[15] These findings provide consistent and unambiguous evidence that

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[15] Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993, 1032-34 & nn.150-156 (Mar. 2010) (collecting studies). *See also* Bernadette Gray-Little & Robert A. Carels, *The Effect of Racial Dissonance on Academic Self-Esteem and Achievement in Elementary, Junior High, and High School Students*, 7 J. RES. ON ADOLESCENCE 109, 123, 125-26 (1997); Geoffrey Borman &

learning in a racially diverse classroom is positively related to outcomes for most students—irrespective of the student's age, race, or socioeconomic status.

Beyond the well-documented educational benefits of racially diverse classrooms, there are broad societal benefits to be realized from the interracial contact that comes with diverse classroom environments. Racial isolation breeds stereotypes and prejudice, whereas "equal status contact between majority and minority groups in the pursuit of common goals" is a critical ingredient in improving relations between members of those groups, especially if such contact "is of a sort that leads to the perception of common interests and common humanity between the members of the two groups."[16] Interracial cooperative contact among students of different races in our public schools has repeatedly been linked with increased levels of tolerance for children of other races, and increased likelihood that children of different races will become and remain friends.[17]

Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TEACHERS COLL. REC. 1201, 1236-39 (2010); James Benson & Geoffrey Borman, *Family, Neighborhood, and School Settings Across Seasons: When Do Socioeconomic Context and Racial Composition Matter for the Reading Achievement Growth of Young Children?*, 112 TEACHERS COLL. REC. 1338, 1371, 1374-75 (2010).

[16] Gordon W. Allport, THE NATURE OF PREJUDICE 281 (1954).

[17] Robert E. Slavin, *Cooperative Learning: Applying Contact Theory in Desegregated Schools*, 41 J. SOC. ISSUES 45, 53, 59 (1985) (concluding, based on review of nineteen studies, "that when students work in ethnically mixed cooperative learning groups, they gain in cross-ethnic friendships").

Classroom diversity offers enduring benefits to a multiethnic, democratic society, and its citizens. Students who learn to interact with individuals of other races in school are far "more likely to function in desegregated environments in later life. As adults, they more frequently live[] in desegregated neighborhoods, ha[ve] children who attend[] desegregated schools, and ha[ve] close friends of the other race[s] than did adults ... who had attended segregated schools."[18] They are also more likely as adults to interact with individuals of other races than are students educated in racially homogeneous schools.[19]

Based on their review of the myriad of benefits of diversity, including racial diversity, Michigan's public universities had, prior to the enactment of Proposition 2, permitted admissions policies that utilized race as a constitutionally permissible factor in the admissions process. *See, e.g.*, Brief for Respondents at 2-12, *Grutter*, 539 U.S. 306 (No. 02-241) (describing the genesis and operation of the University of Michigan Law School's admissions policy that used race as constitutionally permissible factor in evaluating prospective student applications).

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[18] Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation*, 19 J. BLACK STUDIES 267, 269 (1989) (discussing results of desegregation at the elementary and secondary school level based on national survey of 12,686 individuals).

[19] *See, e.g.*, Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. SOC. 1306, 1322 (Mar. 1996); Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. INTERCULTURAL REL. 1 (1990).

Their decisions to do so were subject to the established political processes that govern every facet of the universities' administration, including their admissions policies.

C. Proposition 2 Violates the Equal Protection Clause by Restructuring a Functioning Political Process to Create a Separate and More Onerous Process Based on Explicitly Racial Considerations

It is clear from the foregoing that admissions policies in Michigan's public universities have been and will—with the exception of the subjects removed by Proposition 2—continue to be part of a political process. But with particular regard to the key issue of whether race may be considered as a constitutionally permissible factor in admissions decisions, Proposal 2 has completely restructured the political process by prohibiting those who are in favor of such policies from lobbying elected officials for changes that they desire.

Proposal 2 therefore imposes a special, racially motivated burden for minorities by creating two different political processes for advocating for changes in admissions criteria. Because members of the governing boards of Michigan's public universities are elected, citizens are free to advocate for changes or enhancements to admissions criteria by using political pressure to influence the board members' decisions and by electing their preferred board member candidates. Indeed, board members regularly state their positions with respect to admissions policies in their campaign materials. Thus, with respect to all admissions factors with the distinct exception of

race, the boards' traditional control over the admissions process is preserved. For example, the University of Michigan has long departed from baseline admissions criteria, such as GPA and SAT scores, for a variety of purposes, including taking into account factors such as legacy status, geographic background, athletic ability, and many other lawful factors. But under Proposal 2, proponents of including constitutionally permissible consideration of race in admissions have been excluded from these long-established political processes for influencing the conduct of the state's institutions of higher education and instead must pass a constitutional amendment—an extraordinary burden—before the Board could even contemplate such policies.

Given that result, it is evident that Proposal 2 rests "on distinctions based on race" and targets those distinctions for "peculiar and disadvantageous treatment." *Seattle*, 458 U.S. at 485 ("[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race.") (emphasis in original) (internal quotation marks omitted); *see also Hunter*, 393 U.S. at 393 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.").

The results of this racial gerrymandering have been dramatic. Since Proposal 2 was adopted, racial

diversity in the state's higher education institutions has dropped significantly.[20] For example, in 1994, 8.7% of total enrollment at the University of Michigan were African-American students.[21] But since the passage of Proposal 2, African-American, Latino, and Native American students in the entering undergraduate classes already have dropped by one third.[22] Graduate student enrollment in the law, dental, and medical schools has seen even larger drops in underrepresented minority enrollment.[23] By 2011, the percentage of African-American students made up only

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[20] Similarly, one need only look at the effects of California's Proposal 209, that statute on which Michigan's Proposal 2 is modeled, to see the reality of the place of race-conscious admissions policies in American education today. Since the passage of Proposition 209, the percentage of underrepresented minority students enrolled in the University of California system has declined significantly, especially at the system's most selective and prestigious schools. From 1995 to 2002, the percentage of underrepresented minority freshmen out of all freshmen enrolled has decreased on five of eight UC campuses, and the two flagship campuses—UC Berkeley and UCLA—experienced the steepest declines of underrepresented minority freshmen enrollment, with both campuses experiencing a 56% decrease from 1995 levels. *See* Ian Wang, *Finding a Silver Lining: Positive Impact of Looking Beyond Race Amidst the Negative Effects of Proposal 209*, 2008 BYU EDUC. & L.J. 149, 157-58 & nn. 51-52 (2008).

[21] *See* Univ. of Mich. Office of the President, *The Michigan Mandate: A Seven-Year Progress Report, 1987-1994* 2 (Nov. 1995), *available at* http://milproj.dc.umich.edu/Michigan_Mandate/pdf/Michigan-Mandate-Progress.pdf.

[22] *See* Univ. of Mich. Office of the Registrar, *Ethnicity Reports*, Table 844, *available at* http://www.ro.umich.edu/enrollment/ethnicity.php.

[23] *See id.* at Table 843.

4.77% of the student body despite the fact that they comprised 16.16 % of four-year high school graduates in the state that year.[24]

The Petitioner's contention that Proposal 2 does not have a "racial focus," because it "does not burden minority interests and minority interests alone" is without merit. Although Proposal 2 also prohibits consideration of sex as a factor in the admission process, this inclusion does not invalidate the Respondent's claim of selective political restructuring based on race. In *Hunter*, the initiative burdened both racial and non-racial minorities but this Court still found that the law had a racial focus. *See* 393 U.S. at 387, 390-91. And, as the Sixth Circuit noted, "[t]he history of Proposal 2 and its description on the ballot leave little doubt" that "[h]ere, as in *Hunter*, the clear focus of the challenged amendment is race." *See* Pet. App. 26a n.4.

As it now stands, Michigan's public universities can consider virtually every aspect of an applicant's background *except for race*. Under Proposal 2, citizens can continue to campaign for admissions policies that advance their own interests without undertaking the enormous burden of seeking a state constitutional amendment. Without having to undertake

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[24] *See* Univ. of Mich. Office of the Registrar, *Total Enrollment Overview* (Fall 2011), *available at* http://www.ro.umich.edu/report/11enrollmentoverview.pdf; Mich. Ctr. for Educ. Performance & Information, *2011 Cohort Four-Year, 2010 Cohort Five-Year and 2009 Six-Year Graduation and Dropout Rates including Subgroups*, *available at* http://www.michigan.gov/cepi/0,1607,7-113-21423_30451_51357---,00.html.

the enormous burden of passing a statewide constitutional amendment, those who advocate consideration of legacy status, residency in the Upper Peninsula, or other non-racial characteristics as factors in admissions policies are free to lobby the universities' governing boards and vote for governance board candidates who have stated their position in favor or against particular admission policies.

Based on the teachings of *Hunter* and *Seattle*, Proposal 2 violates the Fourteenth Amendment because it restructures the decision-making process in a way that requires a ballot initiative only for those citizens who want race to be considered as part of university admissions policies. This restructuring effectively closes the ordinary and longstanding political processes for influencing the admissions policies to the state's higher education institutions to any citizen who believes that race and diversity are important considerations in university admissions. Proposal 2 nullifies any use of the regular political processes available to others to advocate for race-conscious admissions policies.

Indeed, Proposal 2 is precisely the type of legislation that *Hunter* and *Seattle* prohibit, because it not only removes race-conscious admissions policies from the political process, but it also makes it nearly impossible for advocates to restore these policies through ordinary political means. *See Seattle*, 458 U.S. at 470. Instead of lobbying school administrators and members of the boards for each university, Proposal 2 requires that proponents of race-conscious admissions policies persuade the entire state of Michigan to amend the state constitution in order

to have those policies considered. This requirement presents a significantly higher hurdle for minorities seeking to advocate for their interests.

The State has not offered any compelling justification in support of Proposition 2. Nor has it endeavored to argue that Proposition 2 is "narrowly tailored" to achieve such an interest. *Adarand*, 515 U.S. at 227. That being the case, Proposition 2 cannot survive the Respondents' Equal Protection challenge.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit—which strikes down Proposal 2 insofar as it applies to constitutionally-permissible consideration of race as a factor in university admission criteria—should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,

-AND-

CHASE M. CANTRELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, HORACE MANN LEAGUE, AND NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTERESTS OF *AMICI*[1]

The National School Boards Association is a not-for-profit organization of state associations of school boards. Through its members, NSBA represents approximately 13,800 school districts across the United States that serve more than 50 million public school students.

The American Association of School Administrators represents more than 13,000 educational leaders, including chief executive officers, superintendents, and senior level school administrators, in the United States and throughout the world.

The Horace Mann League seeks to perpetuate the ideals of Horace Mann, the founder of American public school systems, to strengthen the public school system of the United States.

The National Association of Elementary School Principals represents elementary school (K-8) and middle school principals nationwide and advocates on their behalf on key education issues.

Amici represent elementary and secondary public education organizations committed to the success of all students, upon which their futures in the workplace and as citizens will be shaped. With a

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[1] Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. In accordance with Supreme Court Rule 37.3, counsel for both parties have granted consent to this brief, and the requisite consent letters have been filed with the Clerk of this Court.

recognition of the vital role of diversity in the lives of students, these organizations seek to ensure that public school leaders have the flexibility to adopt and implement within constitutional parameters, policies that foster diversity in public schools and educational excellence for all students.

SUMMARY OF THE ARGUMENT

If this Court upholds Article I, Section 26 of the Michigan Constitution ("Section 26"), Michigan's primary and secondary public schools will be prevented from taking research-based, otherwise constitutional measures to meet the needs of all students for a diverse learning environment. Section 26 is not limited to prohibiting the use of race in higher education. It includes broad prohibitions against reliance on race by "the state." MICH. CONST. art. I, § 26 (2006) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."). The state is defined to include any "school district . . . of or within the State of Michigan." *Id.* That prohibition is identical to those currently found in eight other states. CAL. CONST. art. I, § 31 (adopted 1996); Fla. Executive Order, 99-281 (issued 1996); WASH. CODE ANN. § 49.60.400(1) (adopted 1998); ARIZ. CONST. art. II, § 26(A) (adopted 2010); NEB. CONST. art. I, § 30 (adopted 2008); OKLA. CONST. art. II, § 36 (adopted 2012); N.H. REV. STAT. ANN. § 187-A:16-a(I) (adopted 2011); MASS. GEN. LAWS ch. 151B, § 4 (adopted 2012).

Amici urge this Court to consider carefully the detrimental impact that Section 26 and similar provisions have on public schools. Section 26 directly undermines the ability of public schools to educate all students to be successful participants in a global society. Under this amendment public schools will be severely restricted in creating and maintaining diverse student enrollments that serve the educational needs of all students. If Section 26 is upheld, students will be deprived of learning in an environment where they are taught, mentored and encouraged by a diverse staff who reflect the society in which students must be prepared to live and work. The amendment will also call into question other necessarily race-conscious actions by public schools that target the academic needs of certain subgroups of students.

This amendment wears a guise of non-discrimination, but in reality threatens to limit the discretion of school leaders that this Court has clearly stated is available to school boards under the Equal Protection Clause. *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701 (2007). These decisions granted school boards the authority under certain limited circumstances to adopt race-conscious policies that promote diversity in schools for educational reasons. The Michigan amendment's nullification of this school board authority directly imperils the local governance of public education and will result in innumerable legal disputes that unduly burden public schools and drain resources away from classrooms and into the legal system.

ARGUMENT

I. SECTION 26 UNDERMINES PUBLIC SCHOOLS' ABILITY TO ACCOMPLISH THEIR MISSION: TO EDUCATE ALL STUDENTS SUCCESSFULLY AND TO PREPARE THEM TO LIVE AND WORK IN A GLOBAL SOCIETY.

A. Section 26 Impedes Public Schools From Creating and Maintaining a Diverse Student Population – an Important Tool Needed to Support Students' Academic Achievement and Participation in a Democratic Society.

Section 26 and similar mandates will impede the efforts of public primary and secondary schools to prepare American students to compete in the twenty-first century.[2] A compelling body of research shows that race-conscious means may be necessary to achieve racial and ethnic student diversity in public schools. Alternatives that look to socio-economic status simply are not as successful in

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[2] Although certain briefs in support of Petitioner cite research suggesting that race-neutral alternatives can successfully achieve diversity in the higher education realm, that research does not address the potential impact of a ban on race-conscious preferences in primary and secondary education. *See, e.g., Brief Amicus Curiae of Pacific Legal Foundation, et al.*, at 28-36; *Brief of the States of Arizona, Alabama, Georgia, Oklahoma, and West Virginia as* Amici Curiae *Supporting Petitioner*, at 11-18.

achieving racial and ethnic diversity in primary and secondary public education.[3] In some cases, a school facing re-segregation may find that race-based considerations are the only way to achieve diversity. Yet under Section 26 and related provisions in other states, public schools facing re-emerging *de facto* segregation are precluded from using race-conscious alternatives to increase diversity in the learning environment, no matter how necessary those means may be to achieve diversity and no matter how narrowly tailored the use of race is.

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[3] Research shows that race-conscious means are necessary to achieve racial and ethnic diversity in elementary and secondary public schools and that race-neutral alternatives would not be as successful. As explained and supported by research in the *Brief of 553 Social Scientists as* Amici Curiae *in Support of Respondents*, at 3, *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915), available at http://civilrightsproject.ucla.edu/legal-developments/court-decisions/statement-of-american-social-scientists-of-research-on-school-desegregation-submitted-to-us-supreme-court/amicus_parents_v_seattle.pdf:

> [R]ace-conscious student assignment policies are necessary to maintain racially integrated schools. Evidence shows that choice assignment policies that do not consider race as a factor in student assignments tend to result in racially homogeneous schools or lead to greater segregation; race-neutral policies that rely on socioeconomic status are not as effective in attaining racial diversity; and school districts that have eliminated race as a consideration in student assignment policies have experienced resegregation and the harmful consequences associated with racially isolated schools.

The resulting inability to use even narrowly tailored race-conscious methods to increase diversity in public schools will hinder schools' ability to provide students the academic background necessary to compete in the global marketplace. The negative impact of racial and ethnic homogeneity on student achievement—especially for minority students—is stark.[4] Students who attend racially diverse schools achieve higher test scores and better grades, are more likely to graduate from high school and are more likely to attend and graduate from college as compared to their counterparts who attend schools with high concentrations of minority and low-income students.[5]

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[4] For a comprehensive discussion and analysis of the research showing the importance of integrated schools in preparing students academically to achieve throughout their lives, see the *Brief of 553 Social Scientists*, at 7-9 and related appendix. *See also* NATIONAL ACADEMY OF EDUCATION, RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES, at 20, available at http://nepc.colorado.edu/files/Brief-NAE.pdf; Susan Eaton, *School Racial and Economic Composition & Math and Science Achievement*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF NO. 1, Oct. 2010, updated Mar. 2011, available at http://www.school-diversity.org/pdf/DiversityResearchBriefNo1.pdf; Roslyn Arlin Mickelson, *School Integration and K-12 Educational Outcomes: A Quick Synthesis of Social Science Evidence*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF NO. 5, Oct. 2011, available at http://www.school-diversity.org/pdf/DiversityResearchBriefNo5.pdf.

[5] Mickelson, *School Integration and K-12 Educational Outcomes: A Quick Synthesis of Social Science Evidence*, *supra* n. 4.

In *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*, 551 U.S. 701 (2007), a majority of the Justices recognized that fostering diversity as an educational goal and avoiding racial isolation are compelling interests for school districts. *Id.* at 783, 797 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 838-42 (Breyer, J., dissenting). A majority of the Court affirmed that "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity . . . ." *Id.* at 797-98 (Kennedy, J., concurring).

As Justice Kennedy recognized in *PICS*, a lack of diversity in the student body can prevent "equal educational opportunity" for students who are isolated in schools with students from the same racial and ethnic background. *Id.* at 788. Research establishes that the benefits of diversity inure to non-minority students as well, by providing better learning outcomes and social and psychological advantages that increase their productivity in an increasingly pluralistic workplace.[6] By preventing public schools from using a legitimate means of addressing re-segregation when it is identified,

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[6] Genevieve Siegel-Hawley, *How Non-Minority Students Also Benefit from Racially Diverse Schools*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF NO. 8, Oct. 2012, available at http://www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf.

Section 26 and similar laws will leave students less prepared, both academically and socially, to compete in the global marketplace.

The inability to use race to achieve student diversity will also inhibit public schools from fulfilling their duty to prepare all students to live and work as citizens of an increasingly pluralistic and connected world. As this Court made clear in *Brown v. Board of Education*, education "is the very foundation of good citizenship" and "is . . . a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." 347 U.S. 483, 493 (1954). In *Plyler v. Doe*, the Court elaborated that public schooling "has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage." 457 U.S. 202 (1982). Schools are thus expected to help students learn to navigate what is an increasingly pluralistic society, both at home and in the world at large. Social science research makes clear that racially and ethnically integrated schools better achieve that goal by promoting cross-racial understanding, reducing prejudice, and furthering social cohesion.[7] These benefits inure to more than

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[7] For a comprehensive discussion and analysis of the research showing the importance of integrated schools on instilling democratic values in students, see the *Brief of 553 Social Scientists*, at 9, App. 23-24. *See also* Susan Eaton & Gina Chirichingo, *The Impact of Racially Diverse Schools in a Democratic Society*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF NO. 3, Oct. 2010, updated Mar. 2011, available at http://www.school-diversity.org/pdf/DiversityResearchBriefNo3.pdf.

minority students; students who attend diverse public schools develop stronger democratic ideals from a diverse student population. Schools that slip back into segregation because of an outright ban on race-conscious measures to achieve diversity will be stifled in their goal of teaching students of all races and ethnicities to live in a global society. Their students will miss out on the daily opportunities for gaining cross-cultural understanding, tolerance, and social cohesion that a diverse student body presents.

B. Section 26 Harms Public Schools' Efforts to Achieve the Important Objectives of A Diverse Workforce and Minority Contracting

The efforts by public schools to prepare American students to compete in the global marketplace will also be impaired by Section 26 and similar mandates because those provisions will stymie efforts by schools to achieve diversity in staffing and contracting. Although the need to achieve greater numbers of minority employees and contractors is not unique to public schools,[8] the interest is even more compelling in an institution

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[8] The Equal Employment Opportunity Commission and Department of Justice have encouraged business and employers of all types to be creative and act affirmatively in recruiting, hiring, and employment practices to achieve greater numbers of minority applicants and employees. *See* Press Release, Equal Employment Opportunity Commission, EEOC Partners with Business to Build Best Practices for Increasing Diversity (Mar. 8, 2006), available at http://www.eeoc.gov/eeoc/newsroom/release/3-8-06.cfm.

charged with teaching and inculcating values in children. As U.S. Secretary of Education Arne Duncan has emphasized, there is a serious concern that in public schools, "teachers don't reflect the great diversity of our nation's young people."[9] A 2011-12 study shows that although minority students make up 45.6 percent of the public school population, with the majority of those minority students coming from Black and Hispanic backgrounds, only 16.9 percent of public school principals are Black or Hispanic, and only 14.4 percent of public school teachers are Black or Hispanic.[10] Especially in schools with diverse

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[9] *See* SABA BIREDA AND ROBIN CHAIT, INCREASING TEACHER DIVERSITY: STRATEGIES TO IMPROVE THE TEACHER WORKFORCE 1 (Nov. 2011) (citing Brian Lehrer Show, "Education Reform, Secretary Arne Duncan Weighs In" (2010)), available at http://www.americanprogress.org/wp-content/uploads/issues/2011/11/pdf/ chait_diversity.pdf.

[10] *See* NATIONAL CENTER FOR EDUCATIONAL STATISTICS, CHARACTERISTICS OF PUBLIC AND PRIVATE ELEMENTARY AND SECONDARY SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2011-12 SCHOOLS AND STAFFING SURVEY (NCES-2013-312) (2013), available at http://nces.ed.gov/pubs2013/2013312.pdf; NATIONAL CENTER FOR EDUCATIONAL STATISTICS, CHARACTERISTICS OF PUBLIC AND PRIVATE ELEMENTARY AND SECONDARY SCHOOL PRINCIPALS IN THE UNITED STATES: RESULTS FROM THE 2011-12 SCHOOLS AND STAFFING SURVEY (NCES-2013-313) (2013), available at http://nces.ed.gov/pubs2013/2013313.pdf; NATIONAL CENTER FOR EDUCATIONAL STATISTICS, CHARACTERISTICS OF PUBLIC AND PRIVATE ELEMENTARY AND SECONDARY SCHOOL TEACHERS IN THE UNITED STATES: RESULTS FROM THE 2011-12 SCHOOLS AND STAFFING SURVEY (NCES 2013-314) (2013), available at http://nces.ed.gov/pubs2013/2013314.pdf.

student populations, providing role models of diverse backgrounds for students in the school environment is important to "provide real-life examples to minority students of future career paths." Moreover, as the research bears out, "teachers of color have demonstrated success in increasing academic achievement for engaging students of similar backgrounds."[11] Recommendations on how to achieve greater diversity in the staffs of public schools include the use of programs and activities specifically aimed at and benefitting minority applicants.[12]

With respect to contracting, public school districts across the country recognize that under-utilization of businesses owned by people of color perpetuates inequalities among students as well as the broader community.[13] Such districts have created programs under which a certain percentage of their contracts and other business awards go to minority owned businesses.[14] Because programs aimed at helping minority individuals and

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[11] Bireda, *supra* note 9

[12] *Id.* at 3 (recognizing the need for statewide initiatives to fund teacher preparation programs aimed at both low-income *and* minority teachers).

[13] *See, e.g.*, Portland Public Schools, "PPS Equity in Public Purchasing and Contracting," available at http://www.pps.k12.or.us/files/board/8_50_095_P.pdf.

[14] *See, e.g.*, Chicago Public Schools, "Remedial Program for M/WBE Participation in Goods, Services and Construction Contracts," available at http://www.csc.cps.k12.il.us/purchasing/index.php@tab=1&id=46.htm.

businesses garner employment and contracts from public schools are preferences for minorities, Section 26 and similar provisions would prevent public employers like school districts from engaging in these types of best practices that they already have deemed to be necessary to achieve their compelling goal of providing a diverse workforce as role models for students.

C. Section 26 Thwarts Public Schools From Creating Diverse Learning and Workplace Environments Through Necessary and Constitutional Race-Conscious Means

In order to provide diverse learning and workplace environments for students, school districts may need to consider race in certain constitutionally permissible ways. Yet Section 26 and similar provisions in other states, read in their broadest sense, interfere with that important work by prohibiting any race-conscious action. While proponents argue that Section 26 merely prohibits discrimination on the basis of race, it and similar provisions in other states actually prohibit any reliance on race. This undermines *PICS*, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013), by denying educational institutions the discretion to use race in constitutionally permissible ways.

In *PICS*, *Grutter*, and recently *Fisher*, the Court affirmed that school districts, colleges, and universities may seek to attain the educational benefits associated with a diverse student body

through the consideration of race as one of many diversity factors. Indeed, in *PICS* the Court clarified that school districts should "continu[e] the important work of bringing together students of different racial, ethnic, and economic backgrounds" through a "nuanced, individual evaluation of school needs and student characteristics that might include race as a component." *PICS*, 551 U.S. at 707 (Kennedy, J., concurring). Just two months ago, in *Fisher*, this Court reaffirmed that institutions of higher education may consider race as one of several factors in seeking to achieve the educational benefits of diversity. 133 S.Ct. 2411.

The United States Departments of Education and Justice issued joint guidance documents in December 2011 for elementary and secondary schools and for higher education institutions, explaining how they can voluntarily consider race "to further compelling interests in achieving diversity and avoiding racial isolation."[15] Educational

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[15] Letter from Russlyn Ali, Assistant Secretary, Office for Civil Rights, U.S. Dep't of Educ., and Thomas Perez, Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice to Colleagues (Dec. 2, 2011), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201111.html; U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS & U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), available at http://www2ed.gov/print/about/offices/list/ocr/docs/guidance-ese-201111.html; U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS & U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION (2011), available at http://www2ed.gov/print/ about/offices/list/ocr/docs/guidance-pse-201111.html.

institutions have relied on this advice in crafting legally permissible policies pursuant to this Court's decisions. Section 26 would void these carefully designed and entirely legitimate and constitutional policies.

In addition to the discretionary use of race in crafting student assignment policies, school districts are also required to consider student race in a number of situations. Congress and the legislatures of states require public schools to disaggregate data according to certain subgroups, including race and ethnicity, and to address the critical educational needs of underachieving subgroups to improve their academic performance.[16] Indeed, Michigan's State Department of Education requires school districts to collect and use disaggregated data for instructional planning.[17] That analysis and response inevitably

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[16] *See* 20 U.S.C. § 6311(h) (2013) (requiring disaggregation of data, including by race and ethnicity, and requiring annual improvement in subgroups (AYP)); 34 C.F.R. § 200.2(1) (requiring assessment results to be disaggregated by "[e]ach major racial and ethnic group."). *See also, e.g.*, Missouri School Improvement Plan (requiring annual review of performance data disaggregated on, among other subgroups, race/ethnicity in order to effectively monitor student academic achievement and dropout/persistence to graduation rates).

[17] As the Michigan Department of Education explains in guidance to school districts, school districts must "have a system for managing data and information in order to inform decisions to improve student achievement," including data based on student race/ethnicity. Mich. Dep't of Educ., "On Site Review School Study Guide Items Explanation with Examples Substantiating Implementation," at 17, available at http://www.michigan.gov/documents/mde/7__District_Study_Guide_ with_ Explanations_ 360059_7.doc.

requires considering students based on their races and ethnicities, and tailoring educational programs, strategies and other interventions to the needs of certain student groups. By necessity, school district responses often involve targeted services for members of the subgroup that is underperforming. For example, a school may direct resources (tutors, smaller class sizes/extra staffing, extended day services, summer school classes, counselors, pupil personnel workers, cultural liaisons, cultural proficiency programs, extra classes, mentors, take-home computers) to schools in which more subgroup members are located.[18]

The broad prohibitions of Section 26 and similar provisions could call into question these school district efforts to respond to the educational needs identified by the mandatory disaggregation of achievement data by various subgroups, including race and ethnicity. Any response that a school district might make to data showing that students of a particular race or ethnicity need additional support to succeed arguably would be deemed a preference based on race or ethnicity and could be challenged under provisions like Section 26. These provisions thus may render the collection of disaggregated data meaningless to school district efforts to help all students achieve. Schools would be prevented from using the data to address proactively specific,

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[18] *See, e.g.*, Del. Dep't of Educ., "District Targets and Accountability: Frequently Asked Questions," at 2 Question 4 (referencing "targeting resources towards specific underperforming groups of students"), available at http://www.doe.k12.de.us/infosuites/ddoe/DisTargAccFAQsJan2013.pdf.

identified student needs, as Section 26 could be interpreted to preclude even very limited uses of race in providing the targeted assistance necessary to the academic success of certain minority students. The purported non-discrimination mandate of Section 26 could, in fact, stop schools from addressing inequities in educational opportunities that keep many children from succeeding at school.

Although Section 26 provides that it "does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state," it is not clear that the exception allows public primary and secondary schools to continue responding effectively to achievement data disaggregated by race or ethnicity. Specifically, it is not clear that a school district's failure to respond to the identified needs of racial subgroups would directly lead to a loss of federal funds.

Provisions such as Section 26 may also prevent public schools from addressing the needs of minority students through race-conscious programs, even when those programs are already recognized by federal law. Section 26 provides that "[t]his section does not invalidate any court order or consent decree that is in force as of the effective date of this section." But Section 26 does not include an exception for the use of certain race-conscious tools by school districts that are not enacted pursuant to a court-ordered desegregation plan or consent decree. Yet federal law recognizes that even schools that are not under an order or consent decree may use certain race-conscious tools to address subgroup educational needs. For example, consider the

Magnet Schools Assistance program, which "provides grants to eligible local educational agencies to establish and operate magnet schools that are operated under a court-ordered or federally approved voluntary desegregation plan. These grants assist in the desegregation of public schools by supporting the elimination, reduction, and prevention of minority group isolation in elementary and secondary schools with substantial numbers of minority group students."[19] Section 26 and related provisions call into question whether such programs that have already been established and funded could continue to operate.

II. SECTION 26 CREATES CONFUSION IN THE LAW AND MAY LEAD TO ADDITIONAL LITIGATION FOR SCHOOLS.

Section 26 and related provisions from other states will have a number of other unintended, negative consequences for public schools, including innumerable legal disputes that will require public funds to address. Consider the dueling constitutional standards applicable to distinctions based on race versus those based on gender. Section 26 and related provisions prohibit the use of race, color, ethnicity, and national origin by public schools. Decisions by public schools on those bases are judged under the standard of strict scrutiny under the precedents of this Court. To survive strict scrutiny, a school

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[19] U.S. Dep't of Educ., Magnet Schools Assistance Program, Purpose, Program Description, available at http://www2.ed.gov/programs/magnet/index.html.

district that considers race in making individual student assignment decisions must show that the use of race is narrowly tailored to achieve a compelling governmental interest. *PICS*, 551 U.S. at 720.

Indeed, the outcome in *PICS* shows that this is a high bar and will prevent schools from unconstitutional uses of race, making provisions like Section 26 unnecessary. This Court held that the two school districts in *PICS* failed to demonstrate that their use of individual students' race was narrowly tailored to meet their goals. *Id.* at 722-25. In making that determination, the Court generally applied the four-prong narrow tailoring test from *Grutter*. That test assesses whether an educational institution has considered workable race-neutral alternatives; whether its plan provides for flexible and individualized review of students; whether it has minimized undue burdens on other students; and whether its plan is limited in time and subject to periodic review. *See Grutter*, 539 U.S. at 334-43.

This strict scrutiny requirement constrains school districts. It requires "the most exact connection between justification and classification." *PICS*, 551 U.S. at 720. *PICS* also reaffirmed that when a district chooses to take into account the race of individual students when providing benefits or imposing burdens, it must meet the strict scrutiny standard, demonstrating that its plan is narrowly tailored to meet the compelling interest in achieving diversity or avoiding racial isolation in schools. *Id.* at 787. The Court has repeatedly emphasized, however, that the application of strict scrutiny, in and of itself, is " 'not fatal in fact.' " *Grutter*, 539 U.S. at 327

(quoting *Adarand v. Pena*, 515 U.S. 200, 237 (1995)). Schools may adopt approaches that consider the race of individual students if they do so in a manner that closely fits their goals of achieving diversity or avoiding racial isolation and includes race no more than necessary to meet those ends. *See Grutter*, 539 U.S. at 333-34. Although the *PICS* decision limited the permissible uses of race only in the K-12 context, Justice Kennedy's majority opinion in *Fisher* echoes his concurring opinion in *PICS* and his dissenting opinion in *Grutter* with regard to the issue of narrow tailoring by stressing that race neutrality should be part of the strict scrutiny analysis, regardless of the context.

However, Section 26 and other provisions also prohibit public schools from granting preferences to any group based on *gender*. Gender-based decisions are reviewed under a lower, intermediate level of scrutiny. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Yet Section 26 conflates the constitutional standards applicable to distinctions based on race and those based on gender by providing a sweeping prohibition of both types of decisions. School districts are without any guidance as to how to navigate the clear distinction in the case law between decisions based on race, color, ethnicity, and national origin, on the one hand, and gender, on the other, in light of the mandates of provisions such as Section 26. This will lead to significant financial burdens on school districts as they are forced to litigate these confusing issues. The blending of standards will also create problems for the courts regarding what standard of judicial review must be given to claims under Section 26.

III. SECTION 26 INTERFERES WITH COMMUNITY ENGAGEMENT CRITICAL TO THE DEMOCRATIC PROCESS FOR POLICY DECISION-MAKING BY SCHOOL BOARDS

Section 26 and similar state laws unnecessarily restrict the very local governance and community discretion that this Court has recognized are retained by schools in working toward the permissible goal of achieving diversity. Decisions about the educational need for diversity policies are matters of local control that require a properly functioning democratic process. Section 26 interferes with the proper operation of elected school boards in setting education policy through community engagement and public accountability.

This community self-determination is a fundamental part of the history of American public schools, and is even more important in this area where different approaches may be required based on the "nuanced, individual evaluation of school needs and student characteristics," which this Court has indicated is required. *PICS*, 551 U.S. at 790 (Kennedy, J., concurring). "Those entrusted with directing our public schools must be allowed to bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to [determine educational goals and to] achieve the compelling interest they face . . . ." *Id.* at 798. School districts must be allowed to experiment at the local level with constitutionally sound ways of achieving the compelling interest of diversity in

public schools, within the strict framework explained in *Grutter* and *PICS*.

CONCLUSION

Amici urge this Court to uphold the lower court decision invalidating Section 26 and thereby protect the discretion of public schools to adopt and implement policies that promote diversity and avert racial isolation—goals critical to the education of the youth of this country.

Respectfully Submitted,

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August 30, 2013

AMICUS CURIAE BRIEF

No. 12-682

In the

Supreme Court of the United States

BILL SCHUETTE, Michigan Attorney General,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AMERICAN CIVIL RIGHTS FOUNDATION, NATIONAL ASSOCIATION OF SCHOLARS, PROJECT 21, AND CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation, Center for Equal Opportunity, American Civil Rights Foundation, National Association of Scholars, Project 21, and Cato Institute respectfully submit this brief amicus curiae in support of the Petitioner Bill Schuette, Michigan Attorney General.[1]

For over 40 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to be free from racial discrimination. PLF participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Fisher v. Univ. of Tex. at Austin*, No. 11-345, 2013 WL 3155220 (U.S. June 24, 2013); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The Center for Equal Opportunity (CEO) is a nonprofit research, education, and public advocacy organization. CEO devotes significant time and

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

resources to studying racial, ethnic, and gender discrimination by the federal government, the states, and private entities, and educating Americans about the prevalence of such discrimination. CEO publicly advocates for the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. CEO has advocated for the adoption of various ballot initiatives, including Proposal 2, and has published studies providing voters with information about the impact of preferences on college and university admissions. CEO has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Fisher*, 2013 WL 3155220; *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved*, 551 U.S. 701; *Grutter*, 539 U.S. 306.

The American Civil Rights Foundation (ACRF) is a nonprofit public benefit corporation, with members nationwide, including in Michigan, created to monitor and enforce laws that preclude the use of race, sex, or ethnicity in public contracting, public education, or public employment. Ward Connerly, a coauthor and sponsor of Proposal 2, which became Article I, Section 26, to the Michigan Constitution (Section 26), is a member of the Board of Directors of ACRF and President of the American Civil Rights Institute. He was chairman of the California Civil Rights Initiative Campaign which officially supported the California Civil Rights Initiative, Proposition 209, the progenitor of Section 26. ACRF has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Fisher*, 2013 WL 3155220; *Shelby County v. Holder*, No. 12-96, 2013 WL 3184629 (U.S. June 25, 2013).

The National Association of Scholars (NAS) is an independent membership association of academics working to foster intellectual freedom and to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. NAS supports intellectual integrity in the curriculum, in the classroom, and across the campus. NAS is dedicated to the principle of individual merit and opposes race, sex, and other group preferences. NAS has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Fisher*, 2013 WL 3155220; *Grutter*, 539 U.S. 306. NAS, CEO, ACRF, and PLF participated in this case in the court below. *See Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012) (en banc).

Project 21 is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work. Project 21 has participated as amicus curiae in this Court numerous times. *See Fisher*, 2013 WL 3155220; *Shelby County*, 2013 WL 3184629; *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's

Center for Constitutional Studies was established in 1989 to promote principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether state prohibitions against racial discrimination and preferential treatment violate the Equal Protection Clause. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

On November 7, 2006, Michigan voters reaffirmed their commitment to the principles of equality and nondiscrimination by adopting the Michigan Civil Rights Initiative by 58% of the vote, amending their organic law, and adding Article I, Section 26, to the Michigan Constitution (Section 26). Section 26 prohibits the State, its political subdivisions, and all other governmental instrumentalities from discriminating against, or granting preferential treatment to, any individual or group on the basis of "race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

After Section 26 went into effect, it was immediately challenged as a violation of the Equal

Protection Clause of the Fourteenth Amendment to the United States Constitution. However, contrary to Respondents' claims, Section 26 does not implicate the political structure doctrine of the Equal Protection Clause as articulated in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

The Equal Protection Clause mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This rule admits no exception for affirmative action preference policies. "[A]ll governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry." *Grutter*, 539 U.S. at 326 (citation omitted). The language of Title VI of the 1964 Civil Rights Act is even more explicit. *See* 42 U.S.C. § 2000d (Congress forbade recipients of federal money from engaging in racial or ethnic discrimination.). *Also see* 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory.").

The *Hunter/Seattle* (or "political structure") doctrine does not cast doubt upon the constitutionality of Section 26. The laws declared unconstitutional in *Hunter* and *Seattle* made it more difficult for minorities to secure protections against discrimination, and they treated minorities differently within discreet policy areas—housing and school busing. Conversely, Section 26 enhances protections against discrimination and covers all Michigan government action—not just a single political issue. After Section 26 was adopted, all

of Michigan government was prohibited from discriminating against, or granting preferential treatment to, any individual on the basis of race.

To the extent that language in *Hunter* and *Seattle* can be read to disenfranchise Michigan voters on the subject of the rights guaranteed by their own state constitution, those cases must be overruled. The *Hunter/Seattle* doctrine provides a convoluted framework for analyzing legislation that is neutral on its face, but when applied, prevents minorities from securing advantageous legislation. Eight years after *Hunter* was decided, the Court provided a more coherent framework for that purpose in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). In light of *Arlington Heights*, *Hunter/Seattle* is no longer needed. Moreover, *Hunter/Seattle*, which has not been invoked by this Court in over thirty years, is outdated, incoherent, and unjust. Instead of moving the Country toward a time when racial preferences will meet their "logical end point," *Grutter*, 539 U.S. at 342, *Hunter/Seattle* seeks to enshrine racial preferences in the Constitution for all time.

Such a result would be particularly troubling in light of the experience of underrepresented minorities in California post-Proposition 209.[2] Since public

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[2] In 1996, California voters passed Proposition 209, which added Article I, Section 31, to the California Constitution. Proposition 209 is nearly identical to Section 26; it contains the same prohibitions against governmental race-based discriminations and preferences. *Compare* Cal. Const. art. I, § 31 *with* Mich. Const. art. I, § 26. California's public colleges and universities have now had race-neutral admissions for over fifteen years.

universities in California began using race-neutral admissions, more underrepresented minorities have gained admission to California's public university system. And California's secondary schools have stepped up the effort to improve the academic qualifications of underrepresented minority students. Once admitted to California's public colleges and universities, underrepresented minorities are far more likely to graduate than they were before Proposition 209 took effect.

If the *Hunter/Seattle* doctrine is applied here, it would undermine the famous admonition that, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748. The *Hunter/Seattle* doctrine does not stop discrimination. Quite the opposite—the doctrine enshrines discrimination based on race by forcing jurisdictions to continue to discriminate on that basis.

The decision below should be reversed. .

ARGUMENT

I

SECTION 26 IS NOT IMPLICATED BY THE *HUNTER/SEATTLE* DOCTRINE

Section 26 does not violate the Equal Protection Clause under the "political structure" theory enunciated in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).[3] The measures this Court struck down in

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[3] Amici intentionally omit *Romer v. Evans*, 517 U.S. 620 (1996), for reasons discussed *infra*. *See* Arg. II.B.1.

Hunter and *Seattle* differ significantly from Section 26. Unlike *Hunter* and *Seattle*, minorities have more protection against discrimination as a result of Section 26. Further, this increased protection against discrimination applies across all levels of Michigan government, not just discrete government functions like fair housing and school busing.

A. Section 26 Is Not Implicated by *Hunter/Seattle* Because It Enhances Minority Protections Against Discrimination

Unlike the laws struck down in *Hunter* and *Seattle*, Section 26 enhances minority protections against discrimination. *See* Mich. Const. art. I, § 26(1) & (2) ("The State shall not discriminate . . ."). Section 26 also enhances protections against discrimination by prohibiting government from granting *preferential* treatment on the basis of race in the operation of public education, public contracting, and public employment.[4] *Id.* This Court's decisions in *Hunter* and *Seattle* concerned enactments that made it more difficult for minorities to obtain protection from discrimination, not preferential treatment.

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[4] Once Michigan voters enshrined these new laws against discrimination and preferential treatment into their constitution, it became illegal, for example, for the University of Michigan to require Asian students to outperform white students to gain admission, or for Hispanic students to have to outperform black students to gain admission. *See* Althea K. Nagai, Center for Equal Opportunity, *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Michigan*, *available at* http://www.ceousa.org/attachments/article/548/UM_UGRAD_final.pdf (last visited June 19, 2013).

In *Hunter*, the Akron City Council enacted a fair housing ordinance that required equal housing opportunities for all persons, regardless of race, color, or creed. 393 U.S. at 386. Nellie Hunter attempted to use that ordinance after being denied the opportunity to view prospective houses because she was African-American. But the voters of Akron had amended the city charter to require that any fair housing ordinance enacted by the city council to end housing discrimination of the basis of race must be approved by referendum prior to taking effect. *Id.* at 387. The charter amendment provided that all other housing matters regulating real estate transactions would be subject to referendum only if formally requested by 10% of the electorate. *Id.* at 390. Thus, the charter amendment in *Hunter* discriminated against racial minorities by placing a special burden on them in their efforts to secure anti-discrimination housing laws. *Id.* at 390-91.

Although the charter amendment provided "no right to discriminate in housing," the Court held that it contained "an explicitly racial classification," by treating "racial housing matters differently from other racial and housing matters." *Id.* at 389. Although the amendment was facially neutral, in reality, "the law's impact [fell] on the minority." *Id.* at 391. The amendment placed a "special burden[] on racial minorities within the governmental process." *Id.*

Similarly, in *Seattle*, the governing board of a Washington public school district adopted a plan to end *de facto* racial segregation by busing students to reduce racial imbalance in individual schools. 458 U.S. at 460-61. In response, the voters amended their state's constitution to prohibit busing for the purpose

of desegregation, while still allowing busing for other purposes, such as to provide transportation for special education and to reduce overcrowding. *Id.* at 461-63, 471. Thus, the Court invalidated the state initiative on equal protection grounds under *Hunter*. "[D]espite [the initiative's] facial neutrality there [was] little doubt that the initiative was effectively drawn for racial purposes." *Seattle*, 458 U.S. at 471.

Both *Hunter* and *Seattle* necessitated the finding of an impermissible racial classification in the challenged law before the political structure doctrine was invoked. *See Seattle*, 458 U.S. at 484-86; *Hunter*, 393 U.S. at 391-92. Further, the *Seattle* Court explicitly recognized that "[t]his does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification." *Seattle*, 458 U.S. at 485 (citing *Crawford v. Bd. of Educ. of the City of Los Angeles*, 458 U.S. 527, 538 (1982)).

Section 26's ban on racial preferences is simply not enough to trigger heightened scrutiny under *Hunter/Seattle*, or to disenfranchise Michigan's voters on the issue of racial preferences. The clear effect of Section 26 is to prohibit the State and its political subdivisions from adopting race- and sex-based preference programs. It guarantees equal opportunity in public education, employment, and contracting. It creates no racial classifications. As the Ninth Circuit found: "A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997).

The Ninth Circuit's decision in *Wilson* is particularly informative on this point. Immediately

after the California Civil Rights Initiative (Proposition 209) was passed by the voters, it was challenged as violating the *Hunter/Seattle* doctrine. *Wilson*, 122 F.3d 692. The Ninth Circuit rejected that argument. It held that Proposition 209's prohibition against preferential treatment does not impede protection against discrimination. *Id.* at 708. The *Wilson* court distinguished Proposition 209 from the challenged enactments in *Hunter* and *Seattle*, as follows:

> When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters.

Wilson, 122 F.3d at 707. Thus, the Ninth Circuit held that Proposition 209 is constitutional in all respects, even as applied to college admissions, because a prohibition on racial preferences does not offend the Constitution. *Id.* at 701.

The Ninth Circuit is not alone in upholding the constitutionality of California's Proposition 209. In 2010, the California Supreme Court, "exercising [its] independent judgment on the matter," concluded that Proposition 209 does not violate the Equal Protection Clause under the *Hunter/Seattle* doctrine. *Coral Construction, Inc. v. City & County of San Francisco*, 235 P.3d 947, 959 (Cal. 2010). *Coral Construction* involved a challenge to a local ordinance that required San Francisco to grant race- and sex-based contracting preferences to minority-owned businesses. In

defending its race-based preference, San Francisco claimed Section 31 was unconstitutional under the *Hunter/Seattle* doctrine. *Coral Construction*, 235 P.3d at 956. The California Supreme Court soundly rejected that argument in a 6-1 decision.

The *Coral Construction* court observed that *Hunter/Seattle* prohibits the creation of a political structure that ostensibly treats all individuals equally, yet subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation. *Id.* (citing *Seattle*, 458 U.S. at 467). But the court found nothing in *Hunter* or *Seattle* that defined "beneficial legislation" to include race- or gender-based *preferences*. *Coral Construction*, 235 P.3d at 959. Following *Wilson*, the court held: "'Even a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment.'" *Id.* at 960 (quoting *Wilson*, 122 F.3d at 707). Instead of burdening the right to equal treatment, the court concluded that Proposition 209 directly serves the principle that "'all governmental use of race must have a logical end point.'" *Coral Construction*, 235 P.3d at 960 (citation omitted).

As these cases demonstrate, only laws that interfere with attempts to protect against *discrimination* violate the Equal Protection Clause's political structure doctrine. Because Section 26 prohibits discrimination and preferences, and thereby enhances protections against discrimination, it does not conflict with this Court's decisions in *Hunter* and *Seattle*.

B. Section 26 Is Not Implicated by *Hunter/Seattle* Because It Does Not Treat Racial Matters in Higher Education Differently, But Prohibits Racial Classifications in Public Employment, Education, and Contracting

This Court has never held that sweeping anti-discrimination statutes—like Section 26—are themselves racial classifications subject to strict scrutiny review under the Equal Protection Clause. *See, e.g., Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 669 (1987) (Scalia, J., dissenting) ("[I]t would be strange to construe Title VII to permit discrimination by public actors that the Constitution forbids."); *Bakke*, 438 U.S. at 286-87 (op. Powell, J.) (Title VI embodies constitutional restraints on discrimination); *id.* at 329-40 (op. Brennan, White, Marshall, and Blackmun, JJ.) (same). Unlike Title VI, Title VII, and Section 26, the laws at issue in *Hunter* and *Seattle* drew a distinction between laws that protect against racial discrimination and those that address other problems in the same policy area. *Hunter*, 393 U.S. at 390 (racial anti-discrimination laws regarding housing are subject to referendum; all other housing laws may be adopted by the city council); *Seattle*, 458 U.S. at 463 (permitting school busing for a variety of reasons, but prohibiting school busing as a remedy for *de facto* racial segregation).

Furthermore, the decisions in both *Hunter* and *Seattle* struck down laws that made it more difficult to enact laws protecting minorities from discrimination on the basis of race. *See Seattle*, 458 U.S. at 474 ("[A]uthority over all student assignment decisions," except those involving race, "as well as over most other

areas of educational policy, remains vested in the local school board."); *Hunter*, 393 U.S. at 390-91 (The automatic referendum system only applies to housing discrimination based on race and religion.). The application of the political structure doctrine focused on the fact that race was treated differently from other aspects of the general law. *See Seattle*, 458 U.S. at 474; *Hunter*, 393 U.S. at 390. Neither *Hunter* nor *Seattle* cast any doubt over the constitutionality of a law which treats all racial matters according to the same rule. Section 26 does precisely that.

Section 26 does not single out university admissions for special treatment, and there is no basis to read it so narrowly. *See* Mich. Const. art I, § 26(1) (prohibiting discrimination and preferential treatment by government in all public education (including primary and secondary school), contracting, and employment). The political structure doctrine is an obstacle only to reallocations of political power which treat race differently—either differently from other racial matters or differently from other matters of a specific policy area. *See Hunter*, 393 U.S. at 389 (finding equal protection violated by "an explicitly racial classification treating racial housing matters differently from other racial *and* housing matters." (emphasis added)). Section 26 does not single out race for different treatment; it prohibits discrimination and preferential treatment by the government in *all* cases.

Hunter/Seattle is not invoked by every law that deals with race. Concurring in *Hunter*, Justice Harlan cautioned that the Court's decision should not be read to prohibit generally applicable laws simply because they may concern racial matters. To rule otherwise would amount to questioning neutral laws which do

not have the "purpose of protecting one particular group to the detriment of all others" but "will sometimes operate in favor of one faction; sometimes in favor of another." *See Hunter*, 393 U.S. at 394 (Harlan, J., concurring). The political structure doctrine is no obstacle to laws "designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents." *Id.* at 393 (Harlan, J., concurring). The political structure doctrine must be limited to instances where problems involving racial matters are treated differently than other problems in the same area. *See Seattle*, 458 U.S. at 480. "[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." *Id.* at 486 (citing *Hunter*, 393 U.S. at 391).

No case has cast doubt on the constitutionality, under the political structure doctrine, of a law which—like Section 26—treats all racial matters the same by outlawing discrimination and preferential treatment by government in all cases. This should not be the first.

II

TO THE EXTENT THE *HUNTER/SEATTLE* DOCTRINE PROHIBITS SECTION 26, IT MUST BE OVERRULED

Where a conflict exists between prior precedent and the Constitution's text, the Court is bound to uphold the Constitution. *See South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J.,

dissenting) ("I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991) (When a governing decision is unworkable, the Court is not constrained to follow precedent. *Id.* at 827 (citation omitted)). This Court's primary obligation is to interpret the text of the Constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). Although courts should generally be reluctant to overrule their prior decisions, the principle of *stare decisis* is not an inexorable command. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (citation omitted) (*stare decisis* "[is] not a mechanical formula of adherence to the latest decision").

The key principles that should guide the Court are that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Because there are no textual exceptions, and racial distinctions are "odious to a free people," racial classifications are always subject to strict scrutiny. *Adarand*, 515 U.S. at 214; *see also Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses"); *Parents Involved*, 551 U.S. at 745-46. "The controlling words, we must remember, are 'equal' and 'protection.' Impediments to preferential treatment do not deny equal protection." *Wilson*, 122 F.3d at 708.

As noted *supra*, Amici do not believe Section 26 violates the Equal Protection Clause under a proper understanding of the *Hunter/Seattle* doctrine. Yet, if it

does, the Court should overrule the cases as inconsistent with the text of the Constitution.

A. The *Hunter/Seattle* Doctrine Is No Longer Necessary

The language of the Equal Protection Clause prohibits "official conduct discriminating on the basis of race," *Washington v. Davis*, 426 U.S. 229, 239 (1976), and its ultimate goal is to permanently forbid the government from discriminating on the basis of race.[5] *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *see also Adarand Constructors*, 515 U.S. at 227 (requiring strict scrutiny analysis for all governmental racial classifications). Laws not motivated by a discriminatory purpose do not violate the Equal Protection Clause solely because they have an unequal effect. *See Davis*, 426 U.S. at 239; *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the Equal Protection Clause is only violated where legislation was motivated "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

A year after *Davis*, this Court decided *Arlington Heights*, 429 U.S. 252. *Arlington Heights* provides guidance on how courts are to determine when facially neutral legislation has been adopted for an unconstitutional purpose. *Id.* at 266-68 (identifying factors speak to whether facially neutral legislation violates the Equal Protection Clause). The challenged laws in *Hunter* and *Seattle* were, like *Arlington*

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[5] Thus, even if this Court subjected Section 26 to strict scrutiny, it would be constitutional as a narrowly tailored means of achieving the Equal Protection Clause's ultimate goal of equal treatment.

Heights, facially neutral, *Hunter*, 393 U.S. at 391; *Seattle*, 458 U.S. at 471, and could today be easily analyzed under that precedent. Given the continued utility of *Arlington Heights* and the scant use of *Hunter/Seattle*, there is good reason to suspect that the latter doctrine is no longer useful.

Hunter was decided seven years before *Arlington Heights*, but there is no reason that the amendment at issue in *Hunter* could not be recast in light of *Arlington Heights*. *Arlington Heights* identified the "impact of the official action . . . an important starting point" to determining the constitutionality of facially neutral legislation. *Id.* at 266. In *Hunter*, it was clear that the impact of the charter was going to be felt by minorities. *Hunter*, 393 U.S. at 391 ("The majority needs no protection against discrimination."). Similarly in *Hunter*, the historical background was vital to the Court's finding of a discriminatory motive. *See id.* at 391 ("It is against this background that the referendum . . . must be assessed."); *accord Arlington Heights*, 429 U.S. at 267 (noting that "historical background" may be an important evidentiary source of discriminatory intent). There is little doubt that the ordinance in *Hunter* would have been struck down under the framework established eight years later in *Arlington Heights* without the need to create the unwieldy political structure doctrine.

Even if *Seattle* had not fallen under the *Arlington Heights* framework, the case would probably have been decided differently today. In 1982, when *Seattle* was decided, state-sponsored segregated schools and court-ordered busing to remedy *de jure* discrimination was not uncommon. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken*

v. Bradley, 418 U.S. 717 (1974). Today, state-sponsored segregation is a distant memory. Indeed, five years ago this Court rejected an attempt by the same Seattle school district to racially balance its student body in the name of diversity. *See Parents Involved*, 551 U.S. 701.

Amici are not alone in their belief that *Seattle* is no longer good law. In upholding Proposition 209, the California Supreme Court questioned the continued validity of *Seattle*. "Today the race-conscious pupil assignment programs repealed by Washington's voters would be presumptively unconstitutional . . . . Accordingly, *Seattle* cannot fairly be read as holding that the political structure doctrine protects presumptively unconstitutional racial preferences, as opposed to programs intended to bring about immediate equal treatment." *Coral*, 235 P.3d at 959-60. In the court below, Judge Gibbons echoed the California Supreme Court:

> Today, it is plain that a racially conscious student assignment system—such as the one that the Seattle initiative attempted to make more difficult to enact—would be presumptively invalid and subject to strict scrutiny . . . . Thus, when articulating the reach of the political restructuring doctrine, *Seattle* did not consider that the underlying policy affected by the challenged enactment was presumptively invalid.

Regents of Univ. of Mich., 701 F.3d at 496-97 (en banc) (Gibbons, J., dissenting).

There is no reason to continue to adhere to the *Hunter/Seattle* doctrine. The harm that the *Hunter*

Court sought to prevent has been adequately addressed through the more comprehensive and coherent *Arlington Heights* framework. And *Seattle* makes little sense in light of contemporary equal protection law that presumes all racial classifications are unconstitutional.

B. Principles of *Stare Decisis* Should Not Preserve the *Hunter/Seattle* Doctrine

Stare decisis should give way when "such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). In *Patterson*, 491 U.S. at 172-75, this Court outlined guiding principles that aid in determining whether to overrule prior precedent. Amici support the citizens' right to prohibit constitutionally suspect racial classification by their state governments. For the reasons that follow, adherence to *stare decisis* should not stand in the way of overturning the *Hunter/Seattle* doctrine.

1. The *Hunter/Seattle* Doctrine Has Not Kept Up With Developments in the Law

The first principle advanced by the *Patterson* Court for determining whether to adhere to past precedent concerns whether the older principle is consistent with intervening developments in the law. 491 U.S. at 173. On this score, it is important to note that the *Hunter/Seattle* doctrine is no longer used by courts throughout the country. In other words, the "*Hunter/Seattle* doctrine" ended with *Seattle*. Since that 1982 opinion, the Sixth Circuit is the only federal appellate court that has invoked the political structure

analysis. "The infrequent use of the doctrine is not surprising given its lack of a constitutional basis." *Regents of Univ. of Mich.*, 701 F.3d at 512 (en banc) (Griffin, J., dissenting).

While some commentators argue that *Romer*, 517 U.S. 620, was decided under *Hunter/Seattle*,[6] a close examination of the case reveals that to be untrue. The *Romer* Court did not invoke *Hunter* or *Seattle* in its opinion and, unlike *Hunter* and *Seattle*, *Romer* involved a statute that discriminated on the basis of sexual orientation, not race. *Id.* at 624. Moreover, the statute in *Romer* was facially discriminatory against "Homosexual, Lesbian or Bisexual" individuals. *Id.* Because of this facial classification on the basis of sexual orientation, the Court simply struck down the statute under rational basis scrutiny, without any need to undertake a confusing *Hunter/Seattle* analysis. *Id.* at 632 ("[I]t lacks a rational relationship to legitimate state interests."). That this facial discrimination occurred during the "political process" is hardly reason to analogize *Romer* to *Hunter/Seattle*. If, instead of sexual orientation, the amendment at issue in *Romer* explicitly denied protected status to individuals of "Chinese" decent, there would be little need for the Court to invoke *Hunter/Seattle* to find the statute unconstitutional. Strict scrutiny would suffice.

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[6] *See, e.g.*, Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 Stan. L. & Pol'y Rev. 129, 137 (1999) ("While the Supreme Court has not explicitly applied the *Hunter-Seattle* principle since 1982, *Romer v. Evans* reaffirms the insight that lies at the heart of both these cases.").

Invoking *Romer* in the context of Section 26 is particularly curious given the opening lines of that opinion:

> One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle.

Id. at 623 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Section 26, of course, essentially enshrines in Michigan law Justice Harlan's admonition. *Id.*

In addition to the lack of any Supreme Court precedent relying on *Hunter/Seattle* in the past thirty years, the push by states towards color-blind government counsels against maintaining the antiquated doctrine. To date, California, Louisiana, Washington, Michigan, Arizona, Nebraska, Florida, New Hampshire, and Oklahoma all prohibit racial classifications in university admissions. *See* Cal. Const. art. I, § 31; *La. Associated Gen. Contractors, Inc. v. Louisiana*, 669 So. 2d 1185 (La. 1996) (interpreting Louisiana Constitution as banning all racial classifications); Wash. Rev. Code Ann. § 49.60.400; Ariz. Const. art. II, § 36; Neb. Const. art. I, § 30; Fla. Exec. Order No. 99-281; N.H. Rev. Stat. Ann. § 187-A:16-a; Okla Const. art. II, § 36A. And this Court has already championed the use of these race-neutral alternatives. *Grutter*, 539 U.S. at 342 (counseling universities to "draw on the most promising aspects of these race-neutral alternatives as they develop"). To

invoke *Hunter/Seattle* now and invalidate Section 26 would bring these "promising" race-neutral alternatives to an untimely end.

2. The *Hunter/Seattle* Doctrine Is Incoherent and Provides No Consistency in the Law

The second *Patterson* factor concerns whether the challenged precedent "may be a positive detriment to coherence and consistency in the law." 491 U.S. at 173 (citations omitted). *Hunter/Seattle*, if interpreted as the Sixth Circuit did below, fails this factor.

The argument that a state's ban on racial preferences may violate the Equal Protection Clause of the Constitution is not new. In fact, multiple courts have evaluated the argument that a ban on preferential treatment violates the constitutional guarantee of equal protection. In *Wilson*, the Ninth Circuit upheld Proposition 209 against a challenge that it violated the Equal Protection Clause. In ruling on the challenge, the court noted the absurdity of the argument:

> Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender. Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. *If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.*

Wilson, 122 F.3d at 702 (emphasis added).

The California Supreme Court reached a similar conclusion when it rejected the argument that Proposition 209 violated the Equal Protection Clause:

> [E]ven in the rare case in which racial preferences are required by equal protection as a remedy for discrimination, the governmental body adopting such remedies must undertake an extraordinary burden of justification to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. In contrast, a generally applicable rule forbidding preferences and discrimination not required by equal protection, such as section 31, *does not logically require the same justification*.

Coral, 235 P.3d at 960 (emphasis added) (citations and quotation marks omitted).

While the Sixth Circuit held Section 26 unconstitutional, five separate dissents were filed. Judge Boggs wrote: "Under these circumstances, holding it to be a violation of equal protection for the ultimate political authority to declare a uniform policy of non-discrimination is *vastly far afield from the Supreme Court precedents*." *Regents of Univ. of Mich.*, 701 F.3d at 493 (en banc) (Boggs, J., dissenting) (emphasis added). Judge Gibbons noted:

> Essentially, the argument is one of constitutional protection for racial and gender preference—a *concept at odds with the basic meaning of the Equal Protection*

> *Clause, as understood and explained through decades of jurisprudence.*

Id. at 494 (Gibbons, J., dissenting) (emphasis added). Judge Rogers dissented only to note how the majority's opinion renders *Hunter/Seattle* completely undecipherable. *Id.* at 505 (Rodgers, J., dissenting) ("Whatever *Hunter* and *Seattle* hold, the Supreme Court cannot have intended such a ban."). Judge Sutton's dissent noted:

> Proposal 2 does not place 'special burdens' on racial minorities . . . . The words of the amendment place no burden on anyone, and indeed are designed to prohibit the State from burdening one racial group relative to another. All of this furthers the objectives of the Fourteenth Amendment, the same seed from which the political-process doctrine sprouted.

Id. at 506 (Sutton, J., dissenting). Perhaps the most forceful dissent came from Judge Griffin, who urged this Court to overrule the *Hunter/Seattle* doctrine. "Today's decision is the antithesis of the Equal Protection Clause of the Fourteenth Amendment . . . . I urge the Supreme Court to consign this misguided doctrine to the annals of judicial history." *Id.* at 511-12 (Griffin, J., dissenting).

3. *Hunter/Seattle* Is Inconsistent With a Sense of Justice

The last *Patterson* factor concerns whether the challenged precedent, having been "tested by experience," proves to be "inconsistent with the sense of justice or with the social welfare" and, in particular, "with our society's deep commitment to the eradication

of discrimination based on a person's race or the color of his or her skin." 491 U.S. at 174 (citation omitted). *Hunter/Seattle* fails any test that turns on "the sense of justice" or "the eradication of discrimination."

Hunter/Seattle, as interpreted by the Sixth Circuit, has mandated, not eradicated, racial discrimination and preferential treatment. Were this Court to uphold the Sixth Circuit decision striking down Section 26, other state experiments with race-neutral admissions policies would be immediately challenged. *See supra* Arg. II.B.1 (listing states that have adopted race-neutral admissions policies). "[F]or the first time, the presumptively invalid policy of racial and gender preference has been judicially entrenched as beyond the political process." *Regents of Univ. of Mich.*, 701 F.3d at 494 (en banc) (Gibbons, J., dissenting). Adherence to the *Hunter/Seattle* doctrine would forever frustrate society's goal of a discrimination-free government.

None of the *Patterson* factors counsel in favor of preserving the *Hunter/Seattle* doctrine, and overturning it would not raise the same reliance concerns that were present in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). In *Casey*, this Court was concerned with whether overturning the limitation on state power first enunciated in *Roe v. Wade*, 410 U.S. 113 (1973), would injure individuals "who have relied upon it or [cause] significant damage to the stability of the society governed by it." 505 U.S. at 855. "The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." *Id.* The nature of race-based preferences simply does not create such significant reliance interests.

Under the lower court's rationale, race-based admissions preferences are designed for the benefit of minorities. 701 F.3d at 485 (en banc). Only those individuals from underrepresented minority groups who would not otherwise gain acceptance can be said to have "relied" on those preferences. Yet, it is quite perverse to uphold a doctrine that discourages achievement in secondary school, simply because those individuals may then "rely" upon it for admission to select colleges and universities. In *Casey*, the Court recognized that the women relied upon the availability of abortion in order to "participate equally in the economic and social life of the Nation." 505 U.S. at 856. But this is not the case with race-based admissions preferences. As demonstrated below, in the absence of such preferences, underrepresented minorities in California have improved their academic credentials, and have gained admittance to California's public colleges and universities in record numbers. *See infra* Arg. III.

No government institution is required to institute race-based preferences, yet *Hunter/Seattle* prevents institutions from repealing them. In *Grutter*, this Court recognized that "all race-conscious admissions programs have a termination point." 539 U.S. at 342. Yet, if *Hunter/Seattle* remains, there will be no stopping point for racial preferences—they will be required by the Constitution. Under the Court's *stare decisis* principles, the flawed *Hunter/Seattle* doctrine should be overruled. The sooner the aberrational doctrine is explicitly rooted out of the law, the better the purposes of *stare decisis*—stability, coherence, justice, and predictability—will be served.

III

UNDERREPRESENTED MINORITIES DO NOT NEED RACIAL PREFERENCES TO SUCCEED IN HIGHER EDUCATION

This Court's opinion in *Grutter* endorsed universities' limited use of racial preferences to secure "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. The *Grutter* Court, however, was quick to warn public universities that race-conscious action should only be considered after race-neutral options prove ineffective. *Id.* at 339 (holding that the Equal Protection Clause requires public universities to give "serious, good faith consideration of workable race-neutral alternatives").

Despite this Court's guidance, in the wake of *Grutter*, public universities read the opinion not as a warning to curtail their use of race, but rather as a blueprint for creating a student body with their preferred racial composition. The extent of racial preferences utilized by public universities is widespread and generally conceded even by those who advocate in favor of them. *See, e.g.*, William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 26-27 (1998) ("[A]lmost all academically selective institutions [share] a commitment to enrolling a diverse student population—and, as one way of achieving this objective, to paying attention to race in the admissions process."); Thomas J. Espenshade & Alexandria Walton Radford, *A New Manhattan Project*, Inside

Higher Ed. (Nov. 12, 2009).[7] Indeed, as study after study by Amicus Center for Equal Opportunity has shown, public universities continue to use race to favor preferred minorities and turn away applicants for admission of disfavored races.[8]

This continued use of racial preferences by public universities is not universal: including the Michigan ban at issue in this case, nine states prohibit their public universities from considering a student applicant's race in admissions. *See supra* Arg. II.B.2 (noting the states that have banned racial preferences in university admissions). With the adoption of Proposition 209 in 1996, California became the first state to ban racial preferences in university admissions. *See* Cal. Const. art. I, § 31. Thus, for over fifteen years the underrepresented minority students in the nation's most populous state have had to seek

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[7] *Available at* http://www.insidehighered.com/views/2009/11/12/radford (last visited June 19, 2013).

[8] CEO's studies assess the degree of racial and ethnic admission preferences in admissions by using a statistical model that predicts the probability of admission at a university for members of different ethnic and racial groups, holding other qualifications constant. *See, e.g.*, Center for Equal Opportunity, *Racial and Ethnic Preferences in Admission to the University of Oklahoma*, *available at* http://www.ceousa.org/attachments/article/624/Oklahoma_Study.pdf (last visited June 19, 2013); Althea K. Nagai, Center for Equal Opportunity, *Racial and Ethnic Preferences in Admission at the University of Wisconsin Law School*, *available at* http://www.ceousa.org/attachments/article/545/U.Wisc.law.pdf (last visited June 19, 2013); Althea K. Nagai, Center for Equal Opportunity, *Racial and Ethnic Preferences in Undergraduate Admissions at Two Ohio Public Universities*, *available at* http://www.ceousa.org/attachments/article/547/OHIO3.7.pdf (last visited June 19, 2013).

admission to California's public universities without relying on racial preferences.

California's long experiment with race-neutral admissions has shown that underrepresented minorities do not need racial preferences to succeed. To the contrary, California has demonstrated that blacks and Hispanics are succeeding under a system that refuses to consider their skin color in admissions. Moreover, racial diversity at California's public universities has not suffered under race-neutral admissions. By looking at a broad range of educational outcome measures, it is clear that following adoption of Proposition 209, California's K-12 public schools began focusing their attention on improving minority students' preparation for college rather than relying on racial preferences.

A. Offers of Admission to Underrepresented Minority Students Have Risen at University of California Post-Proposition 209

The University of California (UC) system consists of nine undergraduate campuses.[9] The UC schools tracked the offers for admission by race and/or ethnicity to the University of California from 1997 through 2012. These data show:

- University-wide, underrepresented minorities (defined as American Indian, African-American, and Hispanic/Latino students) constituted 18.8% of the students (7,605 total offers) to whom

[9] Due to the newness of the Merced campus, it is not included in much of the data set forth in this brief. Campuses dedicated solely to graduate level courses are also not included.

admission was offered as freshmen in 1997.[10] By 2012, underrepresented minorities received 30.5% of the freshmen offers of admission (19,085 total offers), an increase of 11,480 offers of admission to underrepresented minority students. Meanwhile, offers of admission to white students declined from 44.2% in 1997 to 28.1% in 2012.[11]

- From 1997 to 2013, the percentage of offers of admission that were extended to underrepresented minorities significantly increased on seven of the eight UC campuses.[12]
- Nearly every UC campus increased—both in raw numbers and percentage of offers—offers of admission to underrepresented minorities. Only UC-Berkeley has decreased its offers of admission to underrepresented minorities—from 25.2% of all offers of admission in 1997 to 22.0% in 2013.

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[10] While Proposition 209 was passed in 1996, an injunction delayed its effective date until August of 1997. *See Wilson*, 122 F.3d at 697, 711.

[11] Univ. of Cal., Office of the President, *University of California Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 through 2012, available at* http://www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf (last visited June 19, 2013).

[12] *Compare* Univ. of Cal., Office of the President, *New California Freshmen Admit Offers by Race / Ethnicity Fall 1997 through 2008, available at* http://www.ucop.edu/news/factsheets/2008/fall_2008_admissions_table_4.pdf (last visited June 19, 2013), *with* Univ. of Cal., Office of the President, *Percent Change in CALIFORNIA Resident Freshman ADMIT Counts by Campus and Race / Ethnicity Fall 2011, 2012, and 2013, available at* http://www.ucop.edu/news/factsheets/2013/fall_2013_admissions_table3.pdf (last visited June 19, 2013).

However, in 1998, the year after Proposition 209 took effect, UC-Berkeley's offers of admission fell from 25.2% to 12.1%. It has steadily increased since then to the 22.0% of 2013. *See supra* Note 12. The university-wide rise in the number of underrepresented minorities who are offered admission as freshmen to the University of California and the rise in the percentage of freshmen from underrepresented minority groups refute any claim that, under Proposition 209, minorities have suffered devastating decreases in admissions from which they have yet to recover.

B. Underrepresented Minority California High School Graduates Are More Likely to Be Admitted to a California University Post-Proposition 209

The University of California's Eligibility and Admissions Study Group prepared a report under the direction of UC President Robert C. Dynes entitled *Analysis of Undergraduate Admissions to University of California Campuses by Race and Ethnicity* (Mar. 2004) (UC Undergraduate Race Analysis Report).[13] Additionally, the California Postsecondary Education Commission (CPEC) produces "Ethnicity Snapshot Tables" regarding High School Graduates and First Time Freshmen at UC.[14] The UC Undergraduate Race

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[13] *Available at* http://www.universityofcalifornia.edu/news/compreview/0308_meeting/Data_release_summary_FINAL_Mar_8_20041_with_data.pdf (last visited June 20, 2013).

[14] Ethnicity Snapshot Tables—High School Graduates; and First Time Freshman at UC, *available at* http://www.cpec.ca.gov/StudentData/EthSnapshotMenu.asp (last visited June 20, 2013).

Analysis Report shows the gap between the percentage of minorities graduating from high school and the percentage of minorities as newly enrolled UC freshmen were increasing in the years immediately preceding the adoption of Proposition 209. In contrast, the CPEC report shows that after Proposition 209, the gap between the percentage of minorities graduating from California high schools and the percentage of minorities newly enrolled UC freshmen has decreased:

- In 1999, 3.4% of California African-American high school graduates enrolled at UC. In 2009, that percentage had increased to 4.8%. 496 more California African-American high school graduates enrolled at UC in 2009 compared to 1999.

- In 1999, 3.3% of California Latino high school graduates enrolled at UC. In 2009, that percentage increased to 4.4%. 3,715 more California Latino high school graduates enrolled at UC in 2009 compared to 1999.

CPEC also produces "Ethnicity Snapshot Tables" regarding High School Graduates and First Time Freshmen at the California State University (CSU) system. The data from these tables also demonstrate how underpresented minority students have succeeded in post-Proposition 209 California throughout the CSU system.

- In 1999, 9.9% of California African-American high school graduates enrolled at CSU. In 2009, that percentage had increased to 11.2%. 747 more California African-American high school graduates enrolled at CSU in 2009 compared to 1999.

- In 1999, 7.9% of California Latino high school graduates enrolled at CSU. In 2009, that percentage increased to 11.2%. 10,090 more California Latino high school graduates enrolled at CSU in 2009 compared to 1999.

Since Proposition 209 became effective in 1997, minorities continue to seek and be offered admission to the University of California and California State University. Prior to Proposition 209, the trend in California was towards fewer underrepresented minority high school graduates gaining admission to the UC. Since Proposition 209 was enforced, however, that trend has reversed. If an individual from an underrepresented minority graduates from a California high school today, she is more likely to be admitted to both UC and CSU, than before California prohibited its university system from considering her race.

C. The Graduation Rates for Underrepresented Minority Students in California Have Risen Appreciably Post-Proposition 209

The UC Berkeley campus, frequently cited by Respondents as the campus where Proposition 209 has perpetrated the most harm on underrepresented minority students, provides detailed data on the graduation rates of its students.[15] This data show:

- The six-year graduation rate for African Americans who entered UC Berkeley in 2006—the most recent year with available data—was 77%.

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[15] *See* University of California, Berkeley, *Undergraduate Students: New Freshmen 6 Year Graduation Rates*, *available at* http://diversity.berkeley.edu/undergraduate-students-new-freshmen-6-year-graduation-rates (last visited June 20, 2013).

This is an increase of 12% from the 65% six-year graduation rate for those who entered in 1996, and whose college preparation was undertaken before Proposition 209 was adopted.[16]

- For Hispanic students who entered in 1996, 73% graduated within six years. For those who entered in 2006, 81% had graduated in six years—an increase of 8%.

The higher graduation rates for minority students at UC Berkeley follows a greater trend across all UC schools. In a forthcoming paper, four Duke University Economics professors analyzed the effects of Proposition 209 on minority graduation rates across all California universities and colleges. *See* Peter Arcidiacono et al., *The Effects of Proposition 209 on College Enrollment and Graduation Rates in California*, Princeton Univ. Applied Microeconomics Seminar (Working Paper, Mar. 2012).[17] The paper demonstrates:

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[16] The 77% figure is the highest six-year graduation rate for African-American students at UC Berkeley since 1991. Conversely, the 65% six-year graduation rate in 1996 was a relatively *high* aberration for African-American students entering UC Berkeley before Proposition 209. For example, the six-year graduation rate for African-American students entering UC Berkeley in 1994 was a depressing 58%.

[17] *Available at* https://www.princeton.edu/economics/seminar-schedule-by-prog/applied_micros-s12/Prop_209_Paper_03-31-12.pdf (last visited June 20, 2013). The professors analyzed data from the Integrated Postsecondary Education Data System which includes "information on all post secondary institutions that participate in Title IV federal student financial aid programs, such as Pell Grants or Stafford Loans." *Id.* at 4.

- The on-time graduation rate of African-Americans at all California public universities and colleges increased 23.1% after Proposition 209 went into effect. The six-year graduation rate for African-Americans increased 9.3%. *Id.* at 9.

- The on-time graduation rate of Hispanic students at all California public universities and colleges increased 23.8% after Proposition 209 went into effect. The six-year graduation rate for Hispanic students increased 6.4%. *Id.*

- After controlling for a variety of factors, a 3.1% increase in the graduation rate of all underrepresented minority students at California's public colleges and universities is attributable to Proposition 209 "matching" students to universities where they are more academically fit. *Id.* at 22.

California's most selective public university—UC Berkeley—has experienced a dramatic increase in the graduation rate of Latinos and African-Americans since Proposition 209 went into effect. But Berkeley is not alone. A minority student enrolling at any one of California's public higher education institutions is much more likely to graduate today than she was fifteen years ago. And this increase is directly attributable to the effect that Proposition 209 has had on matching students to institutions where they are more likely to succeed academically.

All too often, universities that utilize racial preferences are quick to report their inflated admissions statistics, while remaining silent in the discussion of graduation rates. "All that counts as far as these schools are concerned is what the freshman

class looks like. They don't care what the senior class looks like." Jason L. Riley, *Abigail Thernstrom: The Good News About Race in America*, Wall St. J., May 18, 2012.[18] The importance of Proposition 209 (and Michigan's Section 26) on the success of underrepresented minorities cannot be understated. As more studies show the negative impact that racial preferences have on underrepresented minority students' academic success, this Court should not prevent states from constitutionalizing race-neutral admissions policies.

CONCLUSION

Our nation is increasingly multiethnic and multiracial, and individual Americans are more and more likely to be multiethnic and multiracial. In such a nation, it is dangerous to allow the inevitably divisive racial and ethnic discrimination by public institutions to become entrenched in the Constitution.

[18] *Available at* http://online.wsj.com/article/SB10001424052702304723304577369913528826798.html (last visited June 20, 2013).

For the foregoing reasons, Amici respectfully request that this Court reverse the decision below.

DATED: July, 2013.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PRESIDENT AND CHANCELLORS OF THE UNIVERSITY OF CALIFORNIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

Amici Curiae are the President and the ten Chancellors of the University of California ("UC"). UC is the largest highly selective institution of higher education in the United States. Its ten campuses are located throughout California and provide undergraduate, graduate, and professional education to more than 235,000 students. UC is governed by The Regents of the University of California. It is led by the President and the Chancellors of each of its campuses, all of whom join this brief.[2]

The University of California is committed to serving the educational needs of the people of California, the most diverse state in the nation. In 2012, California's high-school graduates were 30.5 percent white, 46.2 percent Latino, 13.6 percent Asian or Pacific Islander, 6.7 percent African American, and 0.7 percent American Indian.[3] UC's admissions policy "seeks to enroll, on each of its campuses, a student body that, beyond meeting the University's eligibility requirements, demonstrates high academic achievement or exceptional personal

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored any part of the brief, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] A full list of *Amici* is included in the Appendix.

[3] *See* California Department of Education, Educational Demographics Unit, *Graduates by Ethnicity for 2011-12* ("*High School Graduates Data Set*"), http://dq.cde.ca.gov/dataquest/GraduateReporting/GraduatesByEth.aspx?cTopic=Graduates&cChoice=StGrdbyEt&cYear=2011-12&level=State&cType=All&cGender=B&cGroup=G12.

talent and that encompasses the broad diversity of cultural, racial, geographic, and socio-economic backgrounds characteristic of California."[4]

It is the policy of the University of California that there is "a compelling interest in making sure that people from all backgrounds perceive that access to the University is possible for talented students, staff, and faculty from all groups."[5] Further, the University recognizes that "[t]he knowledge that the University of California is open to qualified students from all groups, and thus serves all parts of the community equitably, helps sustain the social fabric of the State."[6]

The University of California is central to the national debate over policies governing admission of underrepresented-minority students to public universities. In 1996, California amended its state constitution to prohibit race-conscious measures in college admissions. As this Court has recognized, that prohibition led UC to "experiment[] with a wide variety of alternative approaches" for promoting diversity and ensuring access for qualified underrepresented minorities. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). Those efforts have had

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[4] *University of California Policy on Undergraduate Admissions* (adopted May 25, 1988), http://www.universityofcalifornia.edu/news/compreview/12_16/Admission_UCpolicy.pdf.

[5] The Regents of the University of California, *Regents Policy 4400: Policy on University of California Diversity Statement* (adopted Sept. 20, 2007, as amended Sept. 15, 2010) ("*Regents Policy 4400*"), http://policy.ucop.edu/doc/4000375/Diversity.

[6] *Ibid.*

disappointing results, as *Amici* explain in detail below.

UC's experience thus sheds light on the practical obstacles faced by universities that seek to promote diversity but are barred from granting preferential treatment to underrepresented racial minorities. The UC experience is highly relevant to the Court's consideration of this case, because Petitioner has held the University of California out as an example of the purported success of race-neutral admissions in achieving diversity and providing access to underrepresented minorities. *See* Pet. Br. 31-32, 34-35. In fact, as *Amici* demonstrate below, Petitioner's assertions about UC's experience cannot be squared with the facts.

SUMMARY OF ARGUMENT

More than fifteen years after Proposition 209 barred consideration of race in admissions decisions at public universities in California, the University of California still struggles to enroll a student body that encompasses the broad racial diversity of the State. The percentages of the UC student population that comprise students from underrepresented-minority groups (defined by the University as African Americans, Latinos, and American Indians) dropped sharply in the aftermath of Proposition 209, and the University still has not recovered from this precipitous decline. The long-term results of Proposition 209 are especially apparent on the most highly selective campuses, where the percentages of African-American and American Indian students are far below their pre-Proposition 209 levels, and the

percentages of Latino students have not kept pace with the explosive growth in California's Latino population. Moreover, these lower percentages persist notwithstanding the University's determined efforts to diversify its student body through race-neutral means, including massive outreach to students at the high-school level and adjustments to admissions criteria and the application-review process.

The decline in racial diversity on UC campuses has had its most significant effects on underrepresented minorities. Most fundamentally, fewer members of those groups have been able to attend UC's most selective campuses. Reports from underrepresented-minority students indicate that those who attend these less diverse campuses feel less respected than do their peers on more diverse campuses. While Petitioner asserts that Proposition 209 has improved academic outcomes for underrepresented minorities, the actual facts about UC students belie that assertion. Moreover, declines in diversity at UC deprive communities of racial minorities of significant benefits that would extend well beyond the campus population.

Members of underrepresented racial groups therefore have a special interest in advocating for the adoption of race-conscious admissions policies to increase diversity on UC campuses and at other colleges and universities. By removing the authority to address a lack of racial diversity—but *only* that one type of diversity—from the existing decisionmaking body (the Regents of the University of California), Proposition 209, like Michigan's Proposal 2, "'places *special* burdens on racial minorities within the governmental process,' thereby

'making it *more* difficult for certain racial ... minorities than for other members of the community to achieve [admissions policies] that [are] in their interest.'" *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982) (quoting *Hunter v. Erickson*, 393 U.S. 385, 391, 395 (1969)) (alterations in original omitted). Proposition 209 and Proposal 2 thus disadvantage those who would benefit most from race-conscious admissions policies as against those who would benefit from admissions policies that take into account any other factor, such as socioeconomic status, place of residence, athletic ability, or relationship to an alumnus. *See Seattle*, 458 U.S. at 468 (charter amendment invalidated in *Hunter* "disadvantage[ed] those who would benefit from laws barring racial ... discrimination as against those who would bar other discriminations").[7]

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[7] Just as it did not matter in *Seattle* that "white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom'" or that "Negroes and whites may be counted among both the supporters and the opponents of [the challenged initiative]," 458 U.S. at 472, so too it does not matter here that white as well as African-American, Latino, and American-Indian students benefit from student-body diversity and may support race-conscious admissions policies. Members of certain racial groups and their communities garner especially significant benefits from such diversity, suffer particularly severe harms from its absence, and therefore are uniquely burdened by provisions such as Proposition 209 and Proposal 2.

ARGUMENT

I. The UC Experience Establishes That a Prohibition on Considering Race in Admissions Impedes Public Universities from Achieving Diverse Student Bodies.

Amici are intimately familiar with the challenges that face a large and highly selective university when it is barred from considering race in its admissions decisions. Over the more than fifteen years since California's constitutional ban on affirmative action went into effect, the University of California has experimented with a wide array of race-neutral initiatives aimed at promoting diversity. Overall, these efforts have produced disappointing results. The undergraduate student populations at UC's most selective campuses are markedly less diverse today than they were in the mid-1990s. Enrollment of racial minorities systemwide and at UC's professional and graduate schools continues to lag far behind California's population—even as the University has expanded overall enrollment on many of its campuses.

A. UC and Its Admissions Process.

The University of California is the largest highly selective institution of higher education in the United States. Its ten campuses, located throughout California, provide undergraduate, graduate, and professional education to more than 235,000 students. Five of UC's campuses are ranked among

the top ten public schools in the nation.[8] The University also operates the nation's largest health training program—including six schools of medicine—which educates over 14,000 students annually.[9]

In many respects, the University of California is comparable to Michigan's system for public higher education. Michigan's public universities serve approximately 300,000 undergraduate and graduate students.[10] The University of Michigan-Ann Arbor is also among the nation's most selective and highly ranked public universities.[11] And the two institutions have an historical affinity, as UC's constitutionally autonomous governance structure was expressly modeled after the University of Michigan's.[12]

Applications for undergraduate admission to UC are reviewed in a two-level process. At the highest level, the University considers an applicant's qualification for admission to the University as a whole. Consistent with California's Master Plan for Higher Education, the University seeks to admit

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[8] *See Top Public Schools*, U.S. News and World Report ("*Top Public Schools*"), http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/top-public?int=a557e6.

[9] University of California, Office of the President, *Health Sciences and Services*, http://www.ucop.edu/health-sciences-services/.

[10] Presidents Council, State Universities of Michigan, http://www.pcsum.org/.

[11] *See Top Public Schools*.

[12] Karen Petrosi, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J. College & Univ. Law 149, 178-79 (2005).

freshmen from the top one-eighth (or 12.5 percent) of all graduates of California public high schools.[13] To accomplish this goal, it promulgates minimum eligibility requirements for admission to the University. For example, applicants must have a high-school grade-point average ("GPA") of 3.0 or higher and must have completed fifteen yearlong college preparatory courses, including courses in English, history, mathematics, laboratory science, foreign language, and art.[14] Satisfying these criteria guarantees that an applicant will be considered for admission to the University at large. Applicants whose GPAs and standardized test scores put them in the top nine percent of California high-school students are guaranteed a place at UC—although not necessarily at the campus of their choice.[15] These requirements for admission to the University are entirely race-neutral and have always been so.

At the same time, applicants are considered for admission to specific campuses. Applications for admission from UC-eligible students exceed the maximum enrollment capacity at most of UC's ten campuses, several of which rank among the most

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[13] *A Master Plan for Higher Education in* California (1960-1975), at 4, 73, http://www.ucop.edu/acadinit/mastplan/MasterPlan1960.pdf.

[14] The Regents of the University of California, *Regents Policy 2103: Policy on Undergraduate Admissions Requirements* (June 18, 1982, as amended Feb. 5, 2009) ("*Regents Policy 2103*"), http://regents.universityofcalifornia.edu/governance/policies/2103.html.

[15] Under the current "Eligible in the Local Context" program, discussed *infra* at pages 16-17, students who rank in the top nine percent of their public high school are also guaranteed admission to the University.

selective schools in the nation. As a result, the campuses have developed their own selection criteria, such as consideration of high-school GPA, test scores, and other indicia of academic promise. Beginning in the 1960s and until 1997, individual campuses employed criteria that included consideration of the race of an applicant. The manner in which the campuses employed race-conscious criteria varied over time and across campuses.

Although such race-conscious criteria are not allowed in the wake of Proposition 209, it remains the policy of the University of California that there is "a compelling interest in making sure that people from all backgrounds perceive that access to the University is possible for talented students, staff, and faculty from all groups."[16] Further, the University recognizes that "[t]he knowledge that the University of California is open to qualified students from all groups, and thus serves all parts of the community equitably, helps sustain the social fabric of the State."[17]

B. Proposition 209 Dramatically Reduced Diversity on UC Campuses.

Proposition 209 amended the California Constitution to provide that the State and its political subdivisions—including the University of California—"shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national

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[16] *Regents Policy 4400.*

[17] *Ibid.*

origin in the operation of public employment, public education, or public contracting." CAL. CONST., art. I, § 31, subd. (a).[18] The fall 1998 freshman class was the first undergraduate class at UC to reflect this ban on race-conscious admissions policies. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (vacating preliminary injunction against enforcement of Proposition 209).

The abandonment of race-conscious admissions policies resulted in an immediate and precipitous decline in the rates at which underrepresented-minority students applied to, were admitted to, and enrolled at the University of California.[19] On every

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[18] Proposition 209 was enacted following The Regents' adoption, in July 1995, of Special Policy 1 ("SP-1"), a resolution disallowing the use of "race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study." The Regents of the University of California, *Policy Ensuring Equal Treatment: Admissions* § 2 (July 20, 1995) ("*SP-1*"), http://www.universityofcalifornia.edu/news/compreview/sp1.pdf. When that resolution was being considered, the academic leadership of the University unanimously urged the continuation of the University's 1988 admissions policy, observing that "significant numbers of potentially qualified California students are still underserved by the University." *Statement of the President, Chancellors, and Vice Presidents of the University of California* (July 10, 1995). The Regents later rescinded SP-1. The Regents of the University of California, *Future Admissions, Employment, and Contracting Policies, Resolution Rescinding SP-1 and SP-2* (May 16, 2001), http://www.universityofcalifornia.edu/regents/regmeet/may01/re28new.pdf.

[19] University of California, Office of the President, Student Academic Services, *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies*, at 17, 19, 22 (Mar. 2003) ("*Undergraduate Access to UC*"), http://files.eric.ed.gov/fulltext/ED476308.pdf. The University of

UC campus, the percentage of applicants who were underrepresented minorities declined, as did the admission rates for underrepresented-minority students and the percentage of such students among the total admitted class.[20] These declines were especially pronounced at the most sought-after campuses and were less severe at other campuses, which began to enroll many underrepresented minorities who would have been admitted to the more selective campuses prior to Proposition 209.

For example, at UC Berkeley, the top-ranked public school in the nation,[21] the proportion of applicants who were underrepresented minorities fell from 18.9 percent to 16.0 percent between 1995 and 1998.[22] During the same period, the admission rate

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California considers students to be "underrepresented" based on their collective rates of achieving eligibility for the University. Underrepresented minorities include Latinos/Chicanos (referred to herein as "Latinos"), African Americans, and American Indians. *Id.* at 1 n.3.

[20] *Ibid. See also* Mark Long, *College Applications and the Effect of Affirmative Action*, 121 J. Econometrics 319, 320 (2004) (finding that affirmative-action bans "have widened the gap between the number of SAT score reports sent by non-minority and minority students to in-state, public colleges, particularly in California").

[21] *Top Public Schools*.

[22] *Undergraduate Access to UC* at 17. *Amici* use 1995 as their basis for comparison with the post-Proposition 209 statistics. The incoming class of 1996 represented the first freshman class after the University restricted the use of race and ethnicity in UC admissions by adopting SP-1. While the 1998 class was the first class admitted under Proposition 209, the adoption of SP-1 led to reduced rates of applications to the University by underrepresented students in 1996 and 1997. Thus, 1995 is the

for these students plummeted from 54.6 percent to 20.2 percent.[23] And the percentage of underrepresented-minority students who enrolled at Berkeley fell by more than half: from 24.3 percent of the entering class in 1995 (807 students) to 11.2 percent in 1998 (412 students).[24]

At UCLA, which is ranked number two among the nation's public schools,[25] Proposition 209 had similarly dramatic effects over this three-year period. The proportion of underrepresented-minority applicants dropped from 22.0 percent to 17.7 percent; their admission rate fell from 52.4 percent to 24.0 percent; and the percentage of the enrolled freshman class made up by underrepresented minorities declined from 30.1 percent (1,108 students) down to just 14.3 percent (597 students).[26]

When viewed in isolation over this three-year period, each of the underrepresented-minority groups (African Americans, Latinos, and American Indians) experienced declines in its percentage of the applicant pool and the admitted pool for California-resident students on every campus. At most campuses, the percentage of these minority groups in the enrolled class also declined sharply.[27] The

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best comparison year for measuring the effects of the change in admissions policies.

[23] *Id.* at 19.

[24] *Id.* at 22.

[25] *Top Public Schools.*

[26] *Undergraduate Access to UC* at 17, 19; *see id* at 23.

[27] University of California, *Application, Admissions and Enrollment of California Resident Freshman for Fall 1989 through 2012*, at 1 ("*Application, Admissions, and Enrollment*"), http://www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf.

experience of African-American and Latino students at UC Berkeley and UCLA was particularly striking. African Americans made up 6.7 percent and 7.4 percent of the entering freshman classes at these campuses in 1995. By 1998, those numbers were cut in half, to 3.7 percent and 3.5 percent. In 1995, Latinos were 16.9 percent of the entering class at Berkeley and 22.4 percent of the entering class at UCLA. Three years later, they represented just 8.0 percent and 11.0 percent of Berkeley's and UCLA's freshman classes.[28]

UC's undergraduate schools were not the only programs affected. In the wake of Proposition 209, underrepresented-minority "applications to and enrollments in UC professional schools declined dramatically."[29] UC's Study Group on Diversity reported that in 2005 underrepresented minorities were 17 percent of new medical students,[30] which was just below the figure of 17.4 percent in 1975 that was reported by the equivalent UC Task Force three

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[28] *Id.* at 2, 5. These figures are for California-resident freshmen only.

[29] University of California Regents, Study Group on University Diversity, *Report of the Work Team on Graduate and Professional School Diversity*, at 16 (Sept. 2007) ("*Study Group on Diversity*"), http://diversity.universityofcalifornia.edu/documents/Grad-ProfWorkTeam.pdf; *see also id.* at 21 (reporting that "[r]ates of [under-represented minority] applicants, admitted students and newly enrolled students at UC law schools dropped following Proposition 209"); *id.* at 22 (discussing similar declines for business schools).

[30] *Id.* at 14.

decades earlier.[31] The situation is even more challenging at UC Law Schools. The Study Group on Diversity reported that underrepresented minorities were 12 percent of entering law students at UC in 2005,[32] whereas underrepresented minorities were 20.1 percent of UC's entering law students in 1975.[33]

C. The University's Race-Neutral Admissions Initiatives Have Had Limited and Disappointing Results.

In the face of these daunting statistics, the University of California embarked on a broad and proactive effort to increase diversity on its campuses through the use of race-neutral initiatives. While this effort produced some benefits, the bottom line is that today—more than fifteen years after passage of Proposition 209—the enrollment rates for underrepresented minorities still have not rebounded at UC's most selective campuses, and the overall enrollment figures at the University have not kept pace with the demographic changes among California's graduating high-school population.

1. *Outreach Task Force*. Before Proposition 209 became effective, the University recognized that it was necessary "to take relevant actions to develop and support programs which will have the effect of increasing the eligibility rate of groups which are

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[31] University of California, *Final Report of the Task Force on Graduate and Professional Admissions*, at app. F-7 (Sept. 1977) ("*Graduate and Professional Admissions*").

[32] *Study Group on Diversity* at 14.

[33] *Graduate and Professional Admissions* at app. F-14.

'underrepresented' in the University's pool of applicants as compared to their percentages in California's graduating high-school classes."[34] To accomplish this objective, it created an Outreach Task Force and charged it with developing a comprehensive approach for reversing low eligibility rates for students from underrepresented groups and addressing the challenges those students faced in gaining admission to the most selective UC campuses.[35]

In 1997, the Outreach Task Force recommended a strategy that included: (i) developing partnerships between UC campuses and public schools aimed at improving opportunities for college preparation and fostering positive academic cultures in schools; (ii) expanding academic-development programs for K-12 students; (iii) embarking on an aggressive program of informational outreach to students, families, teachers, and counselors geared towards improving planning and preparation for college; and (iv) conducting research to identify the root cause of the lack of diversity and evaluate the effectiveness of UC's outreach programs.[36]

Consistent with these recommendations, the University has spent more than half of a billion dollars since 1998 to build and expand race-neutral programs aimed at educationally disadvantaged K-12

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[34] *SP-1.*

[35] *See id.* § 1.

[36] *New Directions for Outreach: Report of the University of California Outreach Task Force*, at 3-4 (July 1997), http://www.ucop.edu/education-partnerships/_files/outreachrpt.pdf.

students, and it has substantially increased the percentage of the applicant pool who participate in such programs.[37] There are currently thirteen such programs, which collectively reach students at over 1,100 K-12 public schools and 112 community colleges in California.[38] More than 70 percent of the students in the three largest outreach programs are underrepresented minorities.[39] In addition to the partnership and outreach programs referenced above, these efforts included the creation of the California Professional Development Institutes to train 70,000 public school teachers a year and improve their skills in core subjects such as English and mathematics.[40]

2. *Eligibility in the Local Context*. Beginning with students applying for the freshman class entering the University in 2001, UC modified its eligibility policy. The new policy provided that the top 4 percent of eligible students in each California public-high-school class were designated as "Eligible in the Local Context" ("ELC"). The ELC program was expanded to the top 9 percent of students in each public high school for the freshman class entering in 2012.[41] ELC status guarantees an applicant admission to one of

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[37] University of California, *Student Academic Preparation and Educational Partnerships (SAPEP), 2011-12 Annual Report Highlights*, at 2, 7 (July 2013), http://www.ucop.edu/education-partnerships/_files/sapep-annual-report-highlights-2012.pdf.

[38] *See id.* at 2.

[39] *See* University of California, *Report on Student Academic Preparation and Educational Partnerships (SAPEP) for the 2009-10 Academic Year*, at 8 (Aug. 2011), http://www.ucop.edu/education-partnerships/_files/sapep-funds-outcomes.pdf.

[40] *Undergraduate Access to UC* at 10.

[41] *Regents Policy 2103*.

the ten campuses, space permitting, and is also one of the criteria that individual campuses must consider in evaluating each application.

3. *Comprehensive and Holistic Review*. In addition to eliminating race-conscious criteria from campus admissions processes, the Board of Regents and the faculty have revised the admissions criteria substantially in the years since Proposition 209 was implemented. In 2001, the Board of Regents abandoned a rigid requirement that more than half of the class must be admitted solely on the basis of meeting a narrow range of academic criteria and directed that the campuses should instead institute a "comprehensive review" process.[42] Under comprehensive review, the campuses evaluate applicants "using multiple measures of achievement and promise while considering the context in which each student has demonstrated academic accomplishment."[43]

The comprehensive-review process was intended to allow eligible applicants to be considered for campus admission in light of a broader set of criteria, including information about each individual student's educational and personal circumstances.[44] These

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[42] The Regents of the University of California, *Regents Policy 2104: Policy on Comprehensive Review in Undergraduate Admissions* (Nov. 15, 2001), http://regents.universityofcalifornia.edu/governance/policies/2104.html.

[43] *Ibid.*

[44] *See generally Guidelines for Implementation of University Policy on Undergraduate Admissions*, at 2 (last updated July 20, 2012) ("[M]erit should be assessed in terms of the full range of an applicant's academic and personal achievements and likely contribution to the campus community, viewed in the context of

criteria include not only a student's GPA and standardized test scores, but also her academic accomplishments viewed in the context of her life experience, neighborhood characteristics, qualification for the ELC program, the quality of the student's academic performance relative to the opportunities available in her high school, any recent and marked improvement in academic performance, the nature of the courses taken by the student, outstanding performance in particular areas or fields, and special talents or skills.[45] To implement this policy, the University has created sophisticated tools such as "read sheets," which display an applicant's quantitative data (but not any information about the applicant's race or ethnicity) and compare them with data for other applicants from throughout the State and from the same high school.

In 2011, the Board of Regents extended the concept of comprehensive review by encouraging campuses to use a single holistic score in evaluating applicants.[46] This approach eliminates the use of

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the opportunities and challenges that the applicant has faced."), http://www.ucop.edu/student-affairs/_files/GUIDELINES_FOR_IMPLEMENTATION_OF_UNIVERSITY_POLICY_on_UG_ADM_Revised_July2012.pdf; *ibid.* ("Campus policies should reflect continued commitment to the goal of enrolling classes that exhibit academic excellence as well as diversity of talents and abilities, personal experience, and backgrounds.").

[45] University of California, *Comprehensive Review*, http://admission.universityofcalifornia.edu/counselors/freshman/comprehensive-review/.

[46] The Regents of the University of California, *Regents Policy 2108: Resolution Regarding Individualized Review and Holistic Evaluation in Undergraduate Admissions* (Jan. 20, 2011),

fixed weights for specific criteria and allows reviewers to exercise more judgment in evaluating an applicant's achievements and potential for academic success. Individual applications are read and scored by multiple independent readers, and those with significant score disparities receive further attention to ensure a fair result.[47]

4. *Use of Standardized Tests*. The University also has sought to reduce its reliance on standardized tests in admissions, a policy shift based in part on evidence that scores on aptitude tests were highly influenced by family education and income levels.[48] Indeed, out of concern that requiring numerous standardized tests beyond the SAT or ACT might discourage students from educationally disadvantaged families from applying, the University eventually dropped its requirement for SAT-II subject tests altogether.[49]

5. *Results of UC's Race-Neutral Initiatives*. Notwithstanding these robust and well funded

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http://regents.universityofcalifornia.edu/governance/policies/2108.html.

[47] *See generally* UC Board of Admissions and Relations with Schools, Systemwide Academic Senate, *Comprehensive Review in Freshman Admissions at the University of California 2003-2009*, at 27-29 (May 2010) ("*BOARS Comprehensive Review Report*"), http://senate.universityofcalifornia.edu/reports/HP_MGYreBOARS_CR_rpt.pdf.

[48] *See* BOARS, *Admissions Tests and UC Principles for Admissions Testing*, at 3-4, 10-11 & n.6, 12, 18 (Dec. 2009), http://senate.universityofcalifornia.edu/committees/boars/boars.testingrpt.toRegents_000.pdf.

[49] *See* University of California, Freshman, SAT Subject Tests, http://admission.universityofcalifornia.edu/freshman/requirements/examination-requirement/SAT-subject-tests/.

initiatives, the University has struggled to achieve sufficient levels of diversity in its student populations, even as it has expanded substantially and added thousands of new undergraduate seats.

To be sure, the University's race-neutral initiatives have produced some benefits. The expanded outreach efforts, for example, have helped to drive up the University's enrollment of low-income students and students who will be the first in their families to graduate from college.[50] Students of all ethnicities have taken advantage of these initiatives. This means, however, that they are necessarily less effective at changing the racial and ethnic composition of the University's student body than policies that target only underrepresented minorities.[51]

The Eligibility in the Local Context program has succeeded in increasing applications from students at

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[50] The primary measure of the proportion of "low-income" students is the percentage of undergraduate recipients of federal Pell Grants. In 2010-11, 39 percent of UC undergraduates qualified to receive Pell Grants. That is twice as high as the proportion of Pell Grant-recipients at UC's peer public institutions, and *three or four times* the rate at Ivy League colleges such as Yale (13 percent) and Harvard (10 percent). University of California, *2012 Accountability Report*, at 28, http://accountability.universityofcalifornia.edu/documents/accountabilityreport12.pdf; University of California, *2012 Accountability Report, Data Glossary and Technical Appendix*, Table 3.5.1, http://accountability.universityofcalifornia.edu/documents/accountabilityreport12_glossary_technical.pdf. The percentage of enrolled students for whom neither parent is a college graduate increased from 36 percent in 1999-2000 to 42 percent in 2007-08. *See id.*, Table 2.6.1.

[51] *Undergraduate Access to UC* at 23-24.

California high schools that have traditionally sent only a small number of students to the University. But, as a result of the racial and ethnic make-up of California's high schools, this shift has not substantially increased the diversity of the pool of students who are admitted to the University.[52] The ELC program also does not offer a solution for improving diversity at campuses such as UC Berkeley and UCLA because, while it guarantees admission to the University, it does not guarantee admission to any individual campus. For these highly selective campuses, students from underprivileged schools who qualify for ELC still must compete with tens of thousands of other highly qualified applicants.

Despite the changes to the admissions criteria and the manner of reviewing applications, admission and enrollment data in the years since approval of Proposition 209 reflect a persistent inability to meet the University's diversity goals through race-neutral means. At the University level, the percentages of African Americans and American Indians in the enrolled pool of California residents in 2012 (4.3 percent and 0.6 percent, respectively) remained lower than the corresponding percentages in 1995.[53] A faculty committee recently found that admission rates for African Americans remain "far below" those for the racial groups with the highest admit rates on each campus and concluded that "[t]he

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[52] *See* Patricia Gandara, *A Case Study in the Loss of Affirmative Action*, at 13-14 (Aug. 2012), http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/california-a-case-study-in-the-loss-of-affirmative-action.

[53] *Application, Admissions, and Enrollment* at 1.

Comprehensive Review process alone is not sufficient to overcome the disadvantages that African Americans face in their educational opportunity."[54]

For Latinos, the percentage of the admitted pool of California residents systemwide increased during this period (from 15.8 to 27.1 percent), as did the percentage of the enrolled pool (from 15.6 to 26.5 percent).[55] But these bare figures must be considered in light of the explosive growth in California's Latino student population during the same period: from 1995 to 2012, the percentage of public high-school graduates who were Latino jumped from 30.0 to 46.2 percent.[56] In other words, the growth in the number of Latino students, while substantial, is still far lower than one would expect based on the number of Latino high-school graduates in California.

The failure of these race-neutral initiatives to accomplish the University's diversity goals is most apparent at the University's highly selective campuses. For example, UC Berkeley has experienced dramatic declines in the percentages of its enrolled class that comprise African Americans and American Indians. The freshman class that entered Berkeley in 1995 included 202 African Americans (6.7 percent) and 56 American Indians (1.8 percent). The freshmen class that entered the University in the most recent academic year includes

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[54] *BOARS Comprehensive Review Report* at 25.

[55] *Application, Admissions, and Enrollment* at 1.

[56] *High School Graduates Data Set*; California Postsecondary Education Commission, *Ethnicity Snapshots Table, High School Graduates* ("*Ethnicity Snapshots Table*"), http://www.cpec.ca.gov/StudentData/EthSnapshotTable.asp?Eth=4&Rpt=AtoG_HS.

just 129 African Americans (4.2 percent) and 25 American Indians (0.8 percent). Notwithstanding that the percentage of Latino high-school graduates increased by more than half between 1995 and 2012, their percentage of the admitted pool at UC Berkeley actually declined slightly in this period, and their percentage of the enrolled class did not reach even 1995 levels until 2012.[57]

Similarly, at UCLA, the percentage of the admitted pool that is African American dropped from 6.7 percent in 1995 to 3.7 percent in 2012, while the proportion of African Americans in the enrolled freshman class dropped from 7.4 to 4.2 percent. American Indians saw their percentage of the admitted pool fall from 1.1 to 0.7 percent and their percentage of the enrolled freshman class decline from 1.2 to 0.5 percent. The results for Latino students appear better at first glance: the percentage of Latino students in the admitted pool inched up from 20.1 percent in 1995 to 20.6 percent in 2012; and their percentage of the enrolled freshman class increased from 22.4 to 24.9 percent.[58] But these numbers hardly signify improvements, given that during this period the proportion of high-school graduates who were Latino rose from 30.0 to 46.2 percent.

Petitioner nonetheless mistakenly portrays the University's race-neutral effort to increase diversity as an unqualified success. *See* Pet. Br. 31. He asserts,

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[57] *Application, Admissions, and Enrollment* at 2. All data are for California resident freshmen only.

[58] *Id.* at 5. Again, these data are for California resident freshmen only.

for example, that "[b]y 2002, African-American enrollment at [the University of California] returned to pre-Prop 209 levels, and from 2007 to 2010 averaged 40% higher." *Ibid.* This is merely a parlor trick. The *absolute number* of African-American students enrolled at UC may have returned to pre-Proposition 209 levels by 2002, but in that same period the University added 8,000 new seats to its freshman class (including one new campus). So the *percentage* of African Americans in the total enrolled pool actually declined by more than a quarter, from 4.3 percent in 1995 to 3.1 percent in 2002. And, contrary to Petitioner's claim, this percentage has remained below pre-Proposition 209 levels.[59]

Petitioner similarly touts the "doubl[ing]" of the number of African-American enrollees at UC Irvine since Proposition 209. Pet. Br. 34. He neglects to mention, however, either (i) that UC Irvine increased the size of its freshman class by more than 1,500 students in this period or (ii) that the proportion of African Americans in the enrolled class has never exceeded 3.5 percent in recent years—at a time when African Americans account for nearly 7 percent of California high-school graduates.[60]

Petitioner also highlights the overall increase in Latino enrollment at UC, *see* Pet. Br. 31, but does not mention that the numbers failed to keep pace with the skyrocketing growth of the Latino population in California.

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[59] *Application, Admissions, and Enrollment* at 1.

[60] *Id.* at 4 (data are for California resident freshmen); *High School Graduates Data Set*.

Finally, Petitioner asserts that Proposition 209 had a "warming effect" on the propensity of African-American and Latino students "to accept an admissions offer from and enroll at Berkeley." Pet. Br. 35. But this argument is belied by the hard numbers. In 1997, for the last freshman class that entered UC Berkeley before Proposition 209 went into effect, 46.2 percent of the African-American students who were offered admission enrolled.[61] In the most recent four years for which data are available, that proportion has ranged between 37.8 percent and 42.7 percent.[62] In short, the temperature does not appear to have increased at all—and certainly not enough to bring the number of African-American students at UC Berkeley anywhere near pre-Proposition 209 levels. Similarly, the percentage of Latino students who accepted their offers of admission to UC Berkeley was 37.6 in 1997 (and 40.1 percent the year before); in the most recent four years, the percentage bounced between 36.6 and 38.3.[63] Several studies show that the most accomplished African-American and Latino students in UC's pool of admitted students disproportionately choose to enroll at elite private universities with affirmative action, including Stanford, the University of Southern California, and Ivy League institutions, and the limited data available suggest this challenge worsened for UC after Proposition 209.[64]

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[61] *Application, Admissions, and Enrollment* at 2. Data are for California resident freshmen only.

[62] *Ibid.*

[63] *Ibid.*

[64] Saul Geiser, et al., *"No Show" Study: College Destinations of University of California Applicants and Admits Who Did Not*

6. *UC's Graduate Programs*. This brief focuses primarily on undergraduate admissions and enrollment, as does Petitioner's, but it is important to note that the University's graduate and professional schools have also struggled to enroll diverse classes in the wake of Proposition 209.

UC's business schools, which play a crucial role in educating California's economic leaders, are consistently unable to enroll racially and ethnically diverse classes. Systemwide, the proportion of underrepresented minorities enrolled in the University's business schools in the fall of 2012 (5.3 percent)[65] was less than half of the national average for comparable institutions (12.8 percent)[66]—even though most of those comparable institutions are located in states with far less diverse populations. The figures were particularly bleak for African Americans, who represented just 1.3 percent of enrolled business students in 2012-13.[67] Indeed,

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Enroll, 1997-2002, 19 Educ. Pol'y 396 (2005); William Kidder, *Misshaping the River*, 39 J. of College & Univ. L. 53, 75-83 (2013) ("*Misshaping the River*"). *See also* Susan Wilbur, *Investigating the College Destinations of University of California Freshman Admits*, in Equal Opportunity in Higher Education: The Past and Future of California's Proposition 209, at 63-66, 72, 76 (Eric Grodsky & Michal Kurlaender eds., 2010) ("Equal Opportunity in Higher Education"); *BOARS Comprehensive Review Report* at 19, 82-83.

[65] Internal UC Data.

[66] University of California, *2011 Accountability Report*, at 118 ("*2011 Accountability Report*"), http://accountability.universityofcalifornia.edu/documents/accountabilityreport11.pdf. Enrollment figures from fall of 2012 are from internal UC data sources.

[67] Internal UC data.

during five of the last seven academic years, one or more of UC's six business schools enrolled no African-American students at all.[68]

The University's six medical schools, which are part of the largest health training program in the nation, face similar challenges. The proportion of underrepresented minorities at these schools is a fraction of their percentage of the state population. In 2012-13, for example, 5.2 percent of the University's medical students were African Americans, 0.5 percent were American Indians, and 12.0 percent were Latino.[69] The percentages at the University's four law schools were only slightly higher.[70] This is in a state where African Americans make up 6.6 percent of the population, American Indians 1.7 percent, and Latinos 38.2 percent.[71] In certain years during the ten years ending in 2011, the medical schools at UC Irvine, UCLA, and UC San Diego and the law school at UC Irvine have not had a single African-American student.[72]

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[68] *Ibid.*

[69] *Ibid.*

[70] Internal UC data sources show that in the 2012-2013 academic year, the aggregate enrollment percentages at UC law schools were 4.0 percent for African Americans, 1.4 percent for American Indians, and 10.3 percent for Latinos.

[71] U.S. Census Bureau, *State & County QuickFacts, California*, http://quickfacts.census.gov/qfd/states/06000.html.

[72] *2011 Accountability Report, Data Tables*, at 108-09, http://accountability.universityofcalifornia.edu/documents/accountabilityreport11_tables.pdf.

II. A Total Prohibition of the Use of Race in Admissions and Resulting Declines in Campus Diversity Have Especially Significant Effects on Underrepresented Minorities.

It is the position of *Amici* that a diverse student body advances the educational mission of a university and confers broad benefits on the society at large. *See* Brief *Amicus Curiae* of the President and Chancellors of the University of California in Support of Respondents, *Fisher v. Univ. of Texas at Austin*, No. 11-345, at 5-13. Indeed, abundant research confirms that diversity in higher education benefits all students.[73] At the same time, however, UC's experience since Proposition 209 indicates that underrepresented racial minorities realize especially significant benefits from the use of race in admissions and the resulting increases in campus diversity and have suffered the most from post-Proposition 209 losses in campus diversity. Indeed, one of Petitioner's central factual assertions—that Proposition 209 caused academic outcomes for African-American and Latino students to improve at UC—is belied by UC's actual data. Further, research shows that not just students but also communities of underrepresented racial minorities realize particularly significant benefits from the use of race in university admissions and resulting diversity.

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[73] *See, e.g.*, Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. Soc. Issues 595 (2005) (reviewing extensive prior research and reporting findings of new longitudinal study).

A. Declines in Campus Diversity Have Especially Affected the Experiences of Underrepresented-Minority Students.

Every two years, UC administers a broad survey of its undergraduate population. The survey asks students, among other things, whether they agree with the statement that "[s]tudents of my race/ethnicity are respected on this campus."[74] The responses to this question vary widely by campus. At the University's most diverse campuses, UC Riverside and UC Merced,[75] African-American and Latino students report feeling respected at levels that are substantially above the University-wide average.[76] By contrast, at UC San Diego and UC Berkeley, where the percentages of African-American

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[74] University of California, *2013 Accountability Report*, Indicator 8.3.1 ("*2013 Accountability Report*"), http://accountability.universityofcalifornia.edu/index.php?in=8.3.1&source=uw.

[75] At UC Riverside, African Americans are 7.4 percent and Latinos 33.2 percent of the undergraduate population; at UC Merced, the percentages are 8.3 and 36.5, respectively. Internal UC Data.

[76] Only 13.0 percent of African Americans at UC Riverside felt that members of their race were not respected, compared with an average of 33.6 percent for African Americans systemwide. And just 4.8 percent of Latinos perceived a lack of respect on the Riverside campus, whereas the systemwide figure was 14.8 percent. *2013 Accountability Report*, Indicator 8.3.1. At UC Merced, the percentages were just 9.5 for African Americans and 2.9 for Latinos. Internal UC Data.

and Latino students are much lower,[77] substantially higher percentages of these students report feeling that students of their race are not respected.[78] These survey data suggest that underrepresented minorities are less likely to have a positive view of their campus climate and to feel that they are respected when they represent a disproportionately small sliver of the student population.[79]

At the same time as many underrepresented minorities are voicing concerns about their campus climates, data show that underrepresented minorities "are more likely to spurn an offer from UC than they were before Prop 209, and the difference compared to whites/Asian Americans has gradually widened under Prop 209."[80] This suggests that there may be a

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[77] The student body at UC San Diego is 1.9 percent African American and 15.6 percent Latino; at UC Berkeley, the percentages are 3.5 and 12.5, respectively. Internal UC Data.

[78] At UC San Diego, 51.5 percent of African Americans and 19.1 percent of Latinos felt that they were not respected. At UC Berkeley, the percentages were 47.5 and 21.8. *2013 Accountability Report*, Indicator 8.3.1. *See generally Misshaping the River* at 56-69 (analyzing data and comparing with evidence of more positive racial climates in institutions with greater diversity).

[79] In contrast to the impact on underrepresented-minority students, the survey shows that the percentage of white students who feel disrespected at Riverside, Merced, San Diego, and Berkeley is 8.0 percent, 5.9 percent, 9.1 percent, and 6.2 percent, respectively, and does not appear to relate significantly to the diversity of the campus. The equivalent percentages for Asian-American students on these campuses are 5.7 percent, 4.1 percent, 9.0 percent, and 7.1 percent, respectively. *2013 Accountability Report*, Indicator 8.3.1 (statistics for UC Merced are from internal UC data sources).

[80] *Misshaping the River* at 56; *see id.* at 71-83.

compounding effect at work, with declines in diversity due to Proposition 209 making certain campuses less attractive to underrepresented minorities, who then decide to study elsewhere, even further diminishing diversity on those campuses.

B. The University's Data Belie Petitioner's Claims That Proposition 209 Caused Academic Outcomes for African-American and Latino Students to Improve.

Petitioner relies extensively on an unpublished draft paper—which was not peer-reviewed—contending that "Prop 209 has had an overwhelmingly positive effect on the education blacks and Hispanics receive at the University of California."[81] Even if it were otherwise appropriate for the Court to consider this inchoate analysis, the paper is a textbook example of the dangers of mistaking correlation for causation. *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 173 (2003) ("Correlation is not causation.").

Relying on this draft paper, Petitioner highlights increases in four-and six-year graduation rates for African-American and Latino students by comparing the period before Proposition 209 to the period after it. *See* Pet. Br. 31. But that is only half of the story. The very data set on which Petitioner relies makes

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[81] Richard Sander, *An Analysis of the Effects of Proposition 209 Upon the University of California*, at 1 ("*Effects of Proposition 209*"), http://www.seaphe.org/pdf/analysisoftheeffectsofproposition209.pdf; *see* Pet. Br. 31.

clear that graduation rates have steadily increased for *all* UC students over the past two decades, a trend that began long before Proposition 209 was on the books,[82] and one that has been fueled by the increasing prestige and selectivity of the UC system. The data also show that underrepresented minorities experienced greater gains in graduation rates in the period *before* Proposition 209 than in the period after it.[83]

For example, the four-year graduation rate for African Americans showed a 75 percent increase between 1992 and 1997 (before Proposition 209) and only a 40 percent increase between 1997 and 2005 (after Proposition 209).[84] The same holds true for Latinos, whose four-year graduation rate grew by 55 percent between 1992 and 1997, but just 41 percent between 1997 and 2005.[85] Moreover, the data on which Petitioner relies establish that graduation rates for African-American and Latino students continue to lag far behind those for all other students in the years after Proposition 209. In 2005, for example, the four-year graduation rate was 42.1

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[82] *Effects of Proposition 209* at 4-6.

[83] Tongshan Chang et al., *A Portrait of Underrepresented Minorities at the University of California, 1994-2008*, in Equal Opportunity in Higher Education, at 83, 99 (reviewing UC graduation rates 1994 to 2003 and concluding that "Proposition 209 added little to the momentum URM students already had going back to at least 1995. About two-thirds of the graduation rate improvement occurred before students were subject to the Proposition 209 admissions requirement.").

[84] *Effects of Proposition 209* at 4. The data in this paragraph correspond to the entering cohort for the referenced year.

[85] *Ibid.*

percent for African Americans, 47.4 percent for Latinos, and 62.8 percent for all other students.[86] The same trends are reflected in the five-year and six-year graduation rates.[87]

Similarly, Petitioner reports that African-American and Latino GPAs "increased post-Prop 209, even while minority students enrolled in more difficult science and engineering classes." Pet. Br. 31. Petitioner identifies no data that support the assertion regarding science and engineering classes. And the data regarding GPAs show a pattern similar to the graduation data discussed above: the GPAs of African-American and Latino students have inched up during a period when the average GPA has increased for *all* students; average GPAs for African-American and Latino students still do not, however, keep pace with those of white and Asian-American students.[88]

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[86] *Ibid.*

[87] *See id.* at 5 (showing that the five-year graduation rate increased by 30.0 percent for African Americans and 15.7 percent for Latinos between 1992 and 1997, but only increased by 10.8 percent for African Americans and 7.6 percent for Latinos between 1997 and 2004); *id.* at 6 (showing that the six-year graduation rate for African Americans increased by 15.4 percent for African Americans between 1992 and 1997, but only increased by 5.8 percent for African Americans between 1997 and 2003; for Latinos, the rate increased by 7.3 percent in the former period and actually decreased slightly in the latter period); *id.* at 5-6 (showing that five- and six-year graduation rates for African Americans and Latinos lag the corresponding rates for "all other" students by double-digit percentages).

[88] For example, the average freshman GPA for white students across the University ranged from 2.96 to 2.99 in the years between 1992 and 1995. In the period between 2008 and 2011,

In short, Petitioner's assertions about academic outcomes for underrepresented minority students in the years following Proposition 209 simply are not supported by the numbers.

C. Communities Realize Particularly Significant Benefits from Diversity in Higher Education.

The major benefits for underrepresented minorities of diversity in higher education extend far beyond the campus. Diversity on campus also confers benefits on communities that comprise primarily underrepresented minorities. These communities often suffer from an acute shortage of important professional services. Increasing the number of underrepresented minorities in graduate and professional schools promises to help address such shortages—and even to improve the services that these communities receive from professionals who are not themselves minorities. This is consistent with the University of California's mission of providing public service and "creat[ing] an educated workforce that keeps the California economy competitive."[89]

The field of health services offers a prime illustration of the tangible benefits of increased diversity in higher education for underserved

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this figure ranged from 3.17 to 3.18. By contrast, for African Americans, the range was 2.45 to 2.56 in the former period, and 2.68 to 2.76 in the latter period; for Latinos, average GPAs ranged from 2.58 to 2.61 in the former period, and were stuck at 2.71 in the latter period. Internal UC Data.

[89] University of California, Mission Statement, http://www.universityofcalifornia.edu/aboutuc/mission.html.

communities. Communities with high proportions of African-American or Latino residents are "four times as likely as others to have a shortage of physicians, regardless of community income."[90] Minorities in these communities suffer medical outcomes that are significantly worse, on average, than those experienced by white patients.[91]

Improving diversity in medical education is a proven method of ameliorating the shortage of physicians in minority communities. Physicians who are underrepresented minorities are several times more likely to serve patients from their own racial group than are their white counterparts, and they are nearly twice as likely to practice within a health-manpower shortage area.[92] Similarly, research scientists who are underrepresented minorities are more likely than white scientists to devote their

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[90] Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 New Eng. J. Med. 1305, 1305 (1996) ("Komaromy").

[91] *See, e.g.*, Association of American Medical Colleges, *Addressing Racial Disparities in Health Care* (2009) (discussing racial gulf in medical care), https://members.aamc.org/eweb/upload/Addressing%20Racial%20Disparaties.pdf; Institute of Medicine, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* (2002) (documenting disparities), http://www.iom.edu/Reports/2002/Unequal-Treatment-Confronting-Racial-and-Ethnic-Disparities-in-Health-Care.aspx.

[92] *See* Stephen Keith et al., *Effects of Affirmative Action in Medical Schools*, 313 New Eng. J. Med. 1519 (1985); *see also* Komaromy at 1305 (concluding that "[b]lack physicians practiced in areas where the percentage of black residents was nearly five times as high, on average, as in areas where other physicians practiced").

careers to studying diseases that disproportionately affect minority communities.[93]

Greater diversity in medical school classes even tends to improve the quality of care received by underrepresented-minority patients from *white* physicians. White medical students report that they are prepared to care for individuals from minority racial groups at far higher percentages if they attend a school where a large percentage of their fellow students are underrepresented minorities.[94] Similarly, medical students of all races report that having a diverse student body at their medical school increases their concerns about competently treating a diverse population.[95]

Medical services are but one example. Underrepresented minorities are more likely to be low-income than whites[96] and thus are more likely to

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[93] *See* Association of American Medical Colleges, *Diversity in Medical Education*, at 11 (2008), https://members.aamc.org/eweb/upload/Diversity%20in%20Medical%20Education%20Facts%20and%20Fig%202008.pdf.

[94] Somnath Saha et al., *Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in U.S. Medical Schools*, 300 JAMA 1135, 1139 (2008).

[95] *See* Dean Whitla et al., *Educational Benefits of Diversity in Medical Schools*, 78 Academic Medicine 460, 464-65 (2003).

[96] *See* U.S. Census Bureau, Statistical Abstract of the U.S., Table 697, *Money Income of Families—Median Income by Race and Hispanic Origin in Current and Constant (2009) Dollars*: 1990 to 2009 (reporting median family income of $62,545 for white families, $75,027 for Asian and Pacific Islander families, $38,409 for black families, and $39,730 for Hispanic families), http://www.census.gov/compendia/statab/2012/tables/12s0697.pdf.

have limited access to legal services.[97] Upon graduating from law school, underrepresented minorities are more likely to take jobs in government or other public-service or public-interest fields,[98] jobs which are often associated with serving low-income clients.

Similarly, unemployment is higher in minority communities than in the country at large,[99] and underrepresented minorities "are substantially less likely to own a business than are white and Asian Americans."[100] One factor that contributes to this phenomenon is racial disparities in education.[101] To the extent that improved access to a high-quality college education fosters successful entrepreneurship by underrepresented minorities, it can confer substantial economic benefits on their communities. To take just one example, a survey of African-

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[97] *See, e.g.*, Michelle Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 Rutgers L.J. 1011, 1016 (2009) (noting that there are more than twelve times as many lawyers delivering civil legal assistance to the general population than to low-income persons).

[98] *See* Richard Lempert et al., *Michigan's Minority Graduates in Practice*, 25 Law & Soc. Inquiry 395, 401 (2000).

[99] U.S. Census Bureau, Statistical Abstract of the U.S., Table 627, *Unemployed and Unemployment Rates by Educational Attainment, Sex, Race, and Hispanic Origin*: 2000 to 2010 (reporting 2010 unemployment rates of 7.5 percent for whites, 6.8 percent for Asians, 13.4 percent for blacks, and 10.8 percent for Hispanics), http://www.census.gov/compendia/statab/2012/tables/12s0627.pdf.

[100] Robert Fairlie et al., Race and Entrepreneurial Success 9 (2008).

[101] *Id.* at 3.

American-owned businesses in Atlanta projected that 82 percent of the jobs created by these businesses went to African Americans from that community.[102]

CONCLUSION

The judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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[102] Thomas Boston, Affirmative Action and Black Entrepreneurship 49 (1999).

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AMICUS CURIAE BRIEF

No. 12-682

In The Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT IN SUPPORT OF RESPONDENT COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN)

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INTEREST OF AMICUS CURIAE[1]

San Francisco Bay Area Rapid Transit District (BART) is a rapid transit district comprised of the Counties of San Francisco, Contra Costa and Alameda, created and existing under California Public Utilities Code sections 28500 *et seq.* BART provides rapid public transit to the millions of people who live and work in the Bay Area, as well as to the many hundreds of thousands of visitors from all over the world who come each year for business and pleasure. Because of its relatively large capital budget, BART is in a unique position to evaluate the effects of prohibitions on race- or gender-conscious public contracting policies such as Michigan's Proposal 2, at issue in this case, and the nearly-identical California enactment known as Prop 209, which governs BART's public-contracting responsibilities. Because BART's experience with Prop 209 has demonstrated that the goals of encouraging participation of minority and gender groups in public contracting commensurate with those groups' representation in the population are best advanced by the limited types of race- and gender-conscious policies permitted under this Court's jurisprudence, BART requests leave to file this brief as

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[1] No counsel for any party authored this brief. No person or entity, other than amicus curiae San Francisco Bay Area Rapid Transit District, made a monetary contribution to the preparation or submission of this brief.

All parties have submitted to the Clerk blanket consents to the filing of all amicus briefs.

amicus in support of respondent Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN).

BART's core mission is to provide safe, reliable and affordable public transit to reduce congestion on its region's roads and highways and to improve the quality of the air in the San Francisco Bay Area. BART strives to operate, improve and expand its service with that core mission in mind. In pursuing its core mission, BART provides employment and economic opportunities to local businesses in the areas of construction, engineering, marketing, telecommunication and many others.

For example, BART's efforts to extend service to San Jose and the Livermore valley, and its program to retrofit its system to better withstand earthquakes, have pumped more than $360 million into the local economy in each of the last two years. BART's contracting for such projects has created opportunities for businesses owned by minorities or other traditionally disadvantaged groups to participate in this economic growth.

While federal law permits government entities such as BART to consider a contractor's ownership by disadvantaged and minority persons in awarding contracts, BART is foreclosed from doing so in state-funded projects by an amendment to California's constitution commonly referred to as "Prop 209." Prop 209 is quite similar to Michigan's Proposal 2

which is the state enactment under review in this case. In fact, as the Sixth Circuit noted in its opinion below, Ward Connerly, a former University of California regent, was instrumental in the passage of both Prop 209 and Michigan's Proposal 2. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 701 F.3d 466, 471 (6th Cir. 2012). Like Proposal 2, Prop 209 generally prohibits state and local governments from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin." Cal. Const., Art. I, § 31.

Prop 209 was enacted by the people of California based on a noble principle that few would question: that all persons are created equal, and that there should be no discrimination based on race or other immutable characteristics. But as this Court has recognized, the effects of past discrimination cannot be removed merely through legislative or constitutional pronouncements of equality and the passage of laws prohibiting discrimination. Those affected by discrimination must be given opportunities to catch up and to redress the historical disadvantages they faced, the effects of which continue to affect them today. That is why this Court has found that, in limited circumstances, race-conscious public policies are constitutionally permissible.[2] *See generally Grutter v. Bollinger*, 539 U.S. 306 (2003).

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[2] Throughout this brief, we use the term "race-conscious" or "gender-conscious" to describe government policies that grant

(Continued on following page)

BART is proud of its role as the premier public transportation system in the San Francisco Bay Area and of its support of opportunities for the diverse population it serves. Prop 209 limits BART's ability fully to support and promote the economic and social interests of those in its community, just as Michigan's Proposal 2 limits universities in that state in their efforts to promote higher education for all deserving students. BART submits this brief as amicus in support of respondents because this Court's decision to uphold the ruling below will speak loudly against the continuing validity of Prop 209.

There is, in addition, a very practical reason for BART's interest in this case. Because of Prop 209, BART is forbidden from using *any* race- or gender-based criteria to award contracts financed solely by state funds. Under federal contracting rules, however, BART is generally *required* to show that a certain percentage of the work has been awarded (or at least made available) to contractors owned by women or minorities, groups who have traditionally not been well-represented in public contracts. Thus, BART has one set of contract rules for projects funded by the state, but must use a different, incompatible set of

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certain limited types of preferences to persons in receiving government benefits based on their race, ethnicity, gender or color. Race- or gender-conscious policies are those which pass constitutional muster under this Court's jurisprudence, particularly *Grutter*.

rules for federally-funded contracts.[3] This not only creates administrative difficulties, but, more important, ensures that BART and other public entities in California adhere to two *different* standards for anti-discrimination. It is anomalous, to say the least, that the constitutional protection guarantee of equal protection should mean one thing on state projects and another on federal projects *in the same jurisdiction*.

BART believes that the limited race- and gender-conscious practices permitted under *Grutter* best serve the ends of equal protection, and that it is this Court's responsibility to resolve the conflict between California (and now Michigan) law and that of the United States in favor of the federal rule.

SUMMARY OF ARGUMENT

The Sixth and Ninth Circuits have reached differing conclusions regarding the constitutional permissibility of state prohibitions on race- or gender-conscious public policies, including those governing the award of public contracts and those governing university admissions. The Sixth Circuit has found that Michigan's Proposal 2 is unconstitutional based upon the "political process" aspect of equal protection.

[3] Prop 209 has an exception allowing race-conscious policies where they "must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State." Cal. Const., Art. I, § 31(e).

The Ninth Circuit has found that California's Prop 209, nearly identical to Proposal 2, does not violate the Equal Protection Clause.

BART contends that the Ninth Circuit's analysis depends crucially upon the assumption that race- or gender-conscious policies are not properly described as "antidiscrimination" laws. Only by making such an assumption could the Ninth Circuit assert that Prop 209 does "not isolate race or gender antidiscrimination law from any specific area over which the state has delegated authority to a local entity." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997). But that assertion is plainly false – the limited types of race- and gender-conscious policies permitted under this Court's jurisprudence *are* antidiscrimination laws. And, once such laws are properly characterized, it is obvious that state action that forbids proponents of these types of policies, and *only* these types of policies, from enacting their preferences by any method but a statewide referendum, while those wanting to enact *other* types of preferences (such as those for the disabled or veterans) are not so limited, constitutes a denial of equal protection under the "political process" doctrine.

BART's experience with Prop 209 has demonstrated as well that, laudable as the goals of that enactment (and Proposal 2) may be, they have had the practical effect of perpetuating the race and gender imbalances that have plagued public contracting (and university admissions) for many years. It is ignoring reality to contend, as the proponents of Prop

209 and Proposal 2 have contended, that prohibitions on race- or gender-conscious public policies can better advance the goals of nondiscrimination.

ARGUMENT

I. The Sixth Circuit's Decision Correctly Found Michigan's Proposal 2 Unconstitutional Based Upon The "Political Process" Aspect Of Equal Protection.

The case before the Sixth Circuit involved admissions policies for Michigan's public universities, but the principles of that decision apply equally in the areas of government contracting opportunities provided by public entities such as BART. The Sixth Circuit held that Michigan's Proposal 2 violated the Equal Protection Clause because it had a racial focus and "reallocate[ed] political power or reorder[ed] the decisionmaking process in a way that place[d] special burdens on a minority group's ability to achieve its goals through that process." *Coalition to Defend Affirmative Action*, 701 F.3d at 477. The court concluded that the so-called "political process" aspect of equal protection – derived from this Court's holdings in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) and *Hunter v. Erickson*, 393 U.S. 385 (1969) – rendered Proposal 2 unconstitutional. 701 F.3d at 489.

The Sixth Circuit concluded Proposal 2's prohibition on race- or gender-conscious admissions practices

had the practical effect of making it more difficult for persons advocating for such admissions policies to enact their preferences compared to persons who sought special or preferential treatment for any other discrete group, such as veterans, the disabled or (in the university admissions context) alumni status. As Judge Cole, author of the majority decision, put it, a student who wished to "have her family's alumni connections considered in her application to one of Michigan's esteemed public universities" had a variety of possible venues – ranging from lobbying the admissions committee or the school's governing board to initiating a statewide campaign – in which to express her political preferences. *Coalition to Defend Affirmative Action*, 701 F.3d at 470. Those advocating for constitutionally-permissible race-conscious admissions policies, on the other hand, could do so *only* by convincing a majority of the state's voters to repeal Proposal 2. *Id.*

By contrast, when Prop 209 was challenged in the federal courts, the Ninth Circuit rejected the notion that, by taking away the power of local government entities (including BART) to engage in the limited race-conscious preferences permitted under this Court's jurisprudence, the State of California had violated the political-process aspect of the Equal Protection Clause. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997). The Ninth Circuit founded this rejection upon its assertion that Prop 209 did "not isolate race or gender antidiscrimination

law from any specific area over which the state has delegated authority to a local entity." *Id.* at 707.[4]

BART contends that the Sixth Circuit's analysis of this issue is correct, and that the Ninth Circuit is mistaken in its assertion that prohibition of all race-conscious decisions by public entities "does not isolate antidiscrimination laws" from the normal political process.

The Ninth Circuit's analysis depends crucially upon drawing a distinction between race-conscious public policies and antidiscrimination laws more generally. As noted, the panel opinion asserts that when

> a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in a neutral-fashion race-related and gender-related matters. It does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity.

Id. at 707.

But the mere *assertion* that Prop 209 (or Proposal 2) does not bar certain types of antidiscrimination laws is insufficient to justify state action that makes

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[4] The California Supreme Court adopted the Ninth Circuit's treatment of the political-process issue in turning back a challenge to Prop 209 in 2010. *See Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal.4th 315, 331-32 (2010).

it more difficult to enact race- or gender-conscious policies. The implicit assumption that race-conscious school admissions practices or contracting guidelines cannot constitute "antidiscrimination" laws is plainly incorrect. For an obvious example, this Court has on numerous occasions recognized that "affirmative action" programs that are explicitly race-based may be an appropriate response in jurisdictions that have a history of *de jure* segregation. *E.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971). Such programs are explicitly race-conscious and undeniably "antidiscrimination laws." It is incorrect – or disingenuous – to assert that constitutionally-permissible race-conscious policies are not "antidiscrimination laws."

The type of race-conscious policies pursued by the Michigan university defendants/respondents in this case, as well as the race-conscious policies that BART pursues when it uses federal contracting guidelines, are likewise antidiscrimination laws. Such laws are intended to help remedy the discrimination that women and certain minorities have historically suffered. It is an indisputable fact that minority- and women-owned businesses receive far fewer public contracts than could be expected in the absence of discrimination. That is why this Court has recognized that, in limited circumstances, programs that encourage minority- and women-owned businesses to learn about and participate fairly in public contracts are constitutionally permissible. Such programs are meant to "assur[e] that public dollars, drawn from the tax

contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. Croson*, 488 U.S. 469, 492 (1989).

Because this Court has recognized that some programs which are narrowly tailored to address the imbalances created by historical discrimination – whether *de jure* or *de facto* – are permissible under the Constitution, it is pure sophistry to presume, as the Ninth Circuit did, that prohibitions on such race- or gender-conscious policies do not implicate the goals of antidiscrimination law.

Once it is shown that constitutionally-permissible race-conscious policies are intended to address discrimination – are, in fact, antidiscrimination laws or policies – the compelling force of the Sixth Circuit's decision in this case is obvious. What Proposal 2 did in Michigan (similar to Prop 209 in California) was to ensure that persons who wished to urge the state and/or its subordinate entities to allow constitutionally-permissible race-conscious policies could *only* accomplish their goal by persuading a statewide electorate to change the state constitution. Persons who wished to urge the state and subordinate entities to adopt admissions or contracting policies that might favor *other* groups – such as veterans or the disabled – could pursue their policy goals at a local level. Proposal 2 (and Prop 209) "removes the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body." *Seattle*, 458 U.S. at 468.

Moreover, the hollowness of the Ninth Circuit's analysis of Prop 209 also becomes obvious once the "antidiscrimination" purpose of race-conscious policies is admitted. Perhaps the most important point in the Ninth Circuit's holding is buried in a footnote in its opinion. There, the court asserted that there was no problem with state action in banning only *certain* types of preferences because the persons who wished to advocate for those preferences still had the option of advocating for *other* types of preferences. As the court put it, "[i]f the state ever prohibited women and minorities from seeking preferences on a basis available to everyone else, such as age, disability, or veteran status, the state would violate Proposition 209's prohibition against race or gender discrimination." *Coalition for Economic Equity v. Wilson*, 122 F.3d at 708 n. 17.

To call this point disingenuous is overly generous. No one has ever argued that Prop 209 (or Proposal 2) prohibited certain classes of persons from participating in the political process *completely*. Rather, the point is that these state constitutional amendments took an entire category of preferences – those based on gender or race – out of the hands of local electorates, while leaving other categories, such as those based on age or disability, in those hands. The Ninth Circuit nowhere faces up to the question *why* it is permissible to single out the categories based on race and gender from other categories that may be considered in admissions and public contracting.

In *Hunter* and *Seattle*, this Court properly recognized that no state may encourage invidious discrimination by placing obstacles to political participation by persons who wish to have the state or its local entities enact constitutionally permissible race- or gender-conscious policies. Proposal 2, like Prop 209, does precisely that. Each measure "deprives the proponents of affirmative action – and only the proponents of affirmative action – of the ordinary benefits of representative government." *Coalition for Economic Equity*, 122 F.3d at 712 (Schroeder, J., dissenting from denial of rehearing en banc).

II. Prop 209 Has Created "Dual Track" Contracting Policies In California; Experience Shows That Completely "Color-blind" Contracting Policies Fail To Create Adequate Opportunities For Minority-Owned Businesses.

The mischief created by Proposal 2 and Prop 209 go beyond the issue of whether a state may single out particular types of preferences in admissions or public contracting for different treatment in the political sphere. In the case of Prop 209, at least, experience has shown that prohibiting constitutionally-permissible race- or gender-conscious policies has resulted in "backsliding" among the groups those policies were intended to advance.

As noted, the existence of Prop 209 has created a "dual track" set of contracting policies for BART. On projects funded wholly or partly by federal funds,

BART follows a set of contracting rules that require general contractors to seek out and employ sub-contracting firms owned by traditionally-disadvantaged minorities and/or women (these sub-contractors are collectively known as DBEs – disadvantaged business enterprises) or demonstrate good faith efforts to do so. General contractors who cannot show either significant DBE participation ("significant" varying by the type of sub-contract involved), or unsuccessful attempts to secure DBE participation, may fail to meet the necessary qualifications to enable them to receive contracts from BART.

On projects funded wholly by the state, on the other hand, BART is prohibited by Prop 209 from using any race- or gender-based criteria in evaluating a bid. BART can only encourage general contractors to use DBE subcontractors in proportion to their availability in the market.

This two-track contracting process is, in a sense, a natural experiment in determining whether completely color- and gender-blind contracting policies can address or remedy the historical discrimination women and minorities have faced. The results have not been encouraging.

One way of determining whether DBEs have been able to participate in state-sponsored projects in a manner roughly equivalent to those in federally-sponsored projects is to compare the actual sub-contractors and their dollar participation in the two types of projects.

Thus, in BART's fiscal year 2013, BART awarded ten contracts totaling $15,523,410 in federally-funded contracts where race- and gender-conscious policies are required. In that same period, BART awarded eight contracts totaling $19,412,837 in state-sponsored projects, where Prop 209 bars such policies. The DBEs who participated in the federally-sponsored projects received 13% of the total money awarded. In state-sponsored projects, however, that same pool of DBEs received 4% of the total awards, less than ⅓ of the proportion received in federally-sponsored projects.

The disparity in DBE participation between state- and federally-sponsored projects cannot be attributed to a lack of qualifications among DBE sub-contractors. The qualifications of the DBE sub-contractors used in federally-funded projects had to be approved by BART when those entities were named as possible sub-contractors by the general contractors. There is no reason that same pool of sub-contractors could not receive roughly the same proportion of the sub-contracts in state-sponsored projects requiring similar, if not identical, work experience and performance.

In short, the disparity in numbers between DBEs participating in state and federal projects can only be attributed to the fact that general contractors in state-sponsored projects have no incentive to promote DBE sub-contractors and, as a result, simply rely upon the "old boy network." In other words, despite its lofty goals, Prop 209 has had the effect of reinforcing the entrenched barriers to participation in public

contracts that race- and gender-conscious policies were intended to remove.

Given that Prop 209 (and, presumably, Proposal 2) has not had the "enlightened" effect its proponents had hoped, the notion that barring race- or gender-conscious policies is an effective means of ensuring "nondiscrimination" in public policies is disingenuous, at best. Prop 209 has helped to ensure that those whose voices traditionally were not heard in public choices will remain unheard. Indeed, given that persons who wish to enact race- or gender-conscious policies – policies that are constitutionally permissible under this Court's jurisprudence – are *barred* from using the traditional modes of enacting such policies under both Prop 209 and Proposal 2, the equal protection analysis of the Sixth Circuit in this case appears to have a compelling force.

CONCLUSION

For the foregoing reasons, amicus curiae BART urges this Court to affirm the judgment of the Sixth Circuit.

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AMICUS CURIAE BRIEF

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE SAN FRANCISCO UNIFIED SCHOOL DISTRICT, LOS ANGELES UNIFIED SCHOOL DISTRICT, CITY AND COUNTY OF SAN FRANCISCO, CITY OF OAKLAND, CITY OF BERKELEY, AND COUNTY OF ALAMEDA IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

San Francisco Unified School District, Los Angeles Unified School District, City and County of San Francisco, City of Oakland, City of Berkeley, and County of Alameda (collectively "amici") are local government entities in California that have been subject to Proposition 209 – a close analogue of Michigan's Proposal 2 – since California voters enacted it in 1996. Like Proposal 2, Proposition 209 forbids preferential treatment on the basis of race or sex in public education, government contracting, and public employment. It has had a substantial impact on the amici, and in particular on the children living in the amici's communities and attending the amici's schools. Many of those children are African American or Latino, attend public schools, and hope to attend California's public universities.

The amici's interest in this litigation is to explain why, in contrast to the Sixth Circuit's decision, the Ninth Circuit's refusal to apply the *Hunter-Seattle* doctrine to invalidate Proposition 209 was an unjustifiable departure from this Court's precedent. Because the amici have now lived under Proposition 209 for

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici, their members, or their counsel made a monetary contribution to its preparation or submission.

All parties have consented to the filing of this amici curiae brief.

thirteen years, they have experienced first-hand the toll that prohibiting race as a consideration in public school assignment and admissions to the University of California has taken on public education for the youth in the amici's communities.

SUMMARY OF ARGUMENT

Unlike the *en banc* opinion of the Sixth Circuit, the Ninth Circuit misapplied binding precedent in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) ("*Wilson*"), when it held that Proposition 209, California's 1996 constitutional initiative[2] prohibiting race- or sex-based affirmative action in public education, employment and contracting, does not violate the federal Equal Protection Clause. As this Court has made clear, the Equal Protection Clause forbids selectively placing special political burdens on racial minorities or women to achieve beneficial legislation. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).

Yet that is exactly what Proposition 209 does. Before it was enacted, minorities and women could seek remedies from local school boards and the University of California Regents to counteract public school segregation and a disproportionately low matriculation rate in the University of California

[2] Proposition 209 is now article 1, section 31 of the California Constitution.

system. After Proposition 209's passage, women and minorities could only seek those remedies by amending California's Constitution. No fair application of this Court's precedents can square Proposition 209's effect with the safeguards provided by the Equal Protection Clause.

Nonetheless, the Ninth Circuit refused to apply *Hunter* and *Seattle* to invalidate Proposition 209 because, in its view, race- and sex-conscious policies to desegregate public schools and increase minority admissions constitute *preferential treatment*, whereas *Hunter* and *Seattle* protect only against statutes denying minorities the right to seek protection from *direct discrimination*.

Not only does the Ninth Circuit's preference/discrimination distinction find no support in *Hunter* or *Seattle*, it also plainly contradicts this Court's express rationale for the doctrine: that burdens placed in the way of racial minorities or women who seek "beneficial" legislation violate the Equal Protection Clause. *Seattle*, 458 U.S. at 467; *Hunter*, 393 U.S. at 390-91. Indeed, in *Seattle*, the voters outlawed a remedy for school segregation – busing – which no one claimed was necessary to overcome *de jure* discrimination. Thus, if it is possible, as the Ninth Circuit suggests, to categorize legislation "beneficial" for minorities as either preferential treatment or a remedy for direct discrimination, the legislation at issue in *Seattle* fell squarely on the "preference" side of the distinction. This Court held that the voters could not impair minorities' ability to seek that type of

legislation – legislation that is indistinguishable from the legislation minorities are thwarted from seeking under Proposition 209 and Proposal 2.

Five Ninth Circuit judges dissenting from the denial of *en banc* review in *Wilson*, the Sixth Circuit panel in this case, the majority of the *en banc* Sixth Circuit, and an overwhelming majority of scholarly commentators have all eloquently explained that the *Wilson* majority's preference/discrimination distinction is both unprecedented and, more importantly, irreconcilable with *Hunter* and *Seattle*. Accordingly, this Court should reject *Wilson* and strike down Proposal 2 for the reasons expressed by the majority of the *en banc* Sixth Circuit.

ARGUMENT

I. BY REFUSING TO APPLY THE *HUNTER-SEATTLE* DOCTRINE, THE NINTH CIRCUIT ERRED IN UPHOLDING PROPOSITION 209.

A. The First Court To Evaluate Proposition 209 Properly Held That It Violated The Supreme Court's *Hunter-Seattle* Doctrine.

Immediately after Proposition 209 passed, opponents challenged its constitutionality in the United States District Court for the Northern District of California, which enjoined the measure. *Coal. for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1508

(N.D. Cal. 1996) ("*Coalition I*"), *rev'd, Coal. for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) ("*Wilson*"). The district court held that Proposition 209 violated the Equal Protection Clause based on a straight-forward application of this Court's decisions in *Hunter*, 393 U.S. at 385 and *Seattle School District No. 1*, 458 U.S. at 457. These cases teach that making the political process more onerous only for issues of particular interest to minorities is akin to a racial classification, and the law establishing such a classification is subject to strict scrutiny.

In *Hunter*, this Court applied the Equal Protection Clause to invalidate a voter-enacted amendment to the city charter of Akron, Ohio. That measure repealed all existing housing anti-discrimination ordinances and required voter approval of any future anti-discrimination ordinances. *Hunter*, 393 U.S. at 387. Importantly, in striking down the enactment, this Court did not find that it facially discriminated against any specific group, or that it was adopted for discriminatory purposes. Rather, this Court explained that the charter amendment disadvantaged any group that might seek protection against racial, religious, or ancestral discrimination in the sale and rental of real estate, as compared to any group that might seek to regulate real property transactions in the pursuit of other purposes (*e.g.*, rent control or urban renewal advocates). *Id.* at 390. Because racial minorities are the groups that typically would pursue laws aimed at protection against racial discrimination in housing, this Court concluded, the measure "places

special burdens on racial minorities within the governmental process" by forcing those groups to run a "gantlet" of voter approval that other interest groups were spared. *Id.* at 390-91. Put another way, the measure discriminated against racial minorities because the practical effect of the measure was to make it more difficult for racial minorities to seek political redress than for other groups. Accordingly, this Court subjected the measure to heightened scrutiny, and determined that there was no justification for the special burdens the measure imposed on racial minorities, holding that "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393.

In *Seattle*, this Court similarly applied the Equal Protection Clause to invalidate a voter-approved measure prohibiting local school districts from assigning students beyond their neighborhood schools. The initiative was adopted in response to the Seattle School District's race-conscious integration plan that made extensive use of busing and pupil reassignment to combat segregation. The initiative made no explicit reference to race. However, it contained broad exceptions that permitted busing for any purpose other than racial desegregation, and thus operated as a bar only to race-conscious busing. *Seattle*, 458 U.S. at 474. Applying *Hunter*, this Court observed that the challenged law banned desegregative busing

statewide, but permitted local decisions to use busing for any other purpose. Thus, groups that would benefit from the former were forced to seek redress at a different level of government – the state legislature or the statewide electorate – than groups that might benefit from the latter, who could still appeal to local school boards. "The initiative removes the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474 & 479-80.

This Court further observed that *Hunter* did not require that racial minorities always win, or never lose, in the political process; it merely required that the process not be altered in a manner that "subjected [them] to a debilitating and often insurmountable disadvantage." *Id.* at 483-84. The companion case to *Seattle* clearly illustrated this important distinction. In *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 532 (1982), voters repealed a state constitutional provision that required race-conscious busing in some circumstances. But the repeal did not affect the future capacity of a "public entity, board or official" to voluntarily adopt a desegregation program. Thus, unlike the measures at issue in *Hunter* and *Seattle*, the initiative in *Crawford* did not alter the political process in any way: the parents of minority children could still urge their local school boards to adopt busing plans to remedy segregation. Because the measure did not "place special burdens" on the ability of racial minorities "to achieve legislation that is in

their interest" locally or statewide, it did not run afoul of the *Hunter-Seattle* doctrine. *Id.* at 541-42.

After examining these cases, the district court in *Coalition I* found Proposition 209 to be presumptively unconstitutional. The court asked whether Proposition 209 "removes the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Coalition I*, 946 F. Supp. at 1505 (quoting *Seattle*, 458 U.S. at 474). The court first observed what all parties to the litigation had effectively conceded: "that Proposition 209, at the very least, will prohibit race- and gender-conscious affirmative action efforts" but that "preferences unrelated to race and gender remain unaffected" by the legislation. *Id.* at 1505. Under Proposition 209, the University of California can still incorporate into its admissions decisions whether an applicant is a California resident, has physical and learning disabilities, has an educational disadvantage, whether a student comes from a two-parent or single-parent family, the family's income, whether the student is first generation college bound, or has special talents (for example, artistic or athletic ability) or experiences. *Id.*

Because race- and gender-conscious affirmative action efforts are "of special interest to minorities and women" and have "been singled out for unfavorable political treatment" by Proposition 209, that law has a "racial focus" within the meaning of the *Hunter-Seattle* doctrine. The court went on to conclude that Proposition 209 "displaces authority with respect to a

race and gender issue to 'a new and remote level of government,' *Seattle*, 458 U.S. at 483, and thus reorders the political process to the detriment of women and minorities. . . ." *Coalition I*, 946 F. Supp. at 1508. The court concluded, "the initiative plainly rests on distinctions based on race," and as such violates the *Hunter-Seattle* doctrine. *Id.*

B. The Ninth Circuit Misapplied the *Hunter-Seattle* Doctrine In Reversing The District Court, As Five Ninth Circuit Judges Demonstrated.

In *Wilson*, the Ninth Circuit Court of Appeals reversed *Coalition I*. Writing for the panel, Judge O'Scannlain purported to distinguish *Hunter* and *Seattle* on the basis that those cases did not invalidate statutes that interfered with "preferential treatment," but rather statutes that denied minorities the right to seek protection from direct discrimination. The panel reasoned, incorrectly, that Proposition 209 *could not* deny equal protection by forbidding racial or gender preferences, because by their very nature "preferences" do not guarantee "equal" treatment:

> Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment . . . Impediments to preferential treatment do not deny equal protection . . . While the Constitution protects against obstructions to equal treatment, it

> erects obstructions to preferential treatment by its own terms.

Wilson, 122 F.3d at 708.

After a fractious internal battle, the Ninth Circuit declined to rehear the case *en banc*. In a pointed dissent from the decision denying rehearing, Judge Norris, joined by three other judges, noted that the panel had minted a distinction – between affirmative action programs (i.e., "preferential treatment") on the one hand and other laws aimed at protecting minorities on the other – that found no support in *Hunter* or *Seattle*. The mandate of *Hunter* and *Seattle* was quite simple: a state may not enact any law that has the purpose and effect of making it more difficult for minorities or women to secure legislation that is in their interest. "The relevant inquiry under *Hunter* and *Seattle* is simply to ask whether legislation is *beneficial to minorities*." *Id.* at 714 (emphasis in original). If it is, any law that places special burdens on it in the political process is unconstitutional. Thus, when the *Hunter-Seattle* doctrine is applied to Proposition 209, a court "*has no legitimate choice* but to declare it unconstitutional." *Id.* at 712 (emphasis added).

The panel's contrary conclusion, Judge Norris observed, was based on the *political* proposition that equal treatment cannot be achieved by granting preferential treatment to groups that had historically been treated unequally. Judge Norris emphasized that the panel's "personal view" of affirmative action

was by no means universal. Indeed, "[t]he proponents of affirmative action . . . would no doubt argue that such programs do in fact secure equality because they level the playing field by remedying the inequalities that are the product of the long history of state-sponsored discrimination." *Id.* at 714. The courts' task, reminded Judge Norris, is not to choose sides in that policy battle, as the panel had done, but instead faithfully to apply the clear test set out in *Hunter* and *Seattle*. By choosing sides in a policy debate, the panel had neglected its duty to follow precedent "in favor of a path of conservative judicial activism." *Id.* at 717.

In addition to the four-judge dissent, Judge Hawkins wrote separately, likewise to criticize the panel decision for ignoring the clear mandate of the *Hunter-Seattle* doctrine. Judge Hawkins correctly noted that, whatever the wisdom of affirmative action or Proposition 209, the Ninth Circuit was duty-bound to faithfully apply *Hunter* and *Seattle*, and strike the measure down. He criticized the panel for eschewing that faithful and straightforward application of the law in favor of trying to predict what they believed this Court *would do* if it re-examined the doctrine. This Court has criticized lower courts for engaging in this sort of "precedent-defying predictionism," a practice that Justice Stevens described as "an indefensible brand of judicial activism." *Id.* at 2 n.1 (citing *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 & 486 (1989)).

C. The Sixth Circuit Panel Correctly Identified The Fundamental Flaws In The *Wilson* Majority's Decision.

In the Sixth Circuit panel decision, *Coalition to Defend Affirmative Action, et al. v. Regents*, 652 F.3d 607 (6th Cir. 2011), the court properly applied the *Hunter-Seattle* doctrine and recognized the basic shortcoming in the Ninth Circuit's reasoning. The court summarized the doctrine as follows:

> While "laws structuring political institutions or allocating political power according to neutral principles" are not subject to challenges under the Fourteenth Amendment, "a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process."

Id. at 616 (citing *Seattle*, 458 U.S. at 469-70).

The court observed that, contrary to the Ninth Circuit's pronouncement, the Supreme Court's doctrine was not limited to addressing simply political impediments to non-discrimination laws; it also forbids barriers to other types of legislation that might be "beneficial" to minorities. *Id.* at 629. The court understood that the *Hunter-Seattle* doctrine provides substantially broader protection than the

Ninth Circuit's limited shield against facially unequal treatment:

> It is also an assurance that the majority may not manipulate the channels of change in a manner that places unique burdens on issues of importance to racial minorities. In effect, the political process theory hews to the unremarkable belief that, when two competitors are running a race, one may not require the other to run twice as far, or to scale obstacles not present in the first runner's course.

Id. at 614.

The court also honed in on the Ninth Circuit's intellectually dishonest effort to distinguish *Seattle*. It recognized that *Seattle* presented a "case identical in many respects to the one we confront here." *Id.* at 615. Because "there had been no finding that the *de facto* segregation in Seattle's schools was the product of discrimination," the ballot measure at issue in *Seattle* was not impeding a non-discrimination law, it was placing a burden on minorities seeking beneficial busing legislation that might ameliorate the unquestionable harm caused by a segregated education. *Id.* at 615.

There is no principled way to distinguish *Seattle* from the present case, or from the case presented in *Wilson*:

> Just as the desegregative busing programs at issue in *Seattle* were designed to improve

> racial minorities' representation at many public schools, *see id.* at 460, 102 S.Ct. 3187, race-conscious admissions policies increase racial minorities' representation at institutions of higher education.

Id. at 618.

D. The *En Banc* Majority Of The Sixth Circuit Properly Applied The *Hunter-Seattle* Doctrine And Appropriately Declined To Follow *Wilson*.

In addressing contrary arguments, including those of the *Wilson* court, the *en banc* majority of the Sixth Circuit noted that the "effort to drive a wedge between the political process rights afforded when seeking anti-discrimination legislation and so-called preferential treatment is fundamentally at odds with *Seattle*" because the busing in *Seattle* was voluntary busing to correct *de facto* segregation. *Coal. to Defend Affirmative Action, et al. v. Regents of the Univ. of Mich., et al.*, 701 F.3d 466, 486-87 (6th Cir. 2012). It was an ameliorative measure, not a requisite obligation of the school board in response to discrimination. *Id.* at 487. Prohibiting integration when it is not constitutionally mandated is not unlawful discrimination. The *Seattle* decision "did not (and could not) rely on the notion that the restructuring at issue impeded efforts to secure *equal* treatment." *Id.* (internal quotations omitted; emphasis in original). Therefore, in *Seattle*, this Court "drew no distinction between the equal protection rights at stake in seeking

anti-discrimination legislation and those at stake in seeking preferential treatment." *Id.*

The *en banc* decision correctly declined to follow *Wilson*, noting that the Ninth Circuit's distinction between the voluntary busing in *Seattle* and race-conscious admissions policies is incompatible with this Court's decision in *Grutter v. Bollinger*. The *Wilson* court distinguished race-conscious admissions policies from the *Seattle* busing by asserting that race-conscious admissions policies are inherently invidious and benefit one group of people while harming another. *Wilson*, 122 F.3d at 707 n.16. The *en banc* majority exposed the fundamental flaw in this reasoning by pointing to this Court's decision in *Grutter*, which determined that race-conscious, narrowly tailored admissions programs afford wide-ranging benefits to the entire student body, not just one group of students. *Grutter v. Bollinger*, 539 U.S. 306, 330-32.

E. The Overwhelming Majority Of Legal Scholars Find The *Wilson* Majority's Reasoning Untenable.

Legal scholars have nearly unanimously reached the same conclusion as the well-reasoned judicial determinations discussed above that Proposition 209 (like Proposal 2) is unconstitutional under *Hunter* and *Seattle*. Indeed, the great weight of the scholarly commentary on the issue concludes that Proposition 209 cannot be reconciled with the *Hunter-Seattle*

doctrine. Even before Proposition 209 was passed, legal commentators pointed out its vulnerability under the *Hunter-Seattle* doctrine. *See, e.g.*, Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019 (1996).

Then, in the wake of its enactment and the decisions in *Coalition I* and *Wilson*, the legal literature burgeoned with articles decrying the Ninth Circuit's failure to accurately apply *Hunter* and *Seattle*. Michael G. Moore, *Comment: Constitutional Law: The Redefinition of "Minority" and its Impact on Political Structure Equal Protection Analysis*, 9 U. Fla. J.L. & Pub. Pol'y 121, 126-27 (1997) (arguing the Ninth Circuit distorted *Hunter* doctrine by redefining "minority"); Ryan Goodman, Note, *Gender Blindness and the Hunter Doctrine*, 107 Yale L.J. 261 (1997) (criticizing the Ninth Circuit's variance from *Hunter* doctrine as undermining gender-based equal protection); Rebecca Smith, *Comment: A World Without Color: The California Civil Rights Initiative and the Future of Affirmative Action*, 38 Santa Clara L. Rev. 235, 263 (1997) (finding the Ninth Circuit's analysis of the constitutional issues before it suggests a lack of understanding of the United States Constitution); Emmanuel Margolis, *Affirmative Action: Deja Vu All Over Again?*, 27 Sw. U. L. Rev. 1, 65 (1997) (warning that Ninth Circuit's opinion will allow Equal Protection Clause to tolerate racial supremacy); Girardeau A. Spann, *Proposition 209*, 47 Duke L.J. 187, 252 (1997) (criticizing the Ninth Circuit failure to develop

the arguments necessary to justify such a major jurisprudential revolution); Vikram D. Amar, *Recent Cases: The Equal Protection Challenge to Proposition 209*, 5 Asian L.J. 323, 328 (1998) (finding the Ninth Circuit wide of the mark in not applying the equal protection analysis established in *Hunter* and *Seattle*); Jeremy Moeser, *Comment: Rough Terrain Ahead: A New Course for Racial Preference Programs*, 49 Mercer L. Rev. 915, 934 (1998) (faulting the Ninth Circuit's interpretation of equal protection under *Hunter* and *Seattle*); Stephen M. Rich, Note, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments after Romer v. Evans*, 109 Yale L.J. 587, 605-06 (1999) (arguing the Ninth Circuit's avoidance of *Hunter* doctrine has led to doctrinal instability for future political restructuring cases); Jodi Miller, *Democracy in Free Fall: The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 Ann. Surv. Am. L. 1, 37 (1999) (faulting the Ninth Circuit's distinguishing of *Hunter* as flawed); Keith Sealing, *Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death of Political Structure Equal Protection*, 27 Cap. U. L. Rev. 337, 338-39 (1999) (arguing the Ninth Circuit wrongly ignored political structure equal protection in *Wilson*); Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 Ohio St. L.J. 399, 537

(1999) (finding the Ninth Circuit misses the main thrust of the *Hunter/Romer* line of cases).[3]

Even years after Proposition 209 was on the ballot, the legal literature continued to criticize the Ninth Circuit's analysis. *See, e.g.*, Richa Amara, *Unequal Protection and the Racial Privacy Initiative*, 52 UCLA L. Rev. 1279, 1302 (2005) (criticizing the Ninth Circuit's decision in *Wilson* for failing to make an explicit holding under the *Hunter* inquiry, and for engaging instead "in a long-winded discussion wherein it lumped all women and minority voters together to make them one supermajority and wondered how such a majority could discriminate against itself"); Victor Suthammanonta, Note, *Judicial Notice: How Judicial Bias Impacts the Unequal Application of Equal Protection Principles in Affirmative Action Cases*, 49 N.Y. L. Rev. 1173, 1207-11 (2004-05) (noting that "[t]he Ninth Circuit's application of the 'political structure' doctrine is hampered by its incomplete analysis of the Hunter and Seattle School cases" in describing its failure to apply the doctrine correctly to Proposition 209); Chris Chambers Goodman, *Redacting Race in the Quest for Colorblind Justice: How*

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[3] *See* Martin D. Carcieri, *A Progressive Reply to Professor Oppenheimer on Proposition 209*, 40 Santa Clara L. Rev. 1105, 1118 (2000) (contending *Hunter-Seattle* doctrine does not apply to invalidate Proposition 209); Douglas W. Kmiec, *The Abolition of Public Racial Preference – An Invitation to Private Racial Sensitivity*, 11 Notre Dame J.L. Ethics & Pub. Pol'y 1, 6-7 (1997) (suggesting *Seattle* was not sufficiently analogous to invalidate Proposition 209).

Racial Privacy Legislation Subverts Antidiscrimination Laws, 88 Marq. L. Rev. 299, 344 (2004) (describing the Ninth Circuit argument that Proposition 209 does not classify because it prevents classifying as "miss[ing] the point of the Hunter Doctrine: that where the burden of the challenged legislation falls more heavily on minority access to the political process, the resulting unequal treatment violates the Equal Protection Clause"); Mark Strasser, *Symposium: "Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Same-Sex Marriage Referenda and the Constitution: On* Hunter, Romer, *and Electoral Process Guarantees*, 64 Alb. L. Rev. 949, 974 (2001) (observing the Ninth Circuit misrepresented the spirit of *Hunter*); Elizabeth T. Bangs, *Who Should Decide What Is Best for California's LEP Students? Proposition 227, Structural Equal Protection, and Local Decision-Making Power*, 11 La Raza L.J. 113, 149 (2000) (determining the *Wilson* opinion flies in the face of *Hunter*).

Nonetheless, despite the reams of arguments to the contrary, it is the Ninth Circuit panel's opinion upholding Proposition 209 that remains the law in California. And that law has had very real consequences for millions of Californians not least amici's school children and young adults whose experience of public education shapes, for better or for worse, their path in life.

F. Proposition 209 Has Dramatically Decreased The Admission Rate And Admission Yield Rate For Minority Students At California's Public Universities.

In the aftermath of the passage of Proposition 209, the rates at which underrepresented minority students were admitted to, and enrolled at, the University of California fell by significant percentages. For example, in 1998, the year Proposition 209 took effect, the admission rate for African-American students applying to the University of California, Berkeley, fell from 47.8% to 19.7%. Katy Murphy, *UC After Proposition 209: How Minority Student Admissions Changed*, Oakland Tribune, June 22, 2013. The admission rates have not recovered since the passage of Proposition 209. In 2010, the admission rate for African-American students applying to the University of California, Berkeley, was 15.4% – a decline of more than two-thirds from the pre-Proposition 209 admission rate. Katy Murphy, *Affirmative Action Ban at UC: 15 Years Later*, Oakland Tribune, June 26, 2013.

Not only are fewer minority students accepted at the University of California campuses, but those students are now more likely to reject an offer of admission than they were prior to the passage of Proposition 209. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 78 (2013). The average freshman yield rate (percentage of admitted students accepting an offer of admission) in the top third of the

admit pool for African-American students in the four years prior to the passage of Proposition 209 was 14% at the University of California, Berkeley, and 24% at the University of California, Los Angeles. *Id.* In the four years after the passage of Proposition 209, the average freshman yield rate in the top third of the admit pool for African-American students dropped to 8% at both UC Berkeley (a decline of almost one-half) and UC Los Angeles (a decline of two-thirds). *Id.*

Overall, the year after Proposition 209 passed, the number of African-American, Latino and Native American freshmen at UC Berkeley and UC Los Angeles dropped by over 50%. *Coal. to Defend Affirmative Action v. Brown,* 674 F.3d 1128, 1133 (9th Cir. 2012).

These statistics dramatically illustrate how Proposition 209 and Proposal 2 impede schools from furthering the "compelling interest in a diverse student body," which, among other things, fosters "cross-racial understanding," "helps to break down racial stereotypes," enables students to better understand persons of different races, and can result in "classroom discussion [that] is livelier, more spirited, and simply more enlightening and interesting." *Grutter v. Bollinger*, 539 U.S. 306, 329-30 (2003).

CONCLUSION

The *Hunter-Seattle* doctrine "works to prevent the placement of special procedural obstacles on

minority objectives, whatever those objectives may be . . What matters is whether racial minorities are forced to surmount procedural hurdles in reaching their objectives over which other groups do not have to leap. If they are, the disparate procedural treatment violates the Equal Protection Clause, regardless of the objective sought." *Coal. to Defend Affirmative Action, et al.*, 701 F.3d at 487. This Court should reject the 1997 decision of the Ninth Circuit in *Wilson* as poorly reasoned and contrary to this Court's binding precedent, and should hold that Proposal 2 violates *Hunter* and *Seattle*.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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12-682

In The Supreme Court of the United States

BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

AND

CHASE CANTRELL, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE FOR RICHARD SANDER IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The past decade has witnessed a profusion of careful research on the subject of racial preferences, much of it stimulated by this Court's decisions in *Grutter v. Bollinger*, 549 U.S. 306 (2003), and *Gratz v. Bollinger*, 549 U.S. 244 (2003). *Amicus curiae* has written this brief to bring to the Court's attention the portions of this research that seem most relevant to the issues under consideration in *Schuette v. Coalition to Defend Affirmative Action, et al.*

Richard Sander, the principal author of this brief, is an economist and law professor at UCLA, and a leading scholar in the field of affirmative action. Along with Stuart Taylor, Jr., he is the author of *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* (Basic Books, 2012).

This brief discusses empirical issues explicitly or implicitly raised by the Sixth Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

The essence of the Sixth Circuit's holding is that Michigan voters, in passing Proposal 06-2, denied racial minorities in Michigan an important benefit, and that the Proposal places unreasonably high – and therefore unconstitutional – barriers in

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[1] No counsel for a party wrote this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae* made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

the path of minorities seeking to reinstitute these benefits.

In this brief, *amicus* focuses on the highly abstract nature of the Sixth Circuit's argument, and its apparent detachment from the actual circumstances in Michigan and in the United States surrounding racial preferences. In this brief, *amicus* highlights some of the facts on the ground relevant to assessing Proposal 06-2 as simply an attempt to regulate a particularly troubling social policy.

ARGUMENT

I. The University Of Michigan's Operation Of Racial Preference Programs At The time Of Proposal 06-2's Passage Raised Important Equal Protection Problems

A. Undergraduate-level Racial Preferences At The University Of Michigan Became Larger, And At Greater Expense To Socioeconomic Diversity, After *Gratz* And *Grutter*

1. In 2003, the U.S. Supreme Court evaluated the constitutionality of admissions preferences at the University of Michigan (UM). In *Gratz v. Bollinger*, it heard a challenge to UM's undergraduate admissions system, which used a point system to make admissions.[2] On a 150 point scale, with 100 points guaran-

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[2] Although the admissions process changed slightly from year to year, the University explained that it "changed only the mechanics, not the substance of how race and ethnicity were considered in admissions." *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003).

teeing admission, underrepresented minorities (URMs) received 20 points automatically based on their race.[3] Applicants could receive up to 20 points for socioeconomic disadvantage.[4] In *Grutter v. Bollinger*, it heard a challenge to UM's law school admissions system, which used no explicit formula but gave substantial weight to the applicant's race.[5] The Supreme Court invalidated the undergraduate point system, but found the law school's "holistic" system constitutional – noting, however, that admissions systems edged towards unconstitutionality when they used race in a "mechanical" way (meaning that, for example, an admissions system treated all blacks as providing similar diversity benefits)[6], and ruling flatly unconstitutional any "racial balancing" (meaning that the size of preferences could not be calibrated for a racial group's degree of underrepresentation or overrepresentation).[7]

2. By 2006, the undergraduate admissions program had shifted to a "holistic" system, in apparent compliance with *Grutter* and *Gratz*. But the actual operation of the system showed three disturbing patterns. The implicit weight given to African-Americans had increased in 2006 relative to 1999 (a key admissions cycle in the Court's evaluation); different size preferences were used for each of four major groups (with Asians the most heavily penalized); and the weight given to socioeconomic factors had gone down from essential parity with race to

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[3] *Id.*

[4] *Id.* at 294 (Justice Souter, dissenting).

[5] *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

[6] *Id.* at 334.

[7] *Id.* at 330.

nearly zero (even as the public[8] was giving greater importance to socioeconomic diversity).[9] In other words, the lead educational institution in Michigan using racial preferences, and the one that had been directly rebuked by the Supreme Court in 2003, instituted changes in its admissions practices that seemed to fly in the face of the Supreme Court's tight restrictions on the use of racial preferences. In this context, Proposal 06-2 can be seen as an attempt to control racial preferences at a university that was determined to defy the Supreme Court.

B. Asian-American Students Have Tended To Be Those Most Heavily Disadvantaged By Admissions Systems That Rely On Racial Preferences, And Asian-Americans Are A Politically Vulnerable Group In Michigan

1. Most analyses that examine the size of racial preferences have found that African-American applicants receive the largest preference, followed by

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[8] Associated Press, *Race vs. Class: Inequality Has Shifted Debate Since Court Last Ruled on Affirmative Action*, June 16, 2013; WASH. POST, June 11, 2013; David Leonhardt, *The Liberals Against Affirmative Action*, NEW YORK TIMES, March 9, 2013.

[9] Aaron Danielson, "An Analysis of Undergraduate Admissions at the University of Michigan in 2006 and 2008," (2013 working paper, available at http://www.seaphe.org/working-papers/); Richard H. Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter*, in Kevin McGuire, ed., NEW DIRECTIONS IN JUDICIAL POLITICS (2012); Richard H. Sander and Stuart Taylor, Jr., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (Basic Books 2012) at 212-213.

Hispanics. Non-Hispanic whites are generally penalized (i.e., are assigned a "reverse" preference), and Asian-Americans are even more penalized. Thus, Professor Thomas Espenshade and Alexandra Radford found that, at private institutions, the admissions advantage for blacks was equivalent to 310 SAT points relative to whites; 130 points for Hispanics relative to whites; and a 140 point disadvantage for Asians relative to whites.[10] The same pattern was closely paralleled in public institutions. Espenshade and Chang Y. Chung found that at elite schools, four of the five spaces lost by blacks and Hispanics when racial preferences decline would be occupied by Asians.[11]

2. In the years leading up to the Court's ruling in *Gratz v. Bollinger*, the undergraduate admissions office did not differentiate across individual racial groups; that is, all underrepresented minorities were given the same "points," as discussed above. But this changed after *Gratz*. Analyses of University of Michigan admissions data for the 2005-06 admissions cycle show distinct racial preferences across each of the four major racial groups; blacks received the largest preferences, followed by Hispanics; Asians were penalized relative to whites.[12] Thus, the University of Michigan seems to have slid toward the exact sort of racial balancing the Court warned

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[10] Thomas J. Espenshade and Alexandria Walton Radford, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (Princeton University Press 2009) at 92.

[11] Thomas J. Espenshade and Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. 2 (2005).

[12] Sander, *supra* note 9; Danielson, *supra* note 9.

against, and singled out Asians for particularly unfavorable treatment.

3. There is a long tradition in the United States of enshrining fundamental rights in constitutions, as evidenced by the Fourteenth Amendment itself. This constitutional protection is particularly important for groups that have suffered from discrimination historically, and for groups that are politically weak.[13] Asian-Americans qualify under both criteria; they have suffered extensive discrimination in American history,[14] and they were, at the time of Proposal 06-2's passage, pretty clearly the politically weakest of the four major racial groups in Michigan.[15] Establishing a constitutional prohibition of racial preferences, which protects Asian-Americans from discrimination, is entirely consistent with other protections of rights in both the federal and state constitutions.

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[13] "In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Brennan, concurring).

[14] Ronald Takaki, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (Little, Brown & Company 1998); Michael Klarman, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY (Oxford University Press 2007) at 70-74 and *passim*.

[15] In 2006, 79% of Michigan's residents were non-Hispanic whites; 14% were black, 4% were Hispanic, and fewer than 3% were Asian. U.S. Bureau of the Census, Statistical Abstract of the United States: 2008, p. 23. Out of 151 Michigan legislators listed in the Library of Michigan database in 2003-2004 (2005-2006 session was unavailable) 18 were African-American, one was Hispanic, and one Asian-American. *Michigan Legislative Biography Database*, LIBRARY OF MICHIGAN, http://qa.mdoe.state.mi.us/NewLegislativeBiography/Home/SearchLegislators, 201 (last visited June 25, 2013).

C. The Increasingly Multiracial Character Of America, And The Increasing Affluence Of Minorities Receiving Preferences, Has Made Traditional "Racial" Categories A More And More Outmoded Tool For Social Policy

1. When universities began using racial preferences in the 1960s, nearly all participants thought of the access problem as one involving a single, well-identified racial group: African-Americans.[16] Over time, preference programs became more expansive, adding at various times some or all Hispanic ethnicities, American Indians, Pacific Islanders, and some or all Asian ethnicities. The rationales and social science evidence for the various rules of inclusion and exclusion have become steadily more complex over time[17], and necessarily the connection between these racial categories and the underlying types of "disadvantage" favored, or "diversity" pursued, becomes more attenuated.

2. In the United States today, by far the fastest-growing racial group is "multiracial". The number of people identifying as both black and white increased by 134% between 2000 and 2010, and the number of children identifying as multiracial increased almost 50%.[18] The overall number of people reporting their race as "two or more races" went from 6.8 million in 2000 to 9.0 million in 2010, an increase of 32 per-

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[16] Abigail and Stephen Thernstrom, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (Simon and Schuster 1999) at 389.

[17] Id; See also Deborah Ramirez, *Multicultural Empowment: It's Not Just Black and White Anymore* 57 STAN. L. REV. 5 (1995).

[18] Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, NEW YORK TIMES, March 24, 2011.

cent.[19] The existence of a large and growing multiracial population creates a host of problems and potential abuses in programs that seek to confer benefits according to racial classification.[20] By what rules is racial membership assigned? How does one prevent opportunistic behavior by self-classifying applicants?[21]

3. A study of students at Harvard Law School found that only 30% of students identifying as "African-American" at the law school actually had four African-American grandparents. The other 70% were either of mixed racial backgrounds, or were foreign students.[22] The disproportionately large presence of black immigrants among black students at elite schools is a widespread phenomenon.[23] Partly to deal with such difficulties, the U.S. Department of Education issued revised guidelines on the racial data reported by schools.[24]

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[19] Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, UNITED STATES CENSUS BUREAU (2011).

[20] *See, e.g.*, Paul Brest and Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 5 (1995).

[21] Sander & Taylor, *supra* note 9 at 185; Susan Saulny and Jacques Steinberg, *On College Forms, A Question of Race, or Races, Can Perplex*, NEW YORK TIMES, June 13, 2011.

[22] Marques J. Redd and Kritiana Freelon, BLACK GUIDE TO LIFE AT HARVARD (Harvard Black Students Association 2002).

[23] Douglas S. Massey, Margarita Mooney, Kimberly C. Torres and Camille Z. Charles, *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. OF EDUC. 2 (2007).

[24] *Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education*, 72 FED. REG. 59,266 59,279 (2007).

4. When universities use racial preferences, a very high proportion of the non-white recipients (particularly at elite schools) are from relatively affluent and privileged backgrounds.[25] Here again, the nexus between "disadvantage" and "diversity" on the one hand, and "race" on the other, has become much weaker over time. [26]

5. For all these reasons, it is reasonable as a policy matter for voters or legislators to conclude that preferences defined by characteristics such as race are increasingly impractical and arbitrary, and therefore appropriate to eliminate.[27]

II. Racial Minorities Do Not Generally Consider The Types Of Preferences Banned By Proposal 06-2 To Be An Important Social Benefit

A. A Wide Range Of Reports On Public Opinion Find That Students And Adults Of All Racial Groups Oppose The Use Of Racial Preferences In University Admissions

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[25] Richard D. Kahlenberg, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (Basic Books 1997); Sander & Taylor, *supra* note 9 at 248-252; Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631 (2010).

[26] As Sander and Taylor discuss in *Mismatch*, blacks at elite schools in the early 1970s roughly mirrored the socioeconomic diversity of the American population, but by the early 1990s were drawn very heavily from the most affluent quartile of the American population. Sander & Taylor, *supra* note 9 at 248.

[27] David Brooks, *Speed of Ascent*, NEW YORK TIMES, June 24, 2013.

1. Americans generally draw a clear distinction between "affirmative action" programs and "racial preferences."[28] "Affirmative action" is usually associated with efforts to insure that selection processes are fair and open to all, and that those making selections are looking broadly for talented candidates, and not simply relying on "old boy networks." "Racial preferences" have a clear and very different connotation: that one is not always choosing based on qualifications, but tipping the scale to favor candidates of a particular race.

2. In a broad survey of opinion on college campuses nationwide, several sociologists found that 71% of minority students disapproved of the use of racial or ethnic preferences in university admissions, and 62% of minority students rejected the use of relaxed admissions standards to increase minority representation.[29]

3. Public opinion polls of Americans consistently show broad opposition to racial preferences. A 2013 survey for the *Washington Post* and ABC News asked, "Do you support or oppose allowing universities to consider applicant's race as a factor in deciding which students to admit?" Among 1007 registered voters who responded, large and consistent majorities of all racial groups expressed opposition:

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[28] Sander & Taylor, *supra* note 9 at 188; WASH. POST/KAISER/HARVARD, *Racial Attitudes Survey*, March 8 – April 22, 2001, available at http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/race071101.htm (last visited June 25, 2013).

[29] Stanley Rothman, *Affirmative Action – and Reaction; Is Diversity Overrated?* NEW YORK TIMES, March 29, 2003.

79% of whites, 78% of blacks, and 68% of Hispanics.[30] An earlier *Washington Post* poll asked the question even more directly: "In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired, promoted or admitted to college, or that hiring, promotions, and college admission should be based strictly on merit and qualifications other than race or ethnicity?" Only 3% of whites, 7% of Hispanics, and 12% of blacks thought race or ethnicity should be a factor.[31]

4. In contrast, opinion polls that ask generally about "affirmative action" show a much more evenly divided public and less consensus across racial lines. For example, the NBC News and *Wall Street Journal* have conducted a joint poll for over twenty years that has asked "Is affirmative action still needed, or should it be ended?" In the early 1990s, a large majority of Americans responded that affirmative action was still needed (61%, compared to 28% who favored ending it). Support has steadily eroded since then, so that in June 2013, Americans as a whole were evenly divided on the issue (45% responding that it is still needed, and 45% responding that it should be ended). But a large (and perhaps increasing) majority of blacks (8 in 10) respond that it is still needed.[32] Plausibly, racial minorities view "affirmative action" as measures aimed at maintaining fair

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[30] Associated Press, *supra* note 8.

[31] Sander & Taylor, *supra* note 9 at 188; WASH. POST/KAISER/HARVARD, *supra* note 28.

[32] Domenico Montanaro, *NBC News/WSJ Poll: Affirmative Action Support at Historic Low*, NBCNEWS.COM, June 11, 2013, http://firstread.nbcnews.com/_news/2013/06/11/18885926-nbc-newswsj-poll-affirmative-action-support-at-historic-low?lite&ocid=msnhp&pos=3 (last visited June 25, 2013).

and equal selection processes, and are more anxious than whites to have special efforts maintained to preserve fairness.

5. Given the strong consensus across racial lines on the undesirability of racial preferences, one might reasonably ask why the voting on Proposal 06-2 (and Proposition 209) showed quite racially disparate results, with whites strongly supporting both propositions and blacks strongly opposing them. As Sander and Taylor discuss in *Mismatch*, the proponents of these measures consistently described them as bans on the use of racial preferences.[33] But opponents of the measures, who outspent proponents by over 2.5 to 1 in Michigan,[34] emphasized that the measures would ban "affirmative action."[35] Opponents also frequently characterized the measures as "racist," as "Jim Crow" measures that would reinstitute segregation in public education, or as "slamming the door on progress."[36] Such messages were pervasive in both elections, and it is thus not surprising that the actual attitudes of blacks towards racial preferences would diverge from their voting patterns on Proposal 06-2 and Proposition 209.

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[33] Sander & Taylor, *supra* note 9 at 125.

[34] National Institute on Money in State Politics, *Proposal 06-2: Ban on Affirmative Action Programs*, http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=114 (last visited June 21, 2013).

[35] *See Coalition to Defend v. Regents of Univ. of Mich.*, 701 F.3d 466, 479 (6th Cir. 2012); Sander & Taylor, supra note 9 at 125, 190.

[36] Andrew Grossman, *BAMN Clashes With MCRI Director*, MICH. DAILY, Apr. 5, 2006, available at http://www.michigandaily.com/content/bamn-clashes-mcri-director; Tamar Lewin, *Campaign to End Race Preferences Splits Michigan*," NEW YORK TIMES, Oct. 31, 2006.

B. The Actual Conduct Of Students In The Wake Of A Ban On Racial Preferences Is Consistent With The Conclusion That Minority Students Prefer To Attend Schools That Do Not Use Racial Preferences In Admissions

1. It has often been argued by proponents of racial preferences that it is vital for universities to use these to achieve something close to proportional representation of minorities on campuses, in part because otherwise minority students will feel that the campus climate is "hostile" to racial minorities. A ban on racial preferences could, in this view, set off a chain reaction – the numbers of admitted blacks and Hispanics fall, which then deters other blacks and Hispanics from applying, which then causes minority enrollment to fall further – which could quickly cause minority enrollment to approach zero.[37]

2. An opportunity to test this idea arose in California after the passage of Proposition 209. Because racial preferences at the University of California (UC) were, in fact, substantial before Proposition 209, the admissions rate for Hispanics and especially for African-Americans dropped sharply – at Berkeley and UCLA, the overall probability of admission for blacks and Hispanics fell from about 60% to 30%.[38] Yet a very careful, peer-reviewed study by David

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[37] University of California Office of the President, *The Use of Socio-Economic Status in Place of Ethnicity in Undergraduate Admissions: A Report on the Results of an Exploratory Computer Simulation* (1995); Gary Orfield and Edward Miller (eds.), CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES (Harvard University Press 1998); Sander & Taylor, *supra* note 9 at 131.

[38] Sander & Taylor, *supra* note 9 at 133.

Card and Alan Krueger found that Proposition 209 had no meaningful effect upon the propensity of highly-talented blacks to apply to UC campuses after Proposition 209, or to the University of Texas after Hopwood.[39] A broader study by Kate Antonovics and Ben Backes, which looked at the full range of application patterns to the University of California before and after Proposition 209, found some evidence of a decrease in the rate at which blacks and Hispanics with weak academic credentials sent their SAT scores to Berkeley and UCLA (a logical response, given much lower chances of admission), but also evidence of an increase in that rate for less-selective campuses.[40]

3. Even more striking, Antonovics and Sander found that blacks and Hispanics became significantly *more* likely to accept offers from UC campuses after the era of formal race-neutrality began.[41] At the four most elite UC campuses, the rate at which blacks and Hispanics accepted offers of admission rose by between 10% and 15%. This increase was particular-

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[39] David Card and Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 INDUSTRIAL & LABOR RELATIONS REVIEW 416 (2005). Card & Krueger examined "highly-qualified" blacks because their admission chances would be minimally affected by the ban, which reduced the chances of most other blacks; students are less likely to apply when their admission chances are low.

[40] Kate Antonovics and Ben Backes, *Were Minority Students Discouraged from Applying to University of California Campuses after the Affirmative Action Ban?*, 8 EDUC. FIN. AND POL'Y 2 (2013).

[41] Kate Antonovics and Richard H. Sander, *Affirmative Action Bans and the Chilling Effect*, 15 AM. L. AND ECON. REV. 1 (2012).

ly notable at the two campuses (Berkeley and UCLA) which, prior to Proposition 209, had used the largest racial preferences and had the largest post-209 drops in minority enrollment.[42]

4. We do not know exactly why minority take-up rates went up after Proposition 209, but it is certainly plausible that blacks and Hispanics were more attracted to the idea of attending a campus where they would not be stigmatized by the assumption that they had gotten in by virtue of their race.[43]

III. There Are Strong Empirical Reasons To Conclude That Racial Minorities Are Not Harmed, And Perhaps On Balance Benefited, By A Ban On Racial Preferences In Higher Education

A. Universities And Jurisdictions Covered By Bans On Racial Preferences Generally Implement Policies That Reflect Many Of The Original Goals Of Affirmative Action And Promote Diversity

1. At the University of California (which was affected by a preference ban ten years before Proposal 06-2, and which has been the subject of significant study), many UC campuses used substantial racial preferences before they were banned. In the wake of Proposition 209, nearly all campuses implemented

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[42] See Figure 8.1 in Sander & Taylor, *supra* note 9 at 138.

[43] Antonovics and Sander tested this idea and found it supported by a variety of statistical evidence. Antonovics and Sander, *supra* note 41.

changes in admissions policy that produced racial dividends – that is, which tended to favor black and Hispanic applicants without any explicit consideration of race.[44] Many of these changes also favored applicants with low socioeconomic status, so that the socioeconomic diversity of UC students increased.[45]

2. At the University of Michigan, undergraduate admissions for the 2007-08 cycle (the first full cycle covered by the Proposal 06-2 ban on racial preferences) show that, when one controls for each student's academic credentials and socioeconomic status, blacks continued to be far more likely to be admitted than Hispanics, who were more likely to be admitted than whites, and whites were significantly more likely to be admitted than Asians.[46] These differentials may reflect a continuing use of (covert) racial preferences by the University of Michigan, or they may reflect the use of racial "surrogates" which our database does not include. What is clear in either case, however, is that the University of Michigan has made significant efforts to make sure that underrepresented minorities continue to be admitted in substantial numbers ahead of other students with better academic credentials under the Proposal 06-2 regime.

3. Shortly after the passage of Proposition 209 in California, UC leaders launched task forces to design better mechanisms for identifying talented

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[44] Kate Antonovics and Ben Backes, *The Effect of Banning Affimative Action on College Admissions Rules and Student Quality (2013 working paper, available at http://econ.ucsd.edu/~kantonov/admissions_writeup_probit-2.pdf).*

[45] *Id.*

[46] Danielson, *supra* note 9.

high school students from disadvantaged schools in California.[47] The initiatives were backed by university leadership and have been generously funded. Though these programs and investments naturally took years to have a substantial impact, they eventually produced substantial dividends in increasing applications from low socioeconomic students and from students at historically weak high schools.[48] These programs help explain why black and Hispanic entry into UC schools was far higher ten years after Proposition 209 than it had ever been during the era of outright racial preferences.

4. The University of Michigan has undertaken similar efforts. Following the passage of Proposal 06-2, University of Michigan President Mary Sue Coleman appointed the University-wide Blueprints Task Force to develop strategies for sustaining and enhancing diversity. As with the UC, the Michigan Task Force developed strategies involving recruitment, precollege K-12 outreach, new aid programs, and the like, which had the effect of deepening the university's involvement in disadvantaged and minority communities in Michigan.[49]

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[47] *See, e.g., New Directions for Outreach: Report of the University of California Outreach Task Force* (July 1997); Karl Pister, *UC Outreach: Systemwide Perspective and Strategic Plan* (September 1998).

[48] Sander & Taylor, *supra* note 9 at 160, 255.

[49] Kristen Jordan Shamus, *UM Will Reach Out to Keep Diversity; Group Offers Ways to Deal with Prop 2*, DETROIT FREE PRESS, March 16, 2007.

B. The Sixth Circuit Suggests That Large Racial Preferences In University Admissions Are A Vital Tool For Racial Minorities To Succeed In America.[50] But The Evidence For This Claim Is Exceedingly Thin. Indeed, Evidence That Racial Preferences Result In "Mismatch" Of Various Forms And Undermine The Success Of Minority Students Continues To Mount. Certainly No Special Constitutional Protection Should Be Based On The Insubstantial And Disputed Evidence That Racial Preferences In Universities Are Vital

1. In May 2012, *amicus* coauthored a brief[51] which, *inter alia*, summarized some of the available evidence on the effects of college and university racial preferences upon students who receive them (especially African-Americans, who tend to receive especially large preferences).

2. It is now generally conceded that large admissions preferences – whether these are based on

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[50] *Coalition*, 701 F.3d 466 at 474. "Safeguarding the guarantee that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective. Moreover, universities represent that training ground for a large number of our Nation's leaders. To cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity" (internal quotes, citations, and brackets omitted).

[51] Brief for Richard H. Sander and Stuart Taylor, Jr. as *Amici Curiae*, *Fisher v. University of Texas* 570 U.S. ___ (2012). A few subsections below are taken directly from that brief.

race, "legacy" considerations, or other factors – cause students to receive lower grades. The median black student receiving a large admissions preference to an elite law school, for example, ends up with grades that put her at the 6th percentile of the white grade distribution – an effect that is almost entirely due to the preference itself. The GPA-lowering effect of preferences has not been as clearly documented at the undergraduate level; it is less extreme than what one observes in law school, but still very substantial. Low grades interconnect with other preference-related problems, as discussed below.

3. Dartmouth psychologist Rogers Elliott and several colleagues published a study in 1996 that found very high attrition rates from the sciences in four Ivy League schools for students admitted with large preferences.[52] Students who had weaker academic preparation than their peers were particularly vulnerable in so-called "STEM" classes (for science, engineering, technology, and math), where grading is on a rigid curve, professors often teach at a challenging pace, and material builds sequentially from one course to the next. Students with significantly weaker preparation than the median student can become overwhelmed, and consequently transfer to less rigorous majors at a high rate. This phenomenon came to be known as "science mismatch," because similar students attending less elite colleges appeared to have higher persistence rates in science. The cumulative effect is that even though black entering freshmen have levels of interest and aspira-

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[52] Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier, and Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. IN HIGHER EDUC. 681 (1996).

tion in STEM fields at least as high as those of whites, they receive a very disproportionately small share of those with STEM degrees.

4. These same patterns of science mismatch have been found in a whole series of studies published over the past ten years. Frederick Smyth and John McArdle, then both psychologists at the University of Virginia, used the College and Beyond data (an extensive database created by the Mellon Foundation, with severe limitations on access, that has unusually rich variables on student abilities and experiences) to study science mismatch, and found for a large cross-section of students at strong to very elite schools, that when other academic characteristics were held constant, a student's level of mismatch was one of the strongest predictors of whether the student achieved a STEM degree.[53]

5. Scholars at Duke University documented this same tendency for students admitted with large preferences to transfer out of difficult majors (these authors found the pattern existed for economics as well as STEM majors).[54]

6. Notably, both the Duke and Virginia studies found that when one controlled for mismatch, blacks, whites, and Hispanics completed STEM majors at the same rate; in other words, poor minority perfor-

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[53] Frederick Smyth and John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 RES. IN HIGHER EDUC. 353 (2004).

[54] Peter Arcidiacono, Esteban Aucejo, and Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, 1 IZA J. LABOR ECON. (2012).

mance in STEM fields had little or nothing to do with race, but lots to do with mismatch.

7. Two very recent studies – too recent to complete the peer-review publication process – have found large science mismatch results at the University of California.[55]

8. These various studies have used a wide variety of methodologies and types of data. So far as we know, no one has found any of these results to be in error; nor has anyone published a peer-reviewed paper contending that science mismatch does not exist.

9. In 2003, sociologists Stephen Cole and Elinor Barber (by then deceased) published *Increasing Faculty Diversity*, a study of the minority "pipeline" problem in academia.[56] Drawing on questionnaires and other detailed data from 7,612 graduating seniors at 34 colleges, Cole and Barber found significant evidence that large racial preferences were hurting the minority pipeline to academia. Such students tended to get significantly lower grades and struggle academically, hurting their self-confidence. The idea of pursuing a doctorate to enter academia became less appealing, even among those who had started college with that ambition. Similar students

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[55] Peter Arcidiacono, Esteban Aucejo and Joseph Hotz, *University Differences in the Graduation of Minorities in STEM Fields: Evidence from California* (2013 working paper, available at http://public.econ.duke.edu/~psarcidi/); Marc Luppino and Richard H. Sander, *College Major Competitiveness and Attrition from the Sciences* (2013 working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167961).

[56] Stephen Cole and Elinor Barber, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS (Harvard University Press 2003).

at colleges with smaller or no racial preferences were far more likely to do well, develop self-confidence, and pursue their original goals.

10. The Cole and Barber finding was striking in part because it was emphatically contrary to the assumptions of the authors' funders and sponsors – Ivy League presidents and foundations that passionately supported racial preferences in admissions. Yet we are unaware of any comparable research that even remotely contradicts their conclusions.[57]

11. In contrast to the essentially undisputed findings of those who have documented "science" and "academic" mismatch, similar findings showing evidence of a "law school mismatch" problem have been intensely disputed. The debate in this field was inaugurated by the 2005 study, "A Systemic Analysis of Affirmative Action in American Law Schools," (hereinafter "Systemic Analysis").[58] "Systemic Analysis" contended that students who receive large preferences into law school not only tend to do poorly academically, but appear to actually learn less than otherwise similar students attending less elite law schools, as evidenced by the latter students' much higher bar passage rates. This focus on learning – a key idea in mismatch – makes law school mismatch research particularly intriguing; but on the other hand, the data available to study law school mismatch is limited and in some important ways imprecise. These limitations in the data have led to some plausible criticisms of law school mismatch theory,[59]

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[57] Sander & Taylor, *supra* note 9 at 47.

[58] Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

[59] Those finding evidence of law school mismatch have been candid and vocal about the limitations of the available data.

but very strikingly, these critics never point out that studies of science and academic mismatch that do not suffer from these data limitations find very similar mismatch effects. It is also striking that while proponents of mismatch have been in the forefront of efforts to gain disclosure of better data, critics of mismatch have tended to fiercely oppose the release of such data.[60]

12. Sander has been at some pains to answer critiques of mismatch with care. Every substantive critique advanced against law school mismatch theory (aside from the general complaint about limitations in the data), when laid side by side with the substantive responses, shows that the critiques are either factually mistaken, have misreported their numbers, or rely on implausible assumptions.[61]

i. In 2012, after Sander and Taylor filed a brief[62] in *Fisher v. University of Texas* discussing mismatch (*inter alia*), several briefs (in support of the University) attacked the Sander-Taylor brief.[63]

Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005); Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools*, 10 J. OF EMPIRICAL LEGAL STUD. 2 (2013).

[60] Sander & Taylor, supra note 9 at 240-242; Memorandum from Bill Kidder to Gayle Murphy (January 19, 2007), available at http://www.seaphe.org/pdf/bar-proposal/kidder_critique.pdf.

[61] Sander, *supra* note 58; Richard H. Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 88 DENV. U. L. REV. 889 (2010); Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools*, 10 JOURNAL OF EMPIRICAL LEGAL STUDIES 2 (2013);

[62] Brief for Richard H. Sander and Stuart Taylor, Jr., *supra* note 51.

[63] Brief for Empirical Scholars as *Amici Curiae*, *Fisher v. University of Texas* 570 U.S. ___ (2012). Brief for The American

The best known of these, the "Empirical Scholars Brief," was signed by a number of well-respected social scientists.[64] Notwithstanding their stature, their criticisms of mismatch theory are embarrassingly weak. The fatuity of the critiques of mismatch is well-illustrated by the following observations on the Empirical Scholars Brief. The brief made essentially four arguments:

ii. First, the Empirical Scholars Brief disclaimed any attempt to address science mismatch, academic mismatch, or the stunningly positive effects of Proposition 209 at the University of California, on the ground that most of the Sander-Taylor brief focused on law school mismatch theory.[65] In fact, about six percent of the Sander-Taylor brief dealt with law school mismatch theory.[66] The Empirical Scholars Brief thus maintained the unbroken pattern of defenders of affirmative action in completely ignoring the science mismatch and academic mismatch literature.[67]

iii. Second, the Empirical Scholars Brief noted that the theory of law school mismatch had

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Educational Research Association Et Al. As *Amici Curiae*, *Fisher v. University of Texas* 570 U.S. ___ (2012); Brief for The National Black Law Students Association as *Amici Curiae*, *Fisher v. University of Texas* 570 U.S. ___ (2012).

[64] Brief for Empirical Scholars, *supra* note 63.

[65] "Amici therefore focus the rest of their arguments on the methodological flaws contained in Sander's and economics professor Doug Williams's law-school mismatch research (which dominate the empirical findings of the Sander-Taylor Brief)..." Brief for Empirical Scholars, *supra* note 63.

[66] Based on word count. Brief, *supra* note 51

[67] Sander & Taylor, *supra* note 9 at 38, 40, 47.

been heavily criticized, and cited 21 critiques.[68] Notably, however, the Empirical Scholars Brief cited virtually no specific arguments from these critiques,[69] since the specific arguments have been answered so decisively as to be discredited.[70]

iv. Third, the Empirical Scholars Brief suggested that there were three or four specific methodological defects in the law school mismatch literature. Each of these claims, however, was false.[71] For example, the Brief claimed that in Professor Williams' analyses of law school mismatch, he always compared whites with blacks, thus confounding "mismatch" effects with possible "race" effects. In fact, however, ***all*** of Williams' analyses are ***within-race*** analyses. None of Williams' analyses are black-white comparisons in the sense criticized by the Empirical Scholars Brief. This and other errors of the Empirical Scholars Brief are so obvious, in fact, that amicus is hopeful that at least some of the authors will retract these claims in due course.

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[68] Brief for Empirical Scholars, *supra* note 63.

[69] *Id.*

[70] Most authors of these critiques have generally made no substantive reply to scholarly responses. Specifically there has been no further defense of the critiques advanced by Ian Ayres, Richard Brooks, Jesse Rothstein, Albert Yoon, David Wilkins, or Mitu Gulati; Katherine Barnes has specifically acknowledged that her original findings were in error. Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students? A Correction, a Lesson, and an Update*, 105 NW. U. L. REV. 2 (2011)

[71] Tellingly, the Empirical Scholars Brief treats the work of this Sander and of Doug Williams as essentially interchangeable, even though Sander and Williams use very different methodologies.

v. Fourth, the Empirical Scholars Brief, filed in August 2012, argued that the literature on law school mismatch theory has not "proven" that these effects occur, because the research is not based on the sort of methods that scientists would usually require for convincing proof – such as, for example, a randomized scientific experiment. This is an interesting point, and probably the point that persuaded most of the distinguished signatories to the brief to join it. Many social scientists justly deplore the tendency of some members of the tribe to extravagantly overclaim the power or generalizability of their findings. And it would undoubtedly be a good thing if more randomized experiments were conducted (though the extraordinary cost of randomized social experiments ensures that they will remain comparatively rare). But the literature on mismatch cited in this brief is not generally guilty of this sort of overclaiming. Most of the work is, in fact, quite modest in its claims. And those who have advanced more general arguments about mismatch have tended to focus on the following points: (i) most recent research on mismatch in higher education have found evidence that it exists; (ii) the research that finds evidence of mismatch tends, on the whole, to be considerably more careful than the research that claims mismatch does not exist; (iii) universities have tended to ignore this research and have been notoriously unwilling to seriously engage the mismatch hypothesis or to make available more and better data with which to test it; and therefore (iv) courts and voters should be highly skeptical of the benefits of racial preferences, and should not defer to the judgment of higher education leaders on this issue.

13. Developments over the past year have provided some verdict on the debate over law school mismatch theory. The detailed Williams analysis of law school mismatch, which finds evidence consistent with law school mismatch theory from a wide range of empirical tests, was derided by the Emprical Scholars Brief, but was published in June 2013 by the *Journal of Empirical Legal Studies*, one of the leading peer-reviewed journals in the field of legal empiricism.[72] There are now several peer-reviewed studies that have found evidence of law school mismatch.[73] In contrast we know of no critique of law school mismatch theory which has been published in a peer-reviewed journal.

C. The University Of California Experience With Proposition 209, And Other Related Research, Suggests That The Effects Of A Ban On Racial Preferences Are Beneficial To Black And Hispanic Students

1. The brief filed by Sander and Taylor in *Fisher* documented how blacks and Hispanics have fared at the University of California since the passage of Proposition 209.[74] The elimination (or scaling back) of racial preferences certainly reduced admissions

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[72] Williams, *supra* note 58.

[73] Doug Williams, Richard H. Sander, Marc Luppino, and Roger Bolus, *Revisiting Law School Mismatch: A Comment on* Barnes *(2007,2011)*, 105 NW. U. L. REV. 2 (2011); Sander, *supra* note 57; Williams, *supra* note 59; Richard H. Sander and Jane Bambauer, *The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers*, 9 J. OF EMPIRICAL LEGAL STUD. 4 (2012).

[74] Brief, *supra* note 51.

rates for blacks and Hispanics at UC campuses, especially at the most elite campuses. But the result of this was to redistribute blacks and Hispanics to less elite UC campuses where their academic preparation levels were closer to those of their classmates. Simultaneously, the university launched new efforts to help disadvantaged high school students (predominantly underrepresented minorities) to prepare for college and take the courses required for UC admission. The result was a surge in black and Hispanic enrollment after 2000 that continues to this day at UC, and an even greater surge in graduation rates, science degree completion rates, and improvements in minority GPAs and time-to-degrees.[75]

2. There are many factors behind the improvement in minority outcomes at UC campuses since the passage of Proposition 209, and it is difficult to know – especially with the limited data made available by UC officials – how much a reduction in mismatch can be credited with the results. But it is plain that outcomes have dramatically improved, and there has been a steady stream of careful, dispassionate research finding that mismatch effects existed at the university and that minority students at UC benefit in important ways when they are less mismatched.[76]

3. There have also been useful studies of the broad effects of preference bans across many states. Peter Hinrichs found that minority college completion rates were essentially unaffected by statewide bans on the use of preferences.[77] Ben Backes reached

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[75] Sander & Taylor, supra note 8 at 146-150.

[76] For example, Arcidiacono, Aucejo, & Hotz, *supra* note 54; Luppino & Sander, *supra* note 54.

[77] Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demo-*

a similar conclusion.[78] The available evidence suggests that (a) reductions in access to college as a result of bans on preferences are minimal, and (b) any reductions are offset, or much more than offset, by improvements in minority college completion rates as a result of less mismatch.

IV. While The Sixth Circuit Suggests That Policies On Racial Preferences Should Be Set At The University Level, There Are Strong Reasons Not To Defer To Universities On This Matter

A. Though Universities Often Justify Racial Preferences Through Their Effect On The "Diversity" Climate Of The School, There Is In Fact A Tension Between Policy And Objective That Universities Have Failed To Address

1. A series of careful studies have found that "mismatch" is not simply an academic phenomenon. If a university relies primarily upon large racial preferences to achieve diversity, then this undermines cross-racial interactions. One reason for this is that students tend to form friendships with other students who are similar to them academically. When academic success on a campus correlates

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graphic Composition of Universities, 94 THE REV. OF ECON. AND STAT. 3 (2012).

[78] Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment?*, 47 J. OF HUMAN RESOURCES 2 (2012).

strongly with race, this directly undermines key diversity goals of the university.[79]

B. Universities Have Not Dealt With Evidence Of Problems Of Racial Preferences In Honest And Constructive Ways. This Can Partly Be Explained By Special Pressures Under Which Universities Labor; But In Any Case The Evidence Strongly Suggests That Universities Cannot Deal Honestly With The Evidence On The Side-effects And Inadequacies Of Racial Preferences, And Should Not Be Deferred To In Regulating Them

1. Acreditation agencies have become very aggressive in imposing national racial diversity standards upon individual institutions. The most well-known example, by no means unique, is the George Mason Law School, which was forced to reinstitute large racial preferences to avoid losing accreditation from the American Bar Association.[80] Thus, even universities that conclude that racial preferences have harmful side-effects have been effectively bullied by accreditation agencies into maintaining practices they privately disavow.

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[79] Peter Arcidiacono, Shakeeb Khan, and Jacob Vigdor, *Representation versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?* 95 J. OF PUB. ECON. 1 (2011); Arcidiacono, Aucejo, & Spenner, *supra* note 53.

[80] See Sander & Taylor, *supra* note at 217-232; Robert Zelnick, *Accreditation and Affirmative Action*, (2008 working paper, available at http://www.seaphe.org/pdf/zelnick-accreditation.pdf).

2. The political climate on many campuses makes careful deliberation on the effects and use of racial preferences a very rare thing. For example, the United States Commission on Civil Rights has in recent years issued two extensive and thoughtful reports on, respectively, law school mismatch (in 2007) and science mismatch (in 2010).[81] To our knowledge, there has been no deliberative response to either of these reports from higher education. So far as college and university administrators are concerned, these reports might as well never have existed. This suggests a degree of insularity and arrogance on the issue of racial preferences that certainly legitimizes voter action on the issue.

3. The University of California has, as an official entity, showed no ability or willingness to acknowledge or even carefully study the effects of operating under a "no racial preference" regime. Instead, it appears to be constrained by considerations of political correctness to ritualistically denounce the effects of Proposition 209, regardless of the actual facts.[82] Recently, for example, the University (specifically, its president and chancellors) submitted a brief to this Court in *Fisher*,[83] attempting to persuade the Court that the university had

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[81] United States Commission on Civil Rights, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS, Briefing Report (2007); United States Commission on Civil Rights, ENCOURAGING MINORITY STUDENTS TO PURSUE SCIENCE, TECHNOLOGY, ENGINEERING AND MATH CAREERS, Briefing Report (2010).

[82] This problem is documented in detail in Sander & Taylor, *supra* note 9 at 131-142, 155-174.

[83] Brief for The President and Chancellors of the University of California as *Amici Curiae*, *Fisher v. University of Texas* 570 U.S. ___ (2012).

been gravely harmed by a ban on racial preferences. In making this case, it relied exclusively on data about minority admissions, lingering in detail on declines in minority enrollment at elite schools. The University's brief made no mention of the (apparently undisputed, but ignored) facts discussed in Part III, *supra*, above: that overall minority enrollments have grown sharply in the years since Proposition 209 and have been at record levels for years; that the degree of racial integration across UC campuses increased after Proposition 209; that socioeconomic diversity at the university has increased; that minority graduation rates have risen dramatically; that the university is producing far more minorities with bachelor degrees, and many more minority scientists, than at any time in its history.

4. The University of California has shown no interest or willingness to carefully examine how student outcomes at the university changed before and after the implementation of Proposition 209. It has refused to make confidential administrative data available to independent scholars (with appropriate guarantees of confidentiality); it has ignored many public records requests and yielded to others only after long resistance, and only with the imposition of limits in the data far beyond what are needed to protect student confidentiality. It has shown no interest in the results of published, peer-reviewed research documenting beneficial effects from the end of racial preferences.[84]

5. Events at Duke University in the winter of 2012 illustrate the inability of universities to honestly discuss and assess the operation and utility of

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[84] Sander & Taylor, *supra* note 9 at 155

racial preferences.[85] Three distinguished professors at Duke completed a draft study in the spring of 2011,[86] which examined the reasons why Hispanics and especially blacks at Duke tended to have lower academic performance, and tended over their undergraduate careers to migrate from more academically challenging majors (STEM fields and economics) to majors that tended, at least, to grade students more leniently. Strikingly, they found that mismatch-like effects could explain all of the racial differences – in other words, race itself had no effect on the differences, only the large preferences used by the university. The study initially attracted no attention at Duke, but when the *Chronicle of Higher Education* wrote about the study in January 2012,[87] an uproar ensued on campus, with students staging protests and faculty denouncing the study's findings. In January 2012, the President of Duke delivered a special address that attacked the study for being insensitive to racial issues at Duke, and suggested that it was inappropriate for professors to do research that could be used in a Supreme Court brief! Through all of the upheaval, no one identified a single specific flaw in the study, or even a single phrase in the carefully worded study that was insensitive. The problem, in the university's eyes, was apparently that such research should occur at all. (A few months after these events, the study was accepted for publication by a peer-reviewed journal in labor

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[85] See Sander & Taylor, *supra* note 9 at 176-178, for a detailed discussion of the events at Duke recounted here.

[86] Arcidiacono, Aucejo, & Spenner, *supra* note 54

[87] Peter Schmidt, *Study Disputes Claims That Preferentially Admitted Students Catch Up*, THE CHRONICLE OF HIGHER EDUCATION, January 10, 2012.

economics.) Events similar to these, though usually on a smaller scale, are familiar to students and professors throughout academia.[88]

6. To the extent that the use of preferences has been measured, the data shows that since the Supreme Court's decision in *Grutter*, racial preferences have been larger and more mechanical. There is no sign of any university deciding to phase out preferences of its own accord. The only instances where universities end racial preferences is when outside institutions – voters, legislatures, governors, or courts – force them to give them up.

CONCLUSION

The Court below made mary empirical assumptions about the use and effects of racial preferences which are contradicted by the empirical evidence. To the extent these errors bear on the merits of the case, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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[88] Robert Maranto, Richard E. Redding, Frederick M. Hess (eds.), THE POLITICALLY CORRECT UNIVERSITY: PROBLEMS, SCOPE, AND REFORMS (AEI Press 2009).

JUNE 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-682

IN THE
Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Respondents.

AND

CHASE CANTRELL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* POLITICAL SCIENTISTS GARY SEGURA, SHAUN BOWLER, TODD DONOVAN, ZOLTAN HAJNAL, RODNEY HERO, STEPHEN NICHOLSON, AND CAROLINE TOLBERT IN SUPPORT OF CHASE CANTRELL RESPONDENTS

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August 30, 2013

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INTEREST OF *AMICI CURIAE*[1]

Amici are distinguished professors of political science who specialize in the study of American political elections and voting, especially at the state and local levels. They have engaged in extensive analysis bearing on the comparative burdens of statewide initiatives and referenda on racial and ethnic minorities. They have a strong interest in ensuring that this Court's decision rests on sound empirical data and theoretical research about the impact of Michigan Ballot Proposal 06-02 ("Proposal 2") on minority interests.

Gary Segura is professor of American politics at Stanford University. His work includes four books and more than 40 articles on political representation, with a particular focus on minority citizens. He is the co-Principal Investigator of the American National Election Study for 2010-2013, and he was elected a Fellow of the American Academy of Arts and Sciences in 2010.

Shaun Bowler is a professor of political science at the University of California – Riverside. His research includes comparative electoral systems and voting behavior both domestically and internationally. He has studied, among other things, the relationship between institutional arrangements and voter choice in California's initiative process.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represents that all parties have consented to the filing of this brief in the form of blanket consent letters filed with the Clerk.

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Caroline Tolbert is Professor of Political Science at the University of Iowa and the co-author of six books and more than 30 articles in peer-reviewed scholarly journals. Her research focuses on political behavior and voting, elections, and political representation. She has extensively studied and published on issues relating to state ballot initiatives.

INTRODUCTION AND SUMMARY OF ARGUMENT

Before Proposal 2, proponents of race-conscious admissions policies at Michigan's public universities had the same avenues for pursuing change as proponents of race-neutral admissions policies.[2] They could lobby the admissions committees; petition university leadership; seek to influence university governing boards through voting, campaigning, or otherwise; or, as a last resort, initiate a statewide campaign to amend the Michigan Constitution. *See Coalition to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equality By Any Means Necessary v. Regents of Univ. of Michigan*, 701 F.3d 466, 470, 480-85 (6th Cir. 2012) (*en banc*). After Proposal 2, however, proponents of race-conscious admissions policies must first repeal Proposal 2 by initiating a campaign to amend the Constitution. Only if successful can they pursue the avenues for change that were available to them before Proposal 2 was enacted and that would remain available to proponents of all other university admissions policies if Proposal 2 were upheld.

This reordering of the political process imposes a significant barrier on those who support race-conscious university admissions policies. Political science has demonstrated that it is extremely difficult to effectuate the interests of racial and ethnic minorities through statewide referenda or ballot

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[2] This brief refers to "race-neutral admissions policies" and "race-conscious admissions policies." The former refers to policies that are neutral on their face, despite any impact or intended impact on racial or ethnic minorities. The latter refers to policies that expressly refer to racial or ethnic minorities.

initiatives.[3] Rather, history teaches that voters in States across the country more frequently have used the initiative process to enact policies that target minorities for disfavored treatment or repeal policies that are perceived to benefit minorities. *See* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 261 (1997).

Political science research and literature thus demonstrate that political changes of the kind effectuated by Proposal 2 constitute precisely the type of reordering that the Supreme Court has held violates the Equal Protection Clause. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467, 474 (1982). Its "practical effect" is to "require[] those championing [race-conscious university admissions policies] to surmount a considerably higher hurdle than persons seeking comparable legislative action." *Id.* at 474; *see Hunter v. Erickson*, 393 U.S. 385, 391 (1969). The Sixth Circuit's decision was correct and should be affirmed. *See Coalition to Defend Affirmative Action*, 701 F.3d at 480-85.

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[3] Initiatives and referenda are similar but distinct concepts. Direct initiatives allow citizens "to file a proposed bill with a state office . . . [,] collect signatures from voters to qualify the measure for a spot on the state ballot," and, "[i]f the initiative qualifies, voters have a direct say on approving or rejecting the proposal." Todd Donovan et al., *State and Local Politics: Institutions and Reform* 115 (2011) ("Donovan, *State and Local Politics*") (also defining indirect initiatives, which are available in Michigan with respect to statutes, but not constitutional amendments). Alternatively, "[a] referendum is a public vote on a statute or a constitutional amendment that has already been considered by a state legislature or local government." *Id.* at 113-14. For simplicity, this brief refers to both as initiatives.

ARGUMENT

Under Proposal 2, proponents of race-conscious university admissions policies first need to repeal Proposal 2 by amending the Michigan Constitution. Only if successful could they pursue the avenues for change that were available to them before Proposal 2 was enacted and that would remain available to proponents of all other university admissions policies were Proposal 2 upheld.

Amending the Michigan Constitution involves two arduous steps. First, a proposed amendment must qualify for placement on the ballot by obtaining the support of two-thirds of the Michigan House of Representatives and the Michigan Senate for an amendment proposed in the House or Senate, *see* Mich. Const. art. XII, § 1, or by filing a petition that proposes the amendment with state authorities, which requires collecting, within 180 days of filing the petition, the signatures of the number of voters equal to at least 10% of the number of votes cast for all candidates for governor in the preceding general election in which a governor was elected, *see id.* § 2; Mich. Comp. Laws § 168.472a. Second, proponents of the amendment must earn the support of a majority of electors voting on the question in a statewide election. *See* Mich. Const. art. XII, §§ 1, 2.

Part I explains how and why each step involved in repealing Proposal 2 through the initiative process would be extraordinarily and uniquely difficult, and thus why the Sixth Circuit was correct in holding that Proposal 2's reordering of the political process imposes "special burdens on racial minorities." 701 F.3d at 477. Part II explains how the political science literature addresses two of the concerns expressed by Judge Sutton in his dissent from the Sixth Circuit's *en banc* opinion.

I. PROPOSAL 2 REORDERS THE POLITICAL PROCESS FOR PROPONENTS OF RACE-CONSCIOUS UNIVERSITY ADMISSIONS POLICIES IN A WAY THAT PLACES SPECIAL BURDENS ON RACIAL AND ETHNIC MINORITIES

History, empirical research, and political science literature support the Sixth Circuit's *en banc* holding that Proposal 2 "reorders the political process in Michigan in a way that places special burdens on racial minorities." 701 F.3d at 477.[4] Proponents of the interests of racial and ethnic minorities, in comparison to the majority, face far greater obstacles to effectuating those interests through statewide ballot initiatives. In fact, statewide initiatives in the United States frequently have been used to disadvantage minorities, as in the case of Proposal 2, and they rarely, if ever, have been used to promote minorities' interests.

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[4] Proponents of race-conscious university admissions policies are not unanimously minorities, nor are all minorities proponents of such policies. *See, e.g.*, William C. Kidder, *Restructuring Higher Education Opportunity? African American Degree Attainment After Michigan's Ban on Affirmative Action*, A Civil Rights Project Policy Brief at 1-2 (Aug. 2013) (discussing polling data indicating "that about 64% of whites voted in favor of Proposal 2 in November 2006, while 86% of African Americans voted against it"); *see also* CNN.com, AmericaVotes2006 – Ballot Measures/Michigan Proposition 2/Exit Poll, *at* http://www.cnn.com/ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html; *infra* Part I.B (discussing numerous examples of anti-minority initiatives that demonstrate racially polarized voting and anti-minority outcomes). The proper inquiry, however, is whether Proposal 2 would require "those championing [race-conscious university admissions policies] to surmount a considerably higher hurdle than persons seeking comparable legislative action." *Seattle Sch. Dist. No. 1*, 458 U.S. at 474. As explained throughout this brief, Proposal 2 certainly meets that standard.

A. Proponents Of Race-Conscious University Admissions Policies Face Significant Barriers In Placing On The Statewide Ballot An Initiative That Would Repeal Proposal 2

Under Proposal 2, proponents of race-conscious admissions policies face an arduous burden. Qualifying a proposed amendment to Michigan's Constitution for placement on the ballot would require, first, drafting a proposed constitutional amendment that would repeal Proposal 2, and then collecting signatures, within a period of 180 days, in an amount equal to at least 10% of the number of votes cast for all candidates for governor in the preceding general election in which a governor was elected. *See* Mich. Const. art. XII, § 2; Mich. Comp. Laws § 168.472a. This is a monumental task in any case and particularly so for proponents of initiatives that seek to improve the situation of minorities.

Political science research shows that it is exceedingly difficult to qualify for placement on statewide ballots initiatives aimed at redressing difficulties that confront minorities. This makes sense because almost by definition minority groups, unlike the majority, begin the process of assembling signatures with fewer and perhaps far fewer citizens likely to be especially concerned with the problems such initiatives seek to redress. Indeed, voters in States across the country more frequently have used the initiative process to enact policies that expressly disfavor minorities by targeting them for disfavored treatment or repealing legislatively enacted policies that explicitly benefit minority groups. *See* Gamble, 41 Am. J. Pol. Sci. at 261 ("Citizens in the political majority have repeatedly used direct democracy to put the rights of political minorities to a popular

vote. Not only that, anti-civil rights initiatives have an extraordinary record of success: voters have approved over three-quarters of these . . . .").

For example, political scientist Barbara S. Gamble evaluated 74 civil rights initiatives between 1959 and 1993 involving issues related to housing and public accommodations for racial minorities, school desegregation, gay rights, English-language laws, and AIDS policies. *See id.* at 253-54. Of them, "78% resulted in outcomes that constituted a defeat of minority interests," such as "the repeal of existing civil rights laws, the enactment of laws that prohibited legislative bodies from passing new civil rights laws, and the defeat of measures that sought to extend civil rights protections." *Id.* at 254. "All but six of the 74 initiatives, or 92%, actively sought to restrict the rights of minorities." *Id.* And "only one of the six initiatives that specifically tried to extend civil rights protection has passed since 1959." *Id.* The rate of passage for anti-minority ballot initiatives was almost two-and-a-half times the rate of passage for all referenda during this period. *Id.* Perhaps more importantly, of the 74 initiatives, 26 involved racial, ethnic, and linguistic minorities. *Id.* at 253. Of those 26, 25 were placed on the ballot by the members of the majority group. *Id.* Minority groups suffered defeat in 22 cases, or 88% of the time. *Id.*

There are numerous examples of voters approving citizen initiatives that repealed policies secured through the legislative process that were designed, at least in part, to benefit minorities. *See, e.g., id.* at 246 ("In five issue areas – housing and public accommodations for racial minorities, school desegregation, gay rights, English language laws, and AIDS

policies – the majority has been extraordinarily successful at using the ballot box to repeal existing legislative protections and to pass laws that block elected representatives from creating new laws."); *see also id.* at 255-61 (discussing examples of anti-minority initiatives); Donovan, *State and Local Politics* 138 ("State and local ballot initiatives have been used to undo policies – such as school desegregation, protections against job and housing discrimination, and affirmative action – that minorities have secured from legislatures where they are included in the bargaining process."). Indeed, political science literature demonstrates that, with respect to "civil rights initiatives and popular referenda . . . , voters overwhelmingly favor direct legislation that repeals existing civil rights laws or precludes elected officials from making new ones." Gamble, 41 Am. J. Pol. Sci. at 248.

Two practical and logistical constraints provide additional reasons why it is difficult to qualify proposed amendments to the Michigan Constitution for placement on the statewide ballot.

First, there are significant costs associated with qualifying an amendment to the Michigan Constitution for placement on the ballot. Petitioners must collect signatures of registered voters in an amount equal to 10% of the total vote in the previous gubernatorial election – more than 320,000 signatures if the 2010 election were still the most recent – and file the signatures in the form of a petition to state authorities who "shall . . . determine . . . the validity and sufficiency of the signatures on the petition." Mich. Const. art. XII, § 2; *see also* Mich. Comp. Laws § 168.472a; *id.* § 168.476(1) ("Upon receiving notification [from the secretary of state] of the filing of the

petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors. The qualified voter file shall be used to determine the validity of petition signatures by verifying the registration of signers and the genuineness of signatures on petitions when the qualified voter file contains digitized signatures. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a rebuttable presumption that the signature is invalid."); Michigan Dep't of State, General Election Voter Registration/Turnout Statistics, *at* http://michigan.gov/sos/0,4670,7-127-1633_8722-29616--,00.html (last visited Aug. 21, 2013) (indicating official voter turnout of more than 3.2 million for the 2010 gubernatorial election). And Michigan prohibits the filing of supplemental signatures after a petition has been filed. *See* Mich. Comp. Laws § 168.475(2).

To account for invalid and duplicative signatures, initiative sponsors "need to obtain substantially more than the actual required number of signatures, typically by a 25% to 50% margin." Caroline J. Tolbert et al., "Election Law and Rules for Using Initiatives," *in Citizens as Legislators: Direct Democracy in the United States* 27, 37 (Shaun Bowler et al. eds., 1998) ("Tolbert, *Election Law*"); *see* Donovan, *State and Local Politics* 128 (noting, while discussing California's signature requirements, that "a large percentage of signatures will surely be found to be invalid"). The vast majority of petition efforts thus require initiative sponsors to hire paid petition circulators, at significant expense. *See* Donovan, *State and Local Politics* 127 ("In many states, it is difficult to place a measure on the ballot unless professional

petition firms are paid to collect some or all the signatures required for qualification."); Tolbert, *Election Law* 35 ("In the past two decades, virtually all successful drives have relied, at least predominantly, on professional circulation firms."). It should come as no surprise then that "wealthy groups (unions, corporations, business organizations, professional associations, and trade groups) and wealthy individuals play a prominent, if not dominant, role in affecting what gets put to a public vote." Donovan, *State and Local Politics* 128; *see also* Tolbert, *Election Law* 35 ("Qualifying an initiative for the statewide ballot is thus no longer so much a measure of general citizen interest as it is a test of fundraising ability.") (internal quotation marks and citation omitted).

Second, in order for proponents of race-conscious admissions policies to repeal Proposal 2, they would need to meet strict time requirements associated with collecting signatures. Michigan allows petitioners only 180 days to collect the requisite number of signatures. *See* Mich. Const. art. XII, § 2; Mich. Comp. Laws § 168.472a. Proponents of race-neutral policies, however, could take as long as they want to pursue the other avenues of change available to them. The arduous task of placing a repeal of Proposal 2 on the ballot thus imposes significant barriers to proponents of race-conscious admissions policies.

B. Proponents Of Race-Conscious University Admissions Policies Also Face Significant Barriers In Obtaining Majority Support For Repealing Proposal 2

Proposal 2 also puts proponents of race-conscious admissions policies at significant political disadvantage in generating the votes of "a majority of the electors

voting on the question," which is required to enact the amendment into law. Mich. Const. art. XII, § 2.

As a preliminary matter, amending the Michigan Constitution in any way – relating to minority rights or not – is rare. The Initiative & Referendum Institute at the University of Southern California ("IRI") – a non-profit that has compiled information on roughly 2,000 initiatives since 1904 – found that, between 1914 and 2000, only 60 statewide initiatives were placed on the Michigan ballot, and only 20 passed. *See* IRI, Statewide Initiative Usage [Michigan Initiatives (1914-2000)], *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/Michigan.pdf.

Moreover, obtaining voter support for initiatives designed to improve the situation for racial and ethnic minorities and that expressly address issues relating to those minorities is particularly difficult. Political science research on statewide ballot initiatives demonstrates that the problem of minority disadvantage is especially acute with respect to racially focused initiatives: Racial and ethnic minorities – especially Latinos – more often than not lose when ballot measures explicitly target minorities, while they fare less poorly when ballot measures do not explicitly target minorities. *See* Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. Pol. 154, 156, 165-72, 174 (2002); *see also* Donovan, *State and Local Politics* 138 ("[O]n issues dealing with racial and ethnic matters, studies show that racial and ethnic minorities do end up more on the losing side of the popular vote."); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54

Wash. L. Rev. 1, 28 (1978) ("Justice Black's declaration that referenda demonstrate devotion to democracy rather than to bias, discrimination, or prejudice, is in fact almost the opposite of the truth when the issue submitted to the voters suggests, even subtly, that majority interests can be furthered by the sacrifice of minority rights."). It is difficult to find even a single statewide initiative in any State in which voters approved policies that explicitly favor racial or ethnic minority groups. The IRI's comprehensive survey of statewide initiatives between 1904 and 2000 in all States that allow initiatives reveals very few initiatives that could be said to expand rather than restrict minority rights. *See* IRI, Statewide Initiatives Since 1904-2000, *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/Statewide%20Initiatives%201904-2000.pdf.

One explanation for the difficulty in gaining majority support for pro-minority ballot measures that expressly address issues relating to racial or ethnic minorities is that singling out racially divisive issues dilutes minority voting strength by isolating minority voters from potential electoral allies. *See* Bell, 54 Wash. L. Rev. at 23 ("[R]eferenda and initiatives expose blacks to harm not only because referenda serve to enact racially hostile measures, but also because Blacks are isolated from their class allies and thus have diminished electoral strength."). Indeed, statewide ballot initiatives often are exploited as lightning rods for attacks on disfavored minority groups. *See* Peter Schrag, *Paradise Lost: California's Experience, America's Future* 225-26 (1998) (referring to the "demagogic potential of the intiative"); Bell, 54 Wash. L. Rev. at 19 ("Appeals to prejudice, oversimplifi-

cation of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns."); *see generally id.* at 18 ("The emotionally charged atmosphere often surrounding referenda and initiatives can easily reduce the care with which the voters consider the matters submitted to them."). Ballot initatives that explicitly address racial issues disadvantage minority groups because they impair the ability of those groups to form effective coalitions with non-minorities.

Moreover, empirical research confirms that public opinion towards minority groups erodes when ballot measures explicitly address minority interests. *See, e.g.*, Donovan, *State and Local Politics* 140 ("By targeting a minority group with an initiative, for example, public attitudes about the group (or about policies that benefit the group) can be changed, with mass opinion becoming less tolerant of the targeted minority group."). Indeed, political science research also indicates a racial threat or backlash in support of ending race-conscious public policies. A 2003 study of voting on California's Proposition 209 – which, like Proposal 2, amended the state constitution to prevent state public institutions from considering race, ethnicity, or gender – found that white support for the initiative was higher in neighborhoods with larger Latino, African-American, and Asian-American populations, even after controlling for other factors, than among whites living in more homogeneous areas. *See generally* Caroline J. Tolbert & John A. Grummel, *Revisiting the Racial Threat Hypothesis: White Voter Support for California's Proposition 209*, 3 State Pol. & Pol'y Q. 183, 183, 191, 196 (2003).

Minority-focused ballot initiatives also disadvantage racial and ethnic minority groups because, like collecting signatures, campaigning for a majority of votes can be expensive and resource-consuming, and "organizations advocating on behalf of marginalized groups remain . . . outmoneyed by corporate, business, and professional organizations." Dara Z. Strolovitch & M. David Forrest, "Social and Economic Justice Movements and Organizations," *in The Oxford Handbook of American Political Parties and Interest Groups* 468, 471 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010) ("*Oxford Handbook*"). For example, "[i]n the 2002 elections, almost $9 per capita was spent on initiative campaigns in Arizona, more than the amount spent on any single candidate race – congressional or statewide. Oregon followed with almost $3.5 spent on initiatives for every state resident, with Colorado and Utah tied at almost $2 per capita, and California $1.50 per capita. In the 2004 presidential elections, Oregon topped the list with $8.98 on ballot initiative expenditures per capita, followed by Nevada ($6.65) and California ($5.95)." Caroline J. Tolbert et al., *Initiative Campaigns: Direct Democracy and Voter Mobilization*, 37 Am. Pol. Res. 155, 161 (2009). The 2004 "figures were higher than spending per capita in the presidential election for those states." *Id.* at 158.[5] "In 2006, nearly $525 million was spent on 73 ballot initiative campaigns in 18 states. In several states, more money was spent on ballot initiative campaigns than for all other races for political office combined." Donovan, *State and Local Politics* 129 (noting that "proponents and

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[5] In California, "[m]ore money was spent per capita on initiatives . . than any of the other major candidate races in the state." Tolbert, 37 Am. Pol. Res. at 161.

opponents of eight initiatives on the November ballot [in California alone] spent more than $300 million in an effort to qualify the measures and sway voters on the merits of their arguments"). And, "[i]n 2008, over $800 million was spent nationally on state-level initiative and referendum campaigns, more money than was spent on Barack Obama's presidential campaign." *Id.* (footnote omitted).[6]

Accordingly, ballot initiatives designed to improve the situation for racial and ethnic minorities that explicitly refer to those minorities are extremely difficult for minorities to win, and they tend to diminish minorities' electoral strength on other issues as well. In fact, there are numerous examples of racially polarized voting on minority-related initiatives that resulted in outcomes disadvantaging minorities.

- Proposal 2 exit polling demonstrated racially polarized voting that is consistent with the theoretical and empirical evidence discussed above. Sixty-four percent of whites voted in favor of the Proposal, while 86% of African-Americans voted against it.[7]
- Proposition 209 in California's 1996 election, which eliminated affirmative action programs in public education, hiring, and contracting, was supported by 63% of white voters, who

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[6] The literature cited does not disaggregate costs associated with qualifying questions for placement on ballots, addressed *supra* in Part I.A, and costs associated with generating the requisite votes after a question has qualified for the ballot. Presumably it refers to the sum of those costs.

[7] *See* CNN.com, AmericaVotes2006 – Ballot Measures/ Michigan Proposition 2/Exit Poll, *at* http://www.cnn.com/ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html.

constituted 74% of voters, and opposed by 74% of black voters, who constituted 7% of voters.[8] It passed by a margin of 54%-46%.[9]

- Voters in Washington (through Initiative 200 in 1998), Nebraska (through Initiative 424 in 2008), Arizona (through Proposition 107 in 2010), and Oklahoma (through State Question 759 in 2012) passed similar initiatives by wide margins – approximately 16.4%, 16%, 19%, and 18.4%, respectively.[10]
- Proposition 227 in California's 1998 election, which sought to limit bilingual education programs, resulted in similar polarization. Exit polls showed that 67% of white voters supported

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[8] *See* Hajnal, 64 J. Pol. at 155, 159, 170; Los Angeles Times, Los Angeles Times Poll, Study #389 – Exit Poll: The General Election, November 5, 1996, at 6 ("L.A. Times Poll"), *available at* http://www.latimes.com/media/acrobat/2008-10/43120439.pdf; *see also* Tolbert & Grummel, 3 State Pol. & Pol'y Q. at 196 ("Surveys indicate that nearly two-thirds of white Californians voting on Proposition 209 supported it and that white Californians continue to support ending affirmative action, while a majority of every other racial and ethnic group opposed the proposition.").

[9] *See* L.A. Times Poll, at 1, 6.

[10] *See* Washington Sec'y of State, Elections Div., Elections Search – Results, *at* http://www.sos.wa.gov/elections/results_report.aspx?e=10&c=&c2=&t=&t2=5&p=&p2=&y= (last visited Aug. 21, 2013); Nebraska Sec'y of State, Nebraska Election 2008: Unofficial Election Results, *at* http://www.sos.ne.gov/elec/2008/ElectNight/general.htm (last visited Aug. 21, 2013); Arizona Sec'y of State, State of Arizona Official Canvass: 2010 General Election – November 2, 2010, *at* http://www.azsos.gov/election/2010/General/Canvass2010GE.pdf (last visited Aug. 21, 2013); Oklahoma State Election Bd., Official Results: General Election – November 6, 2012, *at* http://www.ok.gov/elections/support/12gen_seb.html (last visited Aug. 21, 2013).

the initiative, while 63% of Latino voters opposed it. Support by white voters caused the Proposition to pass by a 61%-39% margin, despite opposition from minority groups.[11]

- Proposition 187 in California's 1994 election, which limited illegal immigrants' access to public services, generated support from 59% of white voters, who amounted to 81% of the electorate, while 75% of Hispanics voted against it; it passed by a 59%-41% margin.[12]

At bottom, political science demonstrates that, "on the whole, members of minority groups are indeed less likely than whites to prevail on . . . minority-targeted initiatives." Hajnal, 64 J. Pol. at 171. Because of racially polarized voting and sentiments triggered by minority-focused ballot initiatives, Proposal 2's requirement that proponents of race-conscious admissions policies first prevail in a minority-focused initiative process imposes enormous political burdens on racial and ethnic minority groups and those seeking to advance the interests of those groups – a burden that proponents of other admissions policies do not bear, despite the fact that some of their proposals, such as legacy admissions,

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[11] *See* Los Angeles Times, Los Angeles Times Poll, Study #413 – Exit Poll: California Primary Election, June 2, 1998, at 1, 5, *available at* http://www.latimesinteractive.com/pdfarchive/stat_sheets/la-timespoll413ss.pdf.

[12] *See* R. Michael Alvarez & Tara L. Butterfield, *The Resurgence of Nativism in California? The Case of Proposition 187 and Illegal Immigration* 1, 7 (Sept. 1997), *available at* http://polmeth.wustl.edu/media/Paper/alvar97d.pdf; Caroline J. Tolbert & Rodney E. Hero, *Race/Ethnicity and Direct Democracy: An Analysis of California's Illegal Immigration Initiative*, 58 J. Pol. 806, 806, 808, 809 (1996).

are more likely to advantage members of the majority than racial or ethnic minorities.

II. STATEWIDE BALLOT MEASURES IMPOSE COMPARATIVELY GREATER BURDENS ON MINORITY INTERESTS THAN OTHER POLITICAL PROCESSES

Judge Sutton, dissenting from the Sixth Circuit's *en banc* opinion, emphasized two points. First, he argued that Proposal 2 does not impose a significant burden because state constitutions are "*too easy* to change." 701 F.3d at 507. Second, he expressed doubt that any empirical study demonstrates that passing a ballot initiative, which requires "a single 10% petition drive and a single 51% popular vote," is "more difficult for proponents of change than [electing all new members to the university boards of Michigan, Michigan State, and Wayne State, which would require winning] twenty-four statewide elections (among others) for twenty-four individuals over an eight-year period." *Id.* at 508. Political science research undermines each point.

With respect to Judge Sutton's first point, proponents of initiatives to amend the Michigan Constitution face numerous obstacles, including significant costs to qualify their proposals for statewide ballots and generate a majority of voter support. *See supra* Part I. Michigan's Constitution rarely has been amended through the initiative process. *See supra* Part I.B. And it is particularly difficult to amend state constitutions to enact pro-minority initiatives. As Part I demonstrates, the playing field for proponents of minority-focused initiatives that seek to improve the situation of minorities is tilted against them; it was much easier for those who oppose race-conscious university admissions policies to pass

Proposal 2 than it would be for proponents of those policies to repeal it. *See Seattle Sch. Dist. No. 1*, 458 U.S. at 484 ("'If a governmental institution is to be fair, one group cannot always be expected to win'; by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage.") (quoting *Hunter*, 393 U.S. at 394 (Harlan, J., concurring)).

With respect to Judge Sutton's second point, the relevant inquiry is not whether it is more difficult for proponents of change to win statewide elections of university board members than it is to pass a minority-focused intiative that would repeal Proposal 2. Proposal 2 requires proponents of race-conscious admissions policies to do *both* to achieve their policy goals. Only after repealing Proposal 2 can they seek to elect board members who favor race-conscious admissions policies or pursue the other avenues for change that were available to them before Proposal 2 and that would remain available to proponents of race-neutral admissions policies were Proposal 2 upheld.[13] The problem with Proposal 2 is that it requires proponents of race-conscious admissions policies to overcome an extremely onerous obstacle as a prerequisite to pursuing their policy objectives through other avenues of change.

That preliminary obstacle is particularly onerous because, as explained above, it is significantly more

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[13] It is theoretically conceivable that proponents of race-conscious admissions policies could attempt to repeal Proposal 2 with a constitutional amendment that requires affirmative action, but that is highly unrealistic given the demonstrated tendency of statewide ballot initiatives to be used as a tool to disadvantage racial minorities and other minority groups. *See supra* Part I.

difficult for minorities to achieve their interests through statewide ballot initiatives than through other democratic processes. *See also, e.g.*, Donovan, *State and Local Politics* 138 ("Recent scholarly research shows that the initiative process is sometimes prone to produce laws that disadvantage relatively powerless minorities – and probably is more likely than legislatures to do so.") (internal quotation marks omitted); *see also* Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 Santa Clara L.R. 1037, 1056-57 (2001) ("Racial minorities, illegal immigrants, homosexuals, and criminal defendants have been exposed to the electorate's momentary passions as Californians have adopted a large number of initiatives that represent Populist backlash against representative government's efforts to protect or promote the interests of racial or other minorities.") (footnotes omitted).

In fact, minority groups have been more effective in effectuating change in university policies through more informal methods, such as lobbying the respective boards. For example, as the district court in this case concluded, the universities' policies of considering race as one of many factors in admissions was the product of decades of lobbying effort. *See Coalition to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equality By Any Means Necessary v. Regents of Univ. of Michigan*, 539 F. Supp. 2d 924, 930-31, 935-36 (E.D. Mich. 2008). While lobbying board members remains open to those advocating race-neutral changes to university admissions policies, Proposal 2 forecloses this important avenue of political advocacy exclusively for those who seek consideration of race in university admissions.

Two structural features of Michigan's system for electing boards at the State's three flagship public universities bolster racial and ethnic minorities' ability to effectuate change through the electoral process relative to the initiative process.

First, board members are selected through a "modified at-large" electoral process in which both the first- and second-place candidates are elected. *See* Mich. Const. art. VIII, § 5; Mich. Comp. Laws §§ 168.286, 168.287. That electoral format has been shown to produce greater minority representation (and thus greater representation of minority interests) than winner-take-all, at-large elections, in which a single candidate must obtain a plurality of the vote to be elected for a single position. *See* Elizabeth R. Gerber et al., *Minority Representation in Multimember Districts*, 92 Am. Pol. Sci. Rev. 127, 128-30, 139-42 (1998); Richard L. Engstrom & Michael D. McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 Am. Pol. Sci. Rev. 344, 347-52 (1981); Shaun Bowler et al., *Electoral Reform and Minority Representation: Local Experiments with Alternative Elections* 1-2, 95-98, 105-06 (2003). Accordingly, in multi-candidate elections, electoral success is possible with lower vote totals. Other things equal, such election formats are thus beneficial to minority candidates. In fact, in several elections in recent years, second-place candidates were elected to the University of Michigan, Michigan State University, and Wayne State University boards with less than 25% of the vote, which would not be possible in a single-member election or in a statewide referendum. *See* Michigan Dep't of State, Elections in Michigan, *at* http://www.michigan.

gov/sos/0,4670,7-127-1633_8722---,00.html (last visited Aug. 21, 2013).

Second, the fact that board members are nominated on a partisan basis, *see* Mich. Comp. Laws § 168.282, makes it easier, relative to the initiative process, for proponents of race-conscious admissions policies to seek change through board-member elections. Political parties are, by their nature, coalitions of various groups. *See generally, e.g.*, David W. Brady, "Party Coalitions in the US Congress: Intra- V. Interparty," *in Oxford Handbook* 358-76. As a general matter, these groups in a party nominate candidates with shared goals and from various elements of the party to secure nominations for various offices. *See generally* Valdimer O. Key, Jr., *American State Politics: An Introduction* 198-99 (1956).

Accordingly, because African-American voters are a core component of the contemporary Democratic Party coalition, *see* William H. Flanigan & Nancy H. Zingale, *Political Behavior of the American Electorate* 111-12 (12th ed. 2010), local and state Democratic parties regularly have nominated and elected African-American candidates, *see generally* Rene R. Rocha et al., *Race and Turnout: Does Descriptive Representation in State Legislatures Increase Minority Voting?*, 63 Pol. Res. Q. 890 (2010). As a result, racial minorities have had more success in legislative settings than statewide initiatives. *See* Bruce E. Cain, "Voting Rights and Democratic Theory: Toward a Color-Blind Society?," *in Controversies in Minority Voting: The Voting Rights Act in Perspective* 261, 274-75 (Bernard Grofman & Chandler Davidson eds., 1992); *supra* Part I.A.

Moreover, Judge Sutton's argument proves too much. To the extent citizen views about appropriate

admissions policies can be effectuated through the election of university board members, voters in Michigan do not need to erect constitutional barriers to affirmative action to effectuate their concerns.

In sum, political science does not support Judge Sutton's contention that it would be as easy or easier for proponents of race-conscious admissions policies to prevail in a statewide ballot initiative than to accomplish their policy goals through elections of members of university boards. To the contrary, years of empirical research demonstrate that statewide ballot initiatives pose serious obstacles to minority interests that are not present with respect to ordinary political processes such as elections for public officials.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 12-682

IN THE

Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE SOCIETY OF AMERICAN LAW TEACHERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Founded in 1973, the Society of American Law Teachers ("SALT") is the largest independent membership organization of legal academics in the United States. Over 900 law professors, deans, librarians, and administrators from over 200 law schools make up SALT's membership. Almost all active SALT members hold full-time positions in legal education.

SALT is an active proponent for educational equality at all levels. SALT organizes scholarly conferences; creates mentoring programs for minorities in academia and legal study; leads efforts to secure financial support for low-income law students; conducts and supports studies of bias in standardized testing, including the LSAT and state bar exams; and supports affirmative action to increase racial and ethnic diversity in higher education.

SALT has advocated for race-conscious admissions policies before this Court in three cases. In 1978, SALT filed a brief *amicus curiae* in support of the University of California in *Regents of the*

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[1] Pursuant to Rule 37.6, the *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to fund the preparation or submission of this brief. Blanket consents by the parties to the filing of *amicus curiae* briefs were filed with the Court.

University of California v. Bakke.[2] In 2003, SALT submitted a brief *amicus curiae* in support of the University of Michigan Law School in *Grutter v. Bollinger*.[3] Most recently, SALT supported the University of Texas with a brief *amicus curiae* in *Fisher v. University of Texas at Austin*.[4]

Core to SALT's mission is "mak[ing] the legal profession more inclusive and reflective of the rich diversity of this nation."[5] Through its research and the experience of its members in the fields of law and education, SALT has seen not only a lack of progress in the diversity of law school classes, but declining racial and ethnic diversity. To permanently turn the tide and ensure that all levels of higher education reflect the diversity of our nation's population, universities must be able to use holistic admissions processes that take into account all the factors that shape a student's life, including race.

Although this case is focused on the political process by which university admission policies are adopted, it is of special significance to SALT because the Court's ruling will directly and substantially affect the diversity and pool of college graduates applying to law school. The use of race-conscious admissions programs remain necessary to provide a

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[2] 438 U.S. 265 (1978).

[3] 539 U.S. 306 (2003).

[4] 133 S. Ct. 2411 (2013).

[5] Soc'y of Am. Law Teachers (SALT), *History of SALT*, http://www.saltlaw.org/contents/view/history (last visited Aug. 27, 2013).

pipeline of diverse students to law schools, which serve as a training ground for the nation's future leaders.

SUMMARY OF ARGUMENT

In 2003, this Court upheld in *Grutter* the use of race-conscious admissions programs in public higher education.[6] Under strict scrutiny, the Court determined that the use of such programs were necessary and narrowly tailored to serve the compelling state interest in student body diversity in Michigan's universities.[7]

Ten years later, this Court must address whether Proposal 06-02 ("Proposal 2") undermines that determination, as well as educational missions to achieve a critical mass of underrepresented minorities. The past ten years confirm that it does.

Proposal 2 is a state constitutional amendment passed by Michigan voters that prohibits Michigan's public universities from considering race as but one factor among many in admissions decisions. The exclusion of any consideration of race facilitates diminished diversity in postsecondary education. The passage of Proposal 2, and similar bans on race-conscious admissions measures in other states, has depressed minority student enrollment, particularly at the country's most selective public universities, as well as at law schools and other professional schools. Such bans

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[6] 539 U.S. at 325.

[7] *Id.* at 333-34.

ignore the importance of—and scores of studies showing the benefits of—diversity in education.

Time and experience have shown that whatever "promise" race-neutral alternatives once held has been debunked.[8] These alternatives do not adequately achieve diversity, ignore its crucial aspects, and exploit the lack of diversity. They also do nothing to alleviate the alleged harms of race-conscious measures, confirming that the use of race as a factor in admissions is narrowly tailored and necessary to effectuate the critical societal benefit of student body diversity. Given the ineffectiveness of race-neutral alternatives, universities should be permitted to avail themselves of their collective experience and expertise to determine whether—if at all—race should be a factor in admissions decisions and to tailor their admissions programs accordingly.

Proposal 2 further frustrates attempts to improve diversity in higher education by restructuring the political process. Individuals advocating for race-inclusive policies must undergo the arduous process of amending the state constitution, whereas individuals advocating for any other admissions policy change can simply petition their elected university officials. Under the prevailing doctrine set forth by this Court in *Hunter v. Erickson* and *Washington v. Seattle School District No. 1*, this slanted restructuring constitutes state action that places "*special* burdens on racial minorities within the governmental process" and makes it "*more* difficult for certain racial . . .

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[8] *See id.* at 343.

minorities [than for other members of the community] to achieve legislation that is in their interest," and thus violates the Equal Protection Clause.[9]

Proposal 2 also cannot be reconciled with the equal protection principles articulated in *Romer v. Evans*, which denounced any "law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government" as a "denial of equal protection."[10] Proposal 2 targets minorities by disabling them from seeking race-conscious admissions measures to address the persistent residential and school segregation in Michigan (and in many other parts of the country).

The decision below should be upheld. Proposal 2 strips universities of the ability to use constitutionally permissible, effective, and necessary means to attain student body diversity. And, under the precedent set forth by *Hunter*, *Seattle*, and *Romer*, Proposal 2 violates the Equal Protection Clause.

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[9] *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982) (citing *Hunter v. Erickson*, 393 U.S. 385, 391, 395 (1969)).

[10] 517 U.S. 620, 633 (1996).

ARGUMENT

I. PROPOSAL 2 PROHIBITS UNIVERSITIES FROM USING RACE-CONSCIOUS MEASURES THAT ARE NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST IN STUDENT BODY DIVERSITY.

A. Universities Have a Compelling Interest in Attaining the Educational Benefits of a Diverse Student Body.

Diversity is and remains a compelling state interest. This Court held in *Grutter*, and reaffirmed in *Fisher*, that universities have a "compelling interest in obtaining the educational benefits that flow from a diverse student body."[11] These benefits, characterized by the Court as "substantial," include: (1) "cross-racial understanding," (2) breakdown of racial stereotypes, (3) enhanced classroom discussion, and (4) better preparation of students "for an increasingly diverse workforce and society" and "as professionals."[12]

Studies confirm the Court's conclusions regarding the educational benefits of diversity. These studies emphasize that diversity is especially useful in classroom discussions, in part because "students from different backgrounds offer different

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[11] *Grutter*, 539 U.S. at 343; *Fisher*, 133 S. Ct. at 2419 (declining to revisit *Grutter*'s holding that diversity is a compelling state interest).

[12] *Grutter*, 539 U.S. at 330.

viewpoints that may help with problem solving."[13] "Students across all groups were equally likely to modify their views on an important political issue due to discussions with someone from a different racial/ethnic background."[14] By being exposed to viewpoints and experiences that are entirely new to them, students report that they are pushed beyond their "unexamined world views."[15] As one student put it, "A lot of times you can kind of get caught up in your own world and . . . see things as only you see them. But when you are in a diverse environment, you can take the same set of facts and another person can see those . . . facts as being totally different."[16] Many students agree that diversity had "an overall positive effect on their educational experience in law school."[17]

Diverse law school classrooms also prepare students "to become effective 'corporate counselors and deal makers' as well as 'culturally competent

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[13] Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 Mich. J. Race & L. 63, 78 (2011) (citing Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. Fla. J.L. & Pub. Pol'y 11, 25-26 (2003)).

[14] Charles E. Daye et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 Rutgers Race & L. Rev. 75-S, 175-S (2012).

[15] *Id.* at 161-S.

[16] *Id.* at 162-S.

[17] *Id.* at 174-S.

leaders.'"[18] Students agree that "diversity improves abilities to work and get along with other[s] after graduation in an increasingly diverse society."[19] They also report that white students sharing a classroom with black and Hispanic students "are challenged to rethink and release racial stereotypes."[20] One law student, for example, reported that "it's good just to have different diversity for people to see that everyone can excel at the law, and . . . break down their stereotypes of Blacks and Hispanics."[21] In addition, students recognize that diversity can help them prepare to work "in a world defined by racial and other forms of diversity."[22] As put by a law student, "unless you plan to practice law in a box, you're going to be dealing with all kinds of races when you graduate. So you better have[] some of that respect or that appreciation that people can think differently."[23]

Whereas campus diversity offers substantial benefits, a lack of diversity impairs the effectiveness of a learning environment. Unfortunately, "barriers that exist in society at large" can follow students of color onto a university campus.[24] "[W]ithout a

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[18] Deo, *supra* note 13, at 80 (citing Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, A Deeper Commitment*, 52 J. Legal Educ. 491, 505 (2002)).

[19] Daye, *supra* note 14, at 174-S.

[20] *Id.* at 176-S.

[21] *Id.*

[22] *Id.* at 181-S.

[23] *Id.*

[24] Deo, *supra* note 13, at 79.

meaningful presence," students of color may feel marginalized and "disengaged from the learning process."[25] These students are less likely to participate in class, choosing "silence as a way of protecting themselves from a hostile environment in and out of the classroom."[26] These students must also combat tokenism and the challenge of being seen as a "spokesperson" for their particular identified group.[27]

When students of color are underrepresented on campus, they also face racial isolation. In the higher education context, this racial isolation "correlates with depressed academic achievement, alienation from campus life, and isolation from the campus community."[28] While a critical mass of underrepresented minorities allows for the dissolution of perceived racial "norms," racial isolation causes the opposite effect—"students of color are tokenized, treated as spokespeople for their race, and not expected to deviate from what others

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[25] *See id.* at 75 (citing Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 Calif. L. Rev. 2241, 2268-69 (2000)).

[26] *Id.* at 76-78, 80-81 (quoting Carole J. Buckner, *Realizing* Grutter v. Bollinger's *"Compelling Educational Benefits of Diversity" — Transforming Aspirational Rhetoric Into Experience*, 72 UMKC L. Rev. 877, 888 (2004)).

[27] *Id.* at 102-03.

[28] Meera E. Deo, *Empirically-Derived Compelling State Interests in Affirmative Action Jurisprudence* (Aug. 25, 2013) (forthcoming) (manuscript at 33), *available at* http://ssrn.com/abstract=2315787.

believe the racial 'norm' to be."[29] As put by one student, classroom diversity would allow others to see "greater complexities within various minority groups," and "people [would] no longer make generalizations about what groups believe."[30]

Racial isolation and the lack of diversity perpetuate a pervasive phenomenon known as stereotype threat. Due to stereotype threat, an awareness of a negative stereotype almost always negatively affects performance, causing individuals associated with the negative stereotype to perform below their potential. In one famous experiment, black students who were first asked to racially identify themselves and then complete a verbal test were found to score significantly lower than white students.[31] In contrast, when students were told that the test was about problem-solving, rather than a test of intellectual ability, the racial difference disappeared.[32] A more inclusive learning environment, fostered by a diverse student body, can mitigate stereotype threat and promote academic success.

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[29] *Id.* at 31.

[30] *Id.* at 36.

[31] Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African-Americans*, 69 J. of Personality & Soc. Psychol. 797, 808 (1995).

[32] *Id.* Since 1995, Steele's initial findings on stereotype threat have been peer-reviewed, replicated, and corroborated in over 400 studies. Michael Inzlicht & Toni Schmader, *Stereotype Threat: Theory, Process, and Application* 6 (2012).

Lack of diversity has serious learning consequences for all students—not just students of color. One of the main educational benefits of diversity, as noted in *Grutter*, is the "robust exchange of ideas."[33] These exchanges cannot happen where there is no meaningful interaction between students of different races in the classroom, and are not as likely to happen where students from underrepresented minorities do not constitute a critical mass.[34]

The educational benefits that flow from a diverse student body are profound. "[T]here is no default" in the learning environment cultivated when students are surrounded by a diverse group of classmates.[35] Campus diversity permits more engaging and eye-opening classroom discussions, breaks down stereotypes, and prepares students to be leaders in an increasingly globalized and diverse business world. A diverse classroom also prevents racial isolation and tokenism, which can hinder learning environments for all students. As recognized in *Grutter* and *Fisher* and confirmed by studies, diversity is and remains a compelling state interest.

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[33] 539 U.S. at 329.

[34] Deo, *supra* note 13, at 85.

[35] *Id.* at 99.

B. Law Schools and Other Professional Schools Charged with Developing the Country's Future Leaders Face Considerable Hurdles in Achieving Diversity.

This Court in *Grutter* recognized that "to cultivate a set of leaders with legitimacy in the eyes of its citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[36] Just as a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security,"[37] so too is diversity in the legal profession to achieving the American Bar Association's mission of "defending liberty and delivering justice."[38] These goals require student body diversity in law schools and universities, which serve as a "training ground for a large number of our Nation's leaders."[39]

But the outlook for underrepresented minorities at law schools is bleak. According to a study by Columbia University School of Law, despite steady numbers of African-Americans and Mexican-Americans applying to law schools, improving grade point averages and LSAT scores of African-

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[36] 539 U.S. at 332.

[37] *Id.* at 331.

[38] Am. Bar Ass'n, *ABA Mission and Goals*, http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html (last visited Aug. 27, 2013).

[39] *Grutter*, 539 U.S. at 332.

Americans and Mexican-Americans, and growing enrollment in law schools overall, the percentage of African-Americans and Mexican-Americans making up matriculating classes nationwide has declined.[40] From 1993 to 2008, the proportion of African-Americans in an entering law school class decreased by 7.5 percent, whereas Mexican-Americans experienced a steeper decline of 11.7 percent.[41] These figures are troubling because they indicate not only that the pipeline to law schools remains closed off for certain minorities, but that it is narrowing.

The path to higher education has become more problematic in recent years. Factors that previously helped diversify the pipeline to higher education are now giving way to mounting financial pressures. For example, California's community colleges have cut student enrollment by 17 percent (485,000 students) and course offerings by 15 percent in response to recent reductions in state funding.[42] Federal financial aid grants are shrinking relative to college costs.[43] And some

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[40] Soc'y of Am. Law Teachers (SALT) & Lawyering in the Digital Age Clinic at Columbia Univ. School of Law, *A Disturbing Trend in Law School Diversity* (2009), http://blogs.law.columbia.edu/salt/.

[41] *Id.*

[42] Phil Oliff et al., *Recent State Higher Education Cuts May Harm Students and the Economy for Years to Come* 11, Center on Budget & Policy Priorities (Mar. 19, 2013), http://www.cbpp.org/files/3-19-13sfp.pdf.

[43] Paul Krugman, *Building a Caste Society*, N.Y. Times, Mar. 12, 2012, http://krugman.blogs.nytimes.com/2012/03/12/building-a-caste-society/.

universities have ended or trimmed their need-blind policies of accepting students whether or not they can afford to pay due to the high costs of maintaining such policies.[44]

These pressures underscore the continued need for race-based efforts to achieve student body diversity to ensure a continued pipeline of minorities into professional and graduate schools, and ultimately into the business world and important leadership positions. Race-conscious admissions programs assist in breaking down the barriers along the path to leadership.

C. State Bans on Race-Conscious Measures Have Had a Lasting Adverse Effect on the Enrollment Rates of Underrepresented Minorities at Elite Campuses.

Grutter recognized that enrolling a "critical mass" of "underrepresented minorities is necessary to further [the] compelling interest in securing the educational benefits of a diverse student body."[45] The Court explained that the goal of enrolling a "critical mass" of students did not transform an admissions program into a quota, even though "there is of course some relationship between numbers and achieving the benefits to be derived from a diverse

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[44] Richard Perez-Pena, *Aid Changes Raise Issue of Diversity at Colleges*, N.Y. Times, Nov. 30, 2012, http://www.nytimes.com/2012/12/01/education/elite-smaller-colleges-struggle-to-cover-financial-aid.html?pagewanted=all.

[45] 539 U.S. at 333.

student body."[46] Ensuring a "critical mass" is particularly important at flagship state universities and other elite schools because they serve a critical role in educating the country's most promising students and training them as future leaders.[47]

At flagship state university system campuses in Michigan, California, and Washington, state bans on race-conscious admissions programs have resulted in a drop in the enrollment of underrepresented minorities. While race-neutral programs have offered some success in increasing minority enrollment, they have not even reached pre-ban levels. Without the use of race-conscious admissions policies, universities effectively have a hand tied behind their back when it comes to enrolling underrepresented minority students.

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[46] *Id.* at 335-36 (quotation omitted).

[47] *See* Richard D. Kahlenberg, *A Better Affirmative Action: State Universities That Created Alternatives to Racial Preferences* 4 (Oct. 3, 2012), *available at* http://tcf.org/assets/downloads/tcf-abaa.pdf ("America's leadership class derives disproportionately from the ranks of top colleges and universities. 54 percent of America's corporate leaders and 42 percent of government leaders are graduates of just twelve institutions – Harvard, Yale, the University of Chicago, Stanford, Columbia, MIT, Cornell, Northwestern, Princeton, Johns Hopkins, the University of Pennsylvania, and Dartmouth.").

1. Freshman Enrollment of Black and Hispanic Students Declined at the University of Michigan After Proposal 2.

Proposal 2 banned the use of affirmative action based on race, ethnicity, or gender in public education in 2006.[48] Since its passage, there have been visible declines in the enrollment of black and Hispanic students at Michigan's leading university, the University of Michigan at Ann Arbor. Declines occurred at both undergraduate and graduate levels despite the adoption by the University of Michigan of a new admissions process focusing on race-neutral factors such as socioeconomic background and a student's life experiences.[49]

Before Proposal 2, 5.6 percent of enrolling freshmen were black and 4.5 percent were Hispanic.[50] As of 2012, 4.4 percent of enrolling freshmen were black and 3.7 percent were Hispanic, a decline of about 15 to 22 percent in black and Hispanic enrollment since Proposal 2's adoption (*see* Appendix, Figure 1).[51] In addition, as the

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[48] Mich. Const., art. I, § 26(a).

[49] Kahlenberg, *supra* note 47, at 52 (considering additional factors such as "Extenuating Circumstances," "Educational Environment," and "Personal Background").

[50] Office of the Registrar, Univ. of Michigan – Ann Arbor, *New Freshman Enrollment by Geographic Location and Ethnicity for Term 1660 (Fall 2007)* (Sept. 24, 2007), http://ro.umich.edu/report/07fa856.pdf.

[51] Office of the Registrar, Univ. of Michigan – Ann Arbor, *New Freshman Enrollment by Geographic Location and Ethnicity for Term Fall 2012* (Sept. 24, 2012), http://ro.umich.edu/

(continued...)

enrollment of black freshmen has declined, the number of college-aged Michigan residents who are black has increased to 19 percent.[52] About 6 percent of college-aged Michigan residents are Hispanic.[53]

Proposal 2 also adversely affected diversity at the graduate level, as shown by the severe declines in the enrollment of black students at the graduate schools of the University of Michigan. Before Proposal 2, 7.2 percent of graduate students were black.[54] This number dropped to 6.7 percent after Proposal 2 went into effect in 2008 and has continued to decline to 4.9 percent in 2012.[55] At the law school, the percentage of enrolled black students decreased from 5.2 percent before Proposal 2 to 3.6 percent immediately after, and is now even lower in 2012 at 2.8 percent, a decline of nearly 50 percent.[56]

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report/12fa844.xlsx. The first class entering the University of Michigan without affirmative action was in fall 2008. Kahlenberg, *supra* note 47, at 52.

[52] Ford Fessenden & Josh Keller, *How Minorities Have Fared in States with Affirmative Action Bans*, N.Y. Times, June 24, 2013, http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html.

[53] *Id.*

[54] Office of the Registrar, Univ. of Michigan – Ann Arbor, *Ten Year Enrollment by Ethnicity, Fall 2002 – Fall 2012*, http://www.ro.umich.edu/
report/12fa837.xlsx (last visited Aug. 27, 2013).

[55] *Id.*

[56] Office of the Registrar, Univ. of Michigan – Ann Arbor, *New Graduate Students by Ethnicity with Rackham Students Assigned According to School or College for Term 1660 (Fall*

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The medical school has suffered similar declines in black student enrollment—falling by more than 50 percent, from 6 percent before Proposal 2 and 2.7 percent in 2012 (*see* Appendix, Figure 2).[57]

2. Campuses in California and Washington Have Experienced Similar Declines in Enrollment of Under-represented Minorities After Banning Race-Conscious Policies.

In 1996, California voters barred the University of California from using race as an admissions consideration with the passage of Proposition 209.[58] In response, the university has attempted to build a diverse student body using race-neutral alternatives, such as a percentage plan

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2007) (Sept. 24, 2007), http://ro.umich.edu/report/07fa843.pdf [hereinafter *2007 Michigan Graduate Students*]; Office of the Registrar, Univ. of Michigan – Ann Arbor, *New Graduate Students by Ethnicity with Rackham Students Assigned According to School or College for Term 1710 (Fall 2008)* (Sept. 22, 2008), http://ro.umich.edu/report/08fa843.pdf; Office of the Registrar, Univ. of Michigan – Ann Arbor, *Graduate "New Transfer" Students by Unit and Ethnicity with Rackham Students Assigned According to Field of Specialization for Term Fall 2012* (Sept. 24, 2012), http://ro.umich.edu/report/12fa843.xlsx [hereinafter *2012 Michigan Graduate Students*].

[57] *2007 Michigan Graduate Students*, *supra* note 56; *2012 Michigan Graduate Students*, *supra* note 56.

[58] Cal. Const., art. I, § 31(a). The language of Proposition 209 is identical in substance to Proposal 2.

(which guarantees admission to certain schools to students graduating at the top ranks of their high school) and economic affirmative action (which considers factors such as "low family income, first generation to attend college, need to work," and "disadvantaged social or educational environment").[59] While these alternatives have had some success for the university system as a whole, diversity at the system's flagship campuses—UC Berkeley and UCLA—has faltered.[60] At these elite UC campuses, the "share of African American and Latino new freshmen declined from 23 percent in 1997 to 14 percent in 1998 (the first year of race-blind admissions), but has since rebounded to 20 percent."[61] But enrollment at UC Berkeley and UCLA is still below pre-ban levels, even though more than 15 years have passed since Proposition 209 went into effect. This is in spite of the steady growth of the Hispanic population in California, which now represents 49 percent of college-aged California residents.[62]

Proposition 209 has also resulted in notable declines in the enrollment of underrepresented minorities in UCLA's law and medicine graduate programs. At the law school, underrepresented minority enrollment decreased from 13.6 percent in

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[59] Kahlenberg, *supra* note 47, at 33-34.

[60] *Id.* at 13, 33-36.

[61] *Id.* at 13.

[62] Fessenden & Keller, *supra* note 52.

1997 to 9.1 percent in 1998.[63] Although it has increased to 10.7 percent in 2011, this number falls well short of the enrollment level before Proposition 209.[64] Declines in the medical program were even more drastic—plunging from 29.6 percent pre-ban to 18.5 percent in 2011.[65]

In 1998, Washington voters barred public universities in Washington from considering "race, sex, color, ethnicity or national origin" in admissions.[66] Following the ban, the University of Washington, the state's flagship institution, implemented a "holistic review admissions process" that solicited information regarding "Personal Achievements and Characteristics," such as "attaining a college-preparatory education in the face of significant personal adversity, economic disadvantage, or disability," but eliminated any consideration of race.[67]

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[63] UCLA Graduate Div., *UCLA Graduate Programs Annual Report 1997-1998* Section 1-23, http://www.gdnet.ucla.edu/asis/report/ar9798entire.pdf (last visited Aug. 27, 2013); UCLA Graduate Div., *UCLA Graduate Programs Annual Report 1998-1999*, Section 1-22, http://www.gdnet.ucla.edu/asis/report/ar9899entire.pdf (last visited Aug. 27, 2013).

[64] UCLA Graduate Div., *UCLA Graduate Programs Admissions & Enrollment Report (Sections 1 and 2 of 2011-2012 Annual Report)* 46, http://www.gdnet.ucla.edu/asis/report/aer1112.pdf (last visited Aug. 27, 2013).

[65] *Id.*; *UCLA Graduate Programs Annual Report 1997-1998*, *supra* note 63, at Section 1-23.

[66] Wash. Rev. Code § 49.60.400(1).

[67] Kahlenberg, *supra* note 47, at 40.

After the ban on race-conscious programs, the university experienced a serious decline in the enrollment of black and Hispanic students, respectively 30 percent and 26 percent.[68] Although the numbers have since rebounded, they still fall below the steadily growing numbers of black and Hispanic college-aged Washington residents.[69] The gap between Hispanic college-aged residents and those being admitted to the University of Washington is especially large—16 percent versus 7 percent.[70]

D. Race-Neutral Measures Do Not Adequately Achieve Diversity.

Race-neutral admissions programs, such as income-based affirmative action and percentage programs, are predicated on using socioeconomic status and class rank as proxies for race to build a diverse student body. But studies have shown that the use of such proxies have limited success and moreover fail to improve racial diversity because they do not directly address the unique factors and barriers faced by underrepresented minorities.

While income-based and race-based policies can have some "overlapping effects," they are not the

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[68] Linnea Nissa Limbach, After Initiative 200: Trends in Minority Undergraduate Admissions & Emerging Trends in Race-Neutral Policies to Attain Diversity 58 (2008) (unpublished degree project), *available at* http://www.caa.wa.gov/archives/documents/AfterI-200.pdf.

[69] Fessenden & Keller, *supra* note 52.

[70] *Id.*

same and do not produce the same results.[71] Moreover, income-based policies alone cannot effectively achieve racial and ethnic diversity at universities. "While African Americans and Hispanics are overrepresented among the poor, whites still constitute the majority of families . . . ."[72] Accordingly, low-income minority students still would have to be chosen disproportionately from the pool of low socioeconomic status students in order to achieve a critical mass.[73]

Further, inequality in educational opportunity among blacks and Hispanics cannot be completely accounted for by socioeconomic status or by the quality of schools they have attended.[74] "The view that race should not matter . . . relies solely on a procedural standard of equal treatment rather than a broader standard that considers actual roadblocks impeding the opportunity to learn in minority

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[71] Anthony P. Carnevale & Stephen J. Rose,. *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions* 153, *in* America's Untapped Resource: Low-Income Students in Higher Education (Richard D. Kahlenberg ed., 2004), *available at* http://tcf.org/assets/downloads/tcf-carnrose.pdf.

[72] *Id.*.

[73] Carnevale & Rose, *supra* note 71, at 153; Nikole Hannah-Jones, *A Challenge to the Idea That Income Can Integrate America's Campuses*, The Atlantic Wire, June 24, 2013, http://www.theatlanticwire.com/politics/2013/06/supreme-court-affirmative-action-class-income/66541/ ("[C]olleges would have to recruit seven to eight poor white students to get one black or Latino student.").

[74] Carnevale & Rose, *supra* note 71, at 132.

communities or the racial distribution of degrees from prestigious colleges."[75]

With respect to the effect of socioeconomic status on college preparation, "[p]overty does not produce an equal opportunity burden across racial lines."[76] According to U.S. Census data, the typical low-income white American lives in a neighborhood where roughly one in ten families are poor.[77] The children of these low-income families therefore have access to middle-class schools with the same teachers and curriculum that are offered to their wealthier neighbors. Affluent blacks and Hispanics (with an income over $75,000), however, "have a poorer neighborhood profile than the average for whites."[78] Because of this, most black children attend schools "where two-thirds of their classmates are poor and resources and college prep courses are limited"—irrespective of their family's income.[79] Numerous studies demonstrate that these differences in the quality of neighborhoods and schools help to explain why white and Asian students account for 84 percent of low-income students that are considered high achievers—the same students who would be snapping up spots at

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[75] *Id.* at 135.

[76] Hannah-Jones, *supra* note 73.

[77] John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America* 5 (July 2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf.

[78] *Id.* at 6.

[79] Hannah-Jones, *supra* note 73.

elite colleges using income-based admissions preferences.[80]

Furthermore, when it comes to economic disadvantage, "race seems to add power to the negative effects of low-income status and degrade the positive effects of income and educational improvements."[81] Racial minorities are "disproportionately harmed by increasing income inequality because they are often trapped in jobless enclaves and low-wage job sectors that make them more vulnerable to any kind of social or economic threat."[82]

Socioeconomic-based admissions policies also fail to take into account general racial stigma. Black students, for example, report experiencing discrimination at higher rates than white students, which range from "everyday microassaults, general assessments of discrimination in the work environment, to specific incidents of racial discrimination such as receiving poorer service than others, being discouraged to pursue educational

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[80] *Id.* (citing Caroline M. Hoxby & Christopher Avery, *Low-Income High-Achieving Students Miss Out on Attending Selective Colleges*, http://www.brookings.edu/about/projects/bpea/latest-conference/2013-spring-selective-colleges-income-diversity-hoxby).

[81] Anthony P. Carnevale & Jeff Strohl, *Separate and Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege* 37 (July 2013), *available at* http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Separate&Unequal.FR.pdf.

[82] *Id.*

goals, and being stopped by police."[83] The effects of these experiences on a student's ability to prepare for college are not taken into account using only income-based methods. Race-conscious measures, on the other hand, implicitly recognize that race—and any associated stigma that comes with it—may be a relevant factor in a student's preparedness for college.

Percentage plans are similarly inadequate (and, in some states and for some schools, simply not available or workable).[84] While the presumption has been that percentage plans, by guaranteeing admission to students that are in a certain top percentage of their high school class, produce a proportion of underrepresented minorities that more accurately reflects the general population, experience has shown they do not.[85] The enrollment of black students has decreased, and the enrollment of Hispanic students has either decreased or remained the same.[86] These studies conclude that percentage plans have "fallen well short of creating diverse flagship campuses of the states they are intended to serve."[87]

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[83] Daye, *supra* note 14, at 124-S.

[84] Unlike California and Texas, Michigan has not adopted a percentage plan that guarantees admission to high school students in the top ranks in their class. And no workable solution exists to implement percentage plans at the graduate and professional school level.

[85] Limbach, *supra* note 68, at 71-72.

[86] *Id.*

[87] *Id.* at 72.

Further, although percentage plans purport to be race-neutral, they require high levels of residential and school segregation to succeed. For example, the Texas Top Ten Percent Plan is able to build some levels of racial and ethnic diversity by capitalizing on pockets of segregation that exist in the state.[88] Black and Hispanic students who qualify for automatic admission in Texas disproportionately attend schools where minority students make up a significant majority.[89] This also prevents the University from admitting a mix of minority students, from different backgrounds, which break down racial stereotypes—part of the educational benefit of diversity articulated in Grutter.

If a race-neutral policy is implemented with the intent of fostering campus diversity, the question thus arises whether it can truly be "race-neutral." In her dissent in *Fisher*, Justice Ginsberg recognized that Texas's Top Ten Percent Plan and race-blind holistic review of each application "was adopted with racially segregated neighborhoods and schools front and center stage."[90] She noted that "[i]t is race

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[88] *See* Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 Am. L. & Econ. Rev. 312, 315 and 341 (2006).

[89] *Id.*; *see also* Carnevale & Strohl, *supra* note 81, at 38 ("The Texas 10-percent solution . allows substantial racial diversity in the Texas postsecondary system because it is predicated on continued racial and economic segregation in particular areas and high school.").

[90] *Fisher*, 133 S. Ct. at 2433 (Ginsberg, J., dissenting).

consciousness, not blindness to race, that drives such plans."[91]

"Race-neutral" considerations simply camouflage race-conscious policies and attempt—ineffectively—to achieve the same goal of enrolling a critical mass of underrepresented minorities at institutions of higher learning.[92] Although not ideal, race-conscious admissions policies remain the most effective means to achieve this end, especially at elite universities.

E. Race-Conscious Measures Do Not Harm Minority Students.

Petitioner and other opponents of race-conscious admissions programs argue that such programs set up their intended beneficiaries for failure because they create a "mismatch" between the skill of the student and the abilities required for success at selective universities.[93] Under the so-called mismatch theory, mismatch occurs when a student underperforms because he is granted admission at a school for which he is not academically suited, *i.e.*, that student's grade point average or standardized test score falls below the

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[91] *Id.* ("[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious.")

[92] Hannah-Jones, *supra* note 73 ("We want to figure out ways to get race without using race—if it weren't so tragic it would be funny.").

[93] *See* Pet'r Br. 32.

school's average.[94] Recent studies have shown the contrary, rebutting notions that race-conscious measures harm their intended beneficiaries.

A study on University of California students shows that, although mismatch may occur, supposedly mismatched students perform just as well as their better-prepared peers, and better than their counterparts at less selective schools.[95] Lesser-qualified students at UC Berkeley, UCLA, and UC San Diego earned "nearly identical" grade point averages to their peers with higher records of achievement, and further were more likely to stay in college than other students with similar academic records who went to less competitive campuses.[96] Moreover, the study did not find significant differences when looking at students' race or ethnicity.[97]

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[94] *Id.*; Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. Rev. 1583, 1605-08 (1999).

[95] Michal Kurlaender & Eric Grodsky, *Mismatch and the Paternalistic Justification for Selective College Admissions* 16-18, 20-21, (Ctr. for Demography & Ecology, Univ. of Wis.-Madison, CDE Working Paper No. 2013-06, May 2013), *available at* http://www.ssc.wisc.edu/cde/cdewp/2013-06.pdf. Under a special arrangement in 2004, certain students were denied admission to UC Berkeley, UCLA, and UC San Diego, but were promised admission at a later date if they transferred from a community college. After a change in circumstances, these deferred students were granted immediate admission, which created a large group of potential "mismatch" students to study academic performance. *Id.* at 9-10.

[96] *Id.* at 16-18, 20-21.

[97] *Id.* at 21.

In starker contrast, a study on the Top Ten Percent Plan in Texas demonstrates that when lower-ranked minority students "cascade[] down" into less selective schools, both freshmen retention and graduation rates decline.[98] Whereas mismatch theory would have predicted higher retention and graduation rates for students attending schools where they are better "matched," these results demonstrate the converse.

Those that "flow up" to more selective schools, however, reap substantial benefits. Another study concluded that African-American and Hispanic students with above-average standardized test scores that attend selective schools are nearly twice as likely to graduate as those who attend two- and four-year open-enrollment colleges.[99] Students attending selective schools enjoy higher graduation rates in part because those schools spend two to almost five times as much on instruction per student as open-enrollment schools.[100]

These studies show that there are clear advantages associated with attending a more selective school, despite any mismatch. Although minority students may disproportionately start behind the block at selective schools, they nonetheless thrive or perform the same as their better-prepared peers and achieve better outcomes

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[98] Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan*, 29 Econ. Educ. Rev. 1110, 1111 and 1122 (2010).

[99] Carnevale & Strohl, *supra* note 81, at 27.

[100] *Id.* at 24.

than had they attended a less selective school. Contrary to critics' fears of harm due to mismatch, race-conscious admissions programs expand educational opportunities for minority students and place them on paths to realizing their full potential.

F. Elected University Officials Have the Experience and Expertise to Determine Whether Race Should Be a Factor at All as Part of a Holistic Admissions Process.

The Sixth Circuit's decision should be upheld because it is consistent with *Grutter* and preserves the ability of universities struggling to achieve diversity to consider race as a factor in individualized, holistic admissions decisions. Although courts are the final arbiter as to the necessity and narrow tailoring of race-conscious admissions programs, the experience and expertise of university officials in building student bodies can—and should—be taken into account.[101] Their personal observations of student body diversity (or the lack thereof), study and awareness of the various measures being employed to address diversity, and familiarity with financial, demographic, or political constraints faced by universities place university officials in a prime position to assess whether race should be a consideration at all in admissions decisions.

"Critical mass" takes on a different meaning depending on the school, the state, and the time. For

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[101] *See Fisher*, 133 S. Ct. at 2420.

some, it may mean experimenting with race-neutral alternatives. For others, it may mean using a race-conscious program because race-neutral alternatives do not exist or work. Universities must have the flexibility to adjust their admissions programs within constitutional limits and consider all kinds of diversity, including race.

G. The Termination of Race-Conscious Measures Is Premature.

In *Grutter*, this Court noted that "[i]t has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased."[102] The Court then expressed a hope that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[103] This passage from *Grutter* is aspirational; the reality is that the country simply is not there yet.

The experiences of Michigan, California, and Washington demonstrate that race-conscious measures play a critical role in helping universities to build and maintain a diverse student body and remain necessary to further a compelling state interest. For universities to enroll underrepresented minorities in critical numbers, race-conscious

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[102] *Grutter*, 539 U.S. at 343.

[103] *Id.*

admissions policies still serve as the most effective means to achieve that end.

II. PROPOSAL 2 IMPERMISSIBLY ALTERS THE POLITICAL STRUCTURE IN MICHIGAN AND PRECLUDES ONLY MINORITIES FROM USING THE POLITICAL PROCESS TO OBTAIN REMEDIAL MEASURES.

A. *Hunter* and *Seattle* Are Controlling Precedents.

The political-restructuring doctrine, as set forth by this Court in *Hunter* and *Seattle*, remains a fundamental part of equal protection jurisprudence.

The political restructuring doctrine rests on the premise that "the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."[104] Although "laws structuring political institutions or allocating political power according to 'neutral principles' . . . are not subject to equal protection attack" because they "make it more difficult for *every* group in the community to enact comparable laws," laws that "allocate[] governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process" can be challenged under the Equal

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[104] *Seattle*, 458 U.S. at 468 (quoting *Hunter*, 393 U.S. at 393).

Protection Clause.[105] The Equal Protection Clause prohibits "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."[106] *Hunter* and *Seattle* both found that facially neutral enactments violated the Equal Protection Clause by impermissibly changing the political structure.

In *Hunter*, this Court held that a city charter amendment that required the approval of a majority of electors before any ordinance regulating real property transactions "on the basis of race, color, religion, national origin or ancestry" could take effect violated the Equal Protection Clause.[107] The city charter amendment had a clear racial focus and "place[d] a special burden on racial minorities within the governmental process" by mandating additional procedural hurdles for proposed ordinances addressing "racial housing matters" that were not required for other housing matters.[108]

In *Seattle*, this Court reaffirmed the principles of *Hunter* when it struck down a state constitutional amendment prohibiting racially integrative busing.[109] The Court had "little doubt that the initiative was effectively drawn for racial purposes,"

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[105] *Id.* at 470.

[106] *Id.* at 467 (quotations and citation omitted).

[107] *Hunter*, 393 U.S. at 387, 391-93.

[108] *Id.* at 389-91.

[109] *Seattle*, 458 U.S. at 470-71.

with the goal of targeting busing only for integrative purposes.[110] Under the amendment, individuals seeking to implement a busing policy for non-racial purposes—or almost any other educational policy, for that matter—could continue to lobby the school board to adopt such measures. But individuals seeking race-related educational policies, such as busing or reassignments to end *de facto* segregation, would need to first "seek relief from the state legislature, or from the statewide electorate" to repeal the constitutional amendment.[111] The Court invalidated the amendment because "it use[d] the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities."[112]

Hunter and *Seattle* are squarely applicable here. Like the charter amendment in *Hunter* and the constitutional amendment in *Seattle*, Proposal 2 is focused on race: it "deal[s] in explicitly racial terms with policies "designed to benefit minorities 'as minorities.'"[113] It further requires those championing race-conscious admissions programs that "inure[] primarily to the benefit of the minority" to "surmount a considerably higher hurdle than persons seeking comparable legislative action."[114]

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[110] *Id.* at 463-71.

[111] *Id.* at 474.

[112] *Id.* at 470.

[113] *Id.* at 485.

[114] *Id.* at 472-74.

Petitioner's argument, and the Ninth Circuit's holding in *Coalition for Economic Equity v. Wilson*, that the political restructuring doctrine applies only to denials of "equal protection" and not to bans on "preferential treatment"[115] insists upon a distinction that is unsupported by *Hunter* and *Seattle*. Indeed, the legislation at issue in *Seattle* was not directed at prohibiting discrimination, but instead prohibited, similar to Proposal 2, voluntary programs that benefited minorities. Attempts to characterize race-conscious admissions policies as "preferences" is nothing more than a linguistic distraction from the actual issue: whether a change in the political structure singles out measures that are racially focused for "peculiar and disadvantageous treatment."[116]

B. Proposal 2 Imposes Unique and Substantial Burdens on Minorities and Excludes Them from a Political Process Available to All Other Groups.

The focus and impact of Proposal 2 on racial minorities is undeniable. Although Proposal 2 is facially neutral, Proposal 2 was "drawn for racial purposes."[117] The proponents of Proposal 2 expressly sought "to amend the State Constitution to ban

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[115] *See* Pet'r Br. 20; *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997).

[116] *Seattle*, 458 U.S. at 485.

[117] *See id.* at 471.

affirmative action programs"[118]—programs that Petitioner concedes primarily benefit minorities.[119]

And the reality is that "the law's impact falls on the minority."[120] Proposal 2 interferes with the political process and places nearly insurmountable burdens on minorities seeking legislation that is in their interest. Individuals who seek to change admissions policies on an issue other than race (or other factors banned by Proposal 2) can contact the admissions committees or the administrative authorities of the university, or support the election of a board candidate who will revise the admissions policies. The option of seeking an amendment of the Michigan Constitution remains only as a last resort. But individuals who wish to have admissions policies revised to consider race as a factor have only one option under Proposal 2: to seek a constitutional amendment. They must launch the expensive and arduous process of first getting the Michigan legislature or a sufficient number of voters to put the issue on the ballot, and then win majority support in a statewide election—no easy feat for racial minorities who make up only a small part of the electorate. Only if the constitutional amendment succeeds can the process of lobbying the admissions committee or the school administration begin for those seeking race-conscious admissions policies.

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[118] Notice of State Proposals for November 7, 2006 General Election 5, http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf.

[119] Pet'r Br. 22.

[120] *Hunter*, 393 U.S. at 391.

Meanwhile, university officials remain free to evaluate and use admissions policies that consider, for instance, an applicant's legacy status, economic status, social stature, athletic ability, personal hobbies, or almost any other factor. But any attempt to build diversity by considering race as part of a holistic admissions process is blocked by the need to first amend the state constitution—a "considerably higher hurdle" for minorities.[121] Under this disjointed process, schools can build "diversity" in almost all areas except race.

Under *Hunter* and *Seattle*, Michigan cannot "explicitly us[e] the *racial* nature of a decision to determine the decisionmaking process."[122] As the Sixth Circuit correctly concluded below, Proposal 2 violates the Equal Protection Clause: it "reorders the political process in Michigan in a way that places special burdens on racial minorities," who are most likely to seek race-conscious admissions.[123] Proposal 2 "plainly differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area" of education.[124]

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[121] *See Seattle*, 458 U.S. at 474-75.

[122] *Id.* at 470.

[123] *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN) v. Regents of Univ. of Mich.*, 701 F.3d 466, 477 (6th Cir. 2012).

[124] *See Seattle*, 458 U.S. at 479-80 (quotation omitted).

C. Proposal 2 Forecloses the Ability of a Certain Class of Citizens to Seek Protective Remedies.

Under equal protection principles set forth in *Romer*, and informed by *Hunter* and *Seattle*, Proposal 2 should be struck down for removing the ability of a specific group to seek certain remedies under the law. In *Romer*, Colorado had amended its constitution by referendum to ban non-discrimination ordinances that prohibit discrimination based on sexual orientation.[125] The Court struck down the amendment, rejecting arguments, similar to those made by Petitioner here, that the amendment "does no more than deny homosexuals special rights" and put them "in the same position as all other persons."[126] The amendment went beyond merely "depriv[ing] homosexuals of special rights"; rather, it placed "a special disability upon those persons alone" by requiring them to "enlist[] the citizenry of Colorado to amend the State Constitution" to obtain specific protections against discrimination.[127]

Proposal 2 similarly "nullifies specific legal protections for [a] targeted class" and places a "special disability" on minorities who seek remedial measures for the lack of racial integration in Michigan's public education system.[128] Segregation

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[125] 517 U.S. at 624.

[126] *Id.* at 626.

[127] *Id.* at 631.

[128] *See id.* at 627-29.

at all levels of education plagues Michigan to this day. Due to continued racial segregation geographically and within the public school system, many of Michigan's students—regardless of race—have lived in segregated neighborhoods or attended poorly integrated public schools. Based on 2012 census data, blacks or African-Americans make up 14.3 percent of Michigan's population. Native-Americans comprise 0.7 percent, while Hispanic or Latino residents represent 4.6 percent and Asians make up 2.6 percent.[129] Yet parts of Michigan are still highly segregated. In Detroit, for example, over 82 percent of the city's population is African-American—a marked increase from the 40 percent they represented decades ago, and an increase even from the levels of the 1990s.[130] Not surprisingly, Michigan's public schools have long suffered from a lack of racial integration, as this Court and others have recognized.[131] The Detroit City School District—a predominantly African-American district—had a graduation rate of just 58.42 percent

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[129] U.S. Census Bureau, *State & County QuickFacts for Michigan* (June 27, 2013), http://quickfacts.census.gov/qfd/states/26000.html.

[130] U.S. Census Bureau, *Detroit (City) QuickFacts* (June 27, 2013), http://quickfacts.census.gov/qfd/states/26/2622000.html; *see* R. Farley et al., *Detroit Divided* 4 (2000) (noting that "African Americans make up only one-fifth of metropolitan Detroit's population" according to 1992 study).

[131] *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (noting pervasive segregation in Detroit schools); *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1055-57 (6th Cir. 1977) (affirming district court's finding that board of education for Michigan's capital, Lansing, practiced segregation in elementary schools), *cert. denied*, 434 U.S. 997 (1977).

in 2007, compared to 75.45 percent for Michigan as a whole.[132] Proposal 2 deprives universities of the ability to use race-conscious remedial measures to address the persistent segregation in primary and secondary schools and its effects on diversity in higher education.

The impact of Proposal 2 on minority rights is so significant that a United Nations committee has noted that voter referenda such as Proposal 2 prevent the United States from satisfying its obligations under international law. The International Convention on the Elimination of All Forms of Racial Discrimination requires signatories to adopt "special measures" when circumstances warrant as a "tool to eliminate the persistent disparities in the enjoyment of human rights and fundamental freedoms and ensure the adequate development and protection of members of racial [and] ethnic . . . minorities."[133] Although the United States "committed to using all the tools at its disposal to address disparities in outcomes . . . that disproportionately impact members of racial and

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[132] *See* Ctr. for Educ. Performance & Info., *State of Michigan 2007 4-Year Cohort Graduation and Dropout Rate Report* 6, 20, http://www.michigan.gov/documents/cepi/2007_MI_Grad-Drop_Rate_246517_7.pdf.

[133] U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, ¶ 15, U.N. Doc. CERD/C/USA/CO/6 (Mar. 5, 2008).

ethnic minorities," that commitment will ring hollow so long as laws such as Proposal 2 remain in place.[134]

At its core, Proposal 2, like the unconstitutional amendment in *Romer*, is a "law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government"—a law that "is itself a denial of equal protection of the laws in the most literal sense."[135]

CONCLUSION

Proposal 2 undermines the compelling interest that educational institutions have in achieving student body diversity, and imposes impermissible burdens on racial minorities seeking beneficial admissions programs. Accordingly, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[134] *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination*, ¶¶ 16, 33 (June 12, 2013), *available at* http://www.state.gov/documents/organization/210817.pdf.

[135] 517 U.S. at 633.

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August 30, 2013

APPENDIX

APPENDIX

Figure 1

Black and Hispanic Freshman Enrollment at the University of Michigan at Ann Arbor Before and After Proposal 2

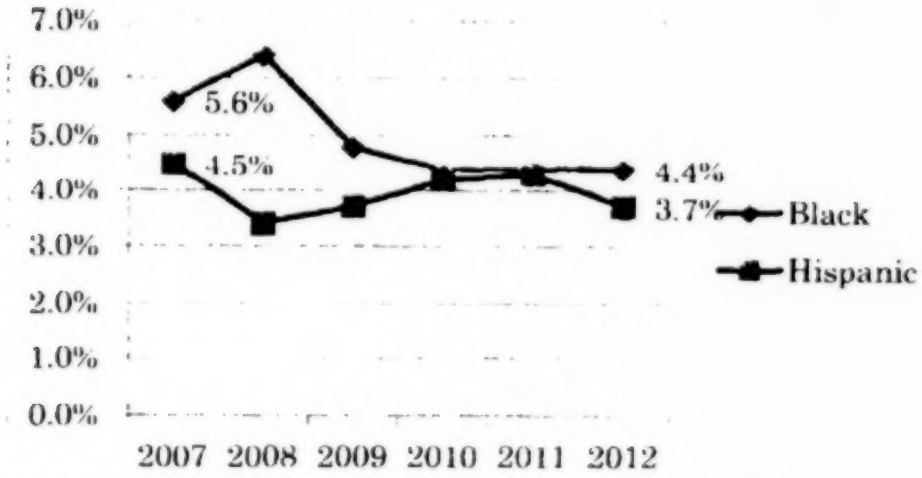
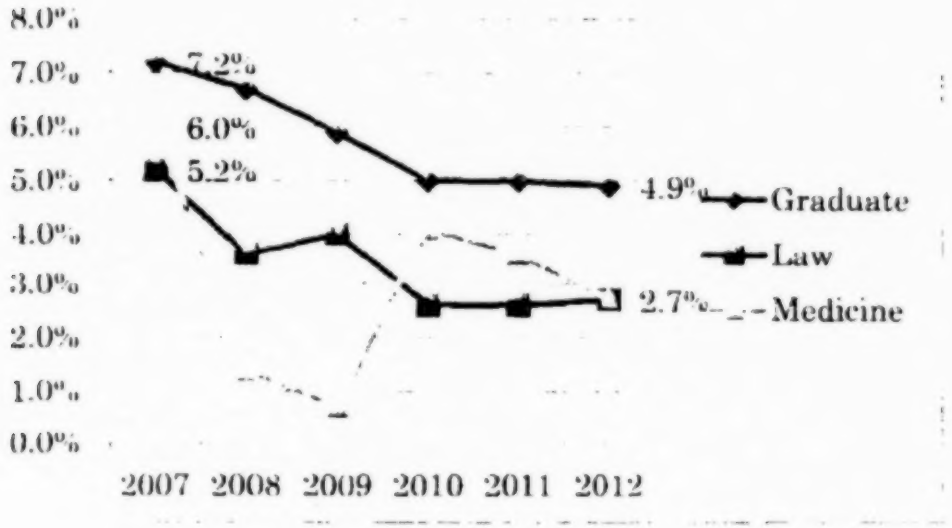


Figure 2

Black New Student Enrollment in Graduate Programs at the University of Michigan at Ann Arbor Before and After Proposal 2



AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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No. 12-682

IN THE

Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Sixth Circuit

BRIEF OF THE XIV FOUNDATION AND SUPPORTERS OF CIVIL RIGHTS INIATIVES IN MICHIGAN, ARIZONA, CALIFORNIA, COLORADO, NEBRASKA, NEW HAMPSHIRE, AND WASHINGTON, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amicus curiae the XIV Foundation (XIV) is dedicated to the principle that equal treatment is the essence of civil rights and that all people are entitled to civil rights. Named after the 14th Amendment, XIV aims to teach the necessity of fair and equal treatment by telling the personal stories of those harmed by discriminatory policies. XIV was founded by Jennifer Gratz—the plaintiff in *Gratz v Bollinger*, 539 U.S. 244 (2003), who has dedicated her life to promoting the importance and value of equal protection under the law. After this Court's decision in *Gratz* and its companion case, *Grutter v. Bollinger*, 539 U.S. 303 (2003), Ms. Gratz was a founder and then leader of the Michigan Civil Rights Initiative, the group that placed the initiative of the same name on the ballot in Michigan, leading to the amendment to the Michigan Constitution that is the subject of this litigation. Gratz also played significant roles educating and mentoring leaders in other states to encourage them to advocate for passage of their own civil rights initiatives.

For obvious reasons, Gratz, a one-time victim of the University of Michigan's unconstitutional program of racial classification in admissions, has an interest in preserving the Michigan Civil Rights Initiative (now

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[1] This *amicus* brief is filed with the consent of the parties. Counsel for the Petitioners and Respondents have granted blanket consent for the filing of *amicus* briefs in this case, in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to these cases or their counsel authored this brief in whole or in part, and that no person other than *amici* and their counsel paid for or made a monetary contribution toward the preparation and submission of this brief.

Mich. Const. art. I, § 26) ("MCRI"), a sweeping civil rights amendment that prohibits discrimination on the basis of race, gender, national origin, or color by the State of Michigan in contracting, employment, and education. The MCRI requires precisely the equal treatment—without regard to race, gender, or national origin—that the XIV Foundation was founded by Ms. Gratz to promote.

The XIV Foundation is joined in this brief by additional *amici*—leaders from around the country who have and continue to promote legislation or constitutional amendments that, like the MCRI, seek to require equal treatment under the law without regard to race or gender.[2] All of the *amici* have an interest in promoting both equal treatment under the law and preserving their rights to seek to require equal treatment through the democratic process.

SUMMARY OF THE ARGUMENT

Michigan's Civil Rights Initiative was passed overwhelmingly (by a 58 to 42 margin) by Michigan voters through the ballot initiative process in November of 2006. The amendment generally prohibits discrimination against, or granting preferential treatment in favor of, individuals on the basis of race, sex, color, ethnicity, or national origin with

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[2] Larry Arnn (Current President Hillsdale College; Chairman, California Civil Rights Initiative); Glynn Custred (Author, California Civil Rights Initiative); John Carlson (Chairman, Washington Civil Rights Initiative); Leon Drolet (Chairman, Michigan Civil Rights Initiative); Marc Schniederjans (Chairman, Nebraska Civil Rights Initiative); Jessica Peck (Executive Director, Colorado Civil Rights Initiative); Rachel Alexander (Chairman, Arizona Civil Rights Initiative); and Representative Gary Hopper (Sponsor, HB 0623, New Hampshire Civil Rights Initiative).

respect to public education, public contracting, or public employment. *See* Mich. Const. art. I, § 26. The amendment has not been challenged insofar as it applies to public contracting and public employment, and with good reason—this Court has been clear that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Thus, Michigan's ban on discrimination (and preferential treatment) in public contracting and employment is fully consistent with this Court's Equal Protection Clause jurisprudence. "It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982). It is hard to imagine any litigant seriously arguing that, by imposing a general prohibition on racial and gender discrimination in state contracting and employment, the State of Michigan has run afoul of the Fourteenth Amendment.

However, with respect to public education, specifically in the narrow context of use of race in decision-making with respect to admission to Michigan's institutions of higher learning, proponents of so-called "affirmative action," and an *en banc* majority of the Sixth Circuit, have turned the Equal Protection Clause on its head to conclude that Michigan's general ban on state racial and gender discrimination violates the Equal Protection Clause by prohibiting racial discrimination in higher education admissions.

Although this case focuses on the ability of institutions of higher learning in Michigan to use racial classifications in their admissions decisions, it does

not turn on this Court's decision in *Grutter*, 539 U.S. 303, which found certain narrow uses of race in admissions permissible under certain circumstances—but certainly not constitutionally required. *Id.* at 343 ("the Equal Protection Clause *does not prohibit* the Law School's narrowly tailored use of race . . . .") (emphasis added). Rather, the Sixth Circuit's counterintuitive result stems from its application of this Court's decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), cases articulating a "political restructuring" theory of equal protection analysis that the Court has not endorsed in 31 years. The Sixth Circuit reads *Hunter* and *Seattle* as compelling a remarkable conclusion: that voters of a state may not choose, via broad constitutional amendment barring discrimination, to prohibit their state-run universities from discriminating on the basis of race or gender without running afoul of the Equal Protection Clause. *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.* 701 F.3d 466, 489 (6th Cir. 2012) ("*BAMN*") ("Those portions of [the MCRI] that affect Michigan's institutions of higher education violate the Equal Protection Clause.")

The Sixth Circuit's decision, which conflicts with both the Ninth Circuit's decision rejecting a nearly identical "political restructuring" challenge to a virtually identical California constitutional amendment[3] (also passed by referendum), *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) ("*Wilson II*"), *cert. denied*, 522 U.S. 963 (1997); as well as the California Supreme Court's decision interpreting the same amendment *Coral Construction, Inc. v. City &*

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[3] Amicus Larry Arn is the Chairman of the California Civil Rights Initiative.

County of San Francisco, 235 P.3d 947 (Cal. 2010), cannot stand.

First, the Sixth Circuit decision rests entirely on the continued vitality of *Seattle* and *Hunter* and the political restructuring doctrine derived from those cases. But *Seattle* and *Hunter* themselves should be overruled because both cases require the Court to apply a different equal protection standard to a facially-neutral statute depending on whether a "minority" or "majority" racial group "benefits" from a particular law (or is harmed by a facially-neutral law modifying it) and, thus, cannot be squared with the Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Id.* at 494 (plurality opinion); *id.* at 520 (Scalia, J., concurring in judgment).

In this respect, *Seattle* and *Hunter* are analogous to *Metro Broadcasting v. FCC*, 497 U.S. 547, 564-65 (1990), in which this Court held that the level of scrutiny to be applied to federal government programs employing racial classifications depended on whether such programs were designed to benefit minority groups historically subject to discrimination (and were therefore "benign," triggering only intermediate scrutiny) or not (therefore triggering strict scrutiny). *Id.* But this Court has since rejected the *Metro Broadcasting* approach, explicitly overruling it in *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995), and has, since *Adarand*, consistently rejected any argument that the type of equal protection analysis employed when evaluating an equal protection challenge is somehow dependent on whether

"minority" or "majority" interests are at stake. *See, e.g.*, *Gratz*, 539 U.S at 270; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

Seattle and *Hunter* are also both decisions that undertook analysis of legislation's effect on ethnic or racial *groups*, rather than on individuals, and, therefore, are in conflict with this Court's more recent Equal Protection Clause cases recognizing the "basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons* not *groups*." *Adarand*, 515 U.S. at 227 (emphasis in original). For this reason as well, it is time to revisit, and overrule, *Seattle* and *Hunter*.

The Court has not had the opportunity to consider whether *Seattle* and *Hunter* remain good law in light of *Croson* and *Adarand's* command that proper equal protection analysis does not change depending on who is asking. Now that that the issue is squarely before the Court, *Seattle* and *Hunter* should suffer the same fate as *Metro Broadcasting* and be overruled.

Second, to the extent that *Seattle* and *Hunter* retain any precedential value, they are inapplicable to the case before the Court for multiple reasons. Most importantly, for the political restructuring doctrine to apply, even under its own terms, there must be a "racial classification," 458 U.S. at 485, or evidence of purposeful racial discrimination. *Seattle School Dist.*, 458 U.S. at 484-85 ("[P]urposeful discrimination is the condition that offends the Constitution. . . . Thus, when facially-neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislature in some sense was designed to accord sep-

arate treatment on the basis of racial considerations." (citations and internal quotation marks omitted)). The opposite is true in the case of the MCRI, the purpose of which is to *eliminate* racial classifications in Michigan and *prohibit* discriminatory conduct. To reach a contrary conclusion, as the Sixth Circuit did below, turns the Equal Protection Clause on its head by "protecting" the right to seek unequal treatment, rather than the right to be treated equally. *See Wilson*, 122 F.3d at 708 ("It is one thing to say individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment.")

Moreover, this case is distinguishable from *Seattle* and *Hunter* because both cases were challenges to government actions that removed a single issue from the local political body, where it had been previously addressed, and granted future authority on the narrow topic to a more remote level of government. *See, Seattle Sch. Dist.*, 458 U.S. at 531 (finding that the amendment in question "lodg[es] decision-making authority at a new and remote level of government.") Even if such transfers of decision-making authority with respect to a particular issue were, under the circumstances of *Hunter* and *Seattle*, improper, those facts bear no resemblance to Michigan's challenged action here.

In contrast with the facts of *Seattle* and *Hunter*, MCRI did not "target" any local, democratically-adopted ordinance. Rather, MCRI is a sweeping anti-discrimination amendment applying to all aspects of Michigan state government.

Nor did MCRI move decision-making regarding racial preferences from a local democratic institution to a more remote level of government. Rather, (with respect to higher education) it put the question of racial discrimination and preferences to a state-wide vote instead of leaving the issue to be determined (on a state-wide basis) in the administrative bureaucracies of the state universities. Thus, unlike in *Hunter* and *Seattle*, here there is no "local" or "less remote" democratic institution affected by the MCRI. Indeed, to the extent the state universities' administrative bureaucracies responsible for racial preference policies are democratically accountable at all, they are accountable through their Boards of Governors, who are elected (state-wide) over multiple election cycles. *BAMN*, 701 F.3d at 499-500 (Gibbons, J. dissenting). To decide an issue of state-wide applicability via state-wide referendum (as opposed to by administrative fiat) is not a restructuring of a political process at all, and, thus, *Seattle* and *Hunter* do not apply to this case.

The political restructuring doctrine is inapposite to this case for yet another reason: as this Court stated in *Seattle*, one justification for the Court's overturning a state constitutional amendment adopted by referendum was that the case "implicate[d] the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Seattle Sch. Dist.*, 458 U.S. at 486 (citing *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 28 (1973).

But such a rationale clearly has no applicability in the context of racial preferences in 2013. Proponents

of racial preferences in higher education today are not a powerless political minority requiring this Court's protection, but a powerful political coalition. Although this brief will be filed long before *amici* in support of racial preferences must file, if the *Fisher v. Univ. of Texas at Austin*, 570 U.S. ____, slip op. (2013), *Gratz*, and *Grutter* cases are any indication, supporters of racial preferences will far outnumber defenders of the MCRI. Whatever term might define proponents of racial preferences in 2013, "powerless" is not one of them. Proponents of racial preferences can certainly be expected to compete on equal footing in the political process with advocates of racial neutrality.

Finally, *Seattle* and *Hunter* cannot apply in the racial preference context because, read in conjunction with this Court's decisions in *Fisher* and *Grutter*, the decisions place respondents on the horns of an inescapable logical conflict: in order for the "political restructuring" doctrine to apply, the respondents must show that the racial preferences they defend "inure primarily to the benefit of the minority, and [are] designed for that purpose." *Seattle Sch. Dist.*, 458 U.S. at 472. But those very same racial preference policies can only be constitutional if their purpose is "to further a compelling interest in obtaining the education benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 342. If indeed racial preference programs were designed to benefit "the minority" as *Seattle* and *Hunter* require, rather than to obtain, for all students and for society as a whole, the educational benefits of diversity, the programs themselves would be unconstitutional. *See Grutter*, 539 at 333 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely

because of its race or ethnic origin.' []That would amount to outright racial balancing, which is patently unconstitutional." *Id.* (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)).

Therefore, any racial preference program in Michigan that is constitutional must not have been designed "for the benefit of the minority," but, rather, "to obtain the benefits of educational diversity" for all people, and no political restructuring claim may be made against the MCRI. Conversely, to the extent the MCRI is found to "target" a racial preference program "designed for the benefit of the minority," that affirmative action program is unconstitutional under *Grutter*.

ARGUMENT

I. *Hunter* and *Seattle*, the lynchpins of the Sixth Circuit decision, are no longer good law and should be overturned.

The decision below eschews "traditional" Equal Protection Clause analysis by relying on *Hunter* and *Seattle*, two cases in which this Court endorsed applying "strict scrutiny" to facially-neutral laws only where such laws effectively repealed a prior law or policy that inured "to the benefit of" racial minorities and moved the applicable decision-making process to a level of government that (the Court perceived) would make political victory more difficult for "the minority." *See generally*, *BAMN*, 701 F.3d at 477 (citing *Seattle Sch. Dist.*, 458 U.S. at 467; *Hunter*, 393 U.S. at 391). This proposition—the "political restructuring doctrine"—holds that a different Equal Protection Clause analysis applies to a facially-neutral statute depending on which racial group "benefits"

from a particular law (or is harmed by a facially-neutral law modifying it) and, therefore, cannot be squared with the Court's decision which held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Croson*, 488 U.S. at 494 (plurality opinion); *id.* at 520 (Scalia, J., concurring in judgment).

While *Croson* (and later *Adarand*, 515 U.S. 200), both addressed explicit racial classifications and rejected the proposition that differing modes of equal protection analysis apply to "benign" versus "invidious" discrimination, *Hunter* and *Seattle* purport to accomplish the same differential treatment (in the context of race-neutral laws) based on which race(s) (in the Court's judgment) "benefit" from, or are burdened by, both the challenged law and the law it modified. *See Seattle Sch. Dist.*, 458 U.S. at 471-72 (acknowledging the "facial neutrality" of the initiative in question, but finding a "racial focus" to the initiative because "desegregation of the public schools, like the Akron open housing ordinance, at bottom *inures primarily for the benefit of the minority* . . .") (emphasis added) and *Hunter*, 393 U.S. at 391 ("[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that *the law's impact falls on the minority. The majority needs no protection against discrimination* . . . ." (emphasis added)).

But this kind of analysis requires the Court to depart from its traditional principle that facially-neutral laws warrant strict scrutiny only if they are "motivated by a racial purpose or object," *Miller v. Johnson*, 515 U.S. 900, 913 (1995), or are, on their face, one of those "rare" laws that are "unexplainable

on grounds other than race," *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (quoting *Arlington Heights v. Metro Hous. Dev. Corp.* 429 U.S. 252, 266 (1977)). Rather, strict scrutiny is triggered based on whether, in the Court's estimation, "the minority" or "the majority" benefits from a particular law or policy. This application of a stricter or looser standard of review depending on which racial or ethnic group's interests are at stake cannot survive because it is functionally indistinguishable from the Court's reasoning (analyzing federal equal protection component of the Fifth Amendment Due Process Clause) in *Metro Broadcasting v. FCC*, 497 U.S. 547, 564-65 (1990) (holding that the question of whether federal race-conscious measures are analyzed under strict or intermediate scrutiny turns on whether such laws are "benign" with regard to the interests of minority groups) that was overruled by *Adarand*, 515 U.S. at 227. In fact, *Adarand* specifically criticized the *Metro Broadcasting* Court's contention, which would also be required by the *Hunter* and *Seattle* "political restructuring" doctrine, that the race of the group benefiting from or burdened by a particular law determines which standard is used to analyze it under the Equal Protection Clause. *See Adarand*, 515 U.S. at 227 ("Under *Metro Broadcasting*, . . . the race of the benefited group is critical to the determination of which standard of review to apply. *Metro Broadcasting* was, thus, a significant departure from much of what had come before it."). Because *Hunter* and *Seattle* suffer from the same defect—applying different equal protection standards depending on the race of group burdened or benefitted by particular law or policy—as *Metro Broadcasting*, they must also be overruled.

Hunter and *Seattle* should be overruled as well because both decisions undertake analysis of legisla-

tion's effect on ethnic or racial *groups*, rather than individuals, and therefore contradict this Court's more recent Equal Protection Clause cases recognizing the "fundamental principle of equal protection as a *personal* right." *Adarand*, 515 U.S. at 235 (emphasis added). *Compare Hunter*, 393 U.S. at 393 ("[T]he State may no more disadvantage any particular *group* by making it more difficult to enact legislation *in its behalf* than it may dilute any person's vote . . . ") (emphasis added) *and Seattle Sch. Dist.*, 458 U.S. at at 484 ("This imposes direct and undeniable burdens on minority interests. . . . [o]ne *group* cannot be subjected to a . . . . disadvantage.") (emphasis added) *with Croson*, 488 U.S. at 494 (noting that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the *individual*. The rights established are *personal* rights." (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)) (emphasis added); *Adarand*, 515 U.S. at 227 ("the Fifth and Fourteenth Amendments to the Constitution protect *persons* not *groups*") (emphasis in original); *Gratz*, 539 U.S at 270 ("It is by now well established" that any person, of any race, has the right to challenge government racial classifications under the same standard of review).

The wisdom of this Court's more recent decisions viewing equal protection as a personal right rather than a group right is highlighted by any attempt to apply *Seattle's* test and determine whether affirmative action policies that plaintiffs below sought to preserve "inure primarily to the benefit of the minority, and [are] designed for that purpose," *Seattle Sch. Dist.*, 458 U.S. at 472, and whether art. I, § 26—by requiring equal treatment—"burdens minority interests." The first hurdle to be overcome is defining the "minority." Are women, who make up a majority

of both Michigan voters and college students, a minority or a majority for purposes of the political restructuring doctrine? *See Wilson*, 122 F.3d at 705, fn.13 (finding the argument that *Hunter* and *Seattle* do not extend to gender-based laws because women are a majority of the electorate "compelling" but not reaching the issue). Similarly, are women as a group "burdened" or "benefitted" by a ban on gender preferences, given that it is likely men who are currently the "underrepresented" gender on Michigan campuses? If women are the "beneficiaries" of affirmative action policies and, therefore, "burdened" by MCRI's prohibition on gender preferences, then can over half the population be a "minority" requiring protection under *Seattle* and *Hunter*?

Moreover, who is "the" minority for purposes of the political restructuring doctrine's purported application to this case? For example, Asian-Americans are certainly traditionally viewed as *a* minority group, albeit one that has in recent history been burdened by, not a beneficiary of, racial preferences. *See, e.g.*, *Gratz*, 539 U.S. at 253-54 (describing racial and ethnic groups (other than Asian Americans) receiving preferential treatment under the challenged admissions program). By virtue of being an ethnic minority in the typical sense are Asian-Americans to be regarded as part of the "minority" racial preference policies are designed to be "racially beneficial" for? *See Seattle Sch. Dist*, 458 U.S. at 483 (noting that the state of Washington's anti-bussing initiative made "racially beneficial legislation" more difficult). Or because Asian-Americans have not been "underrepresented" minorities with the scope of Michigan's racial preference policies, are Asian-Americans, therefore, part of the "majority that needs no protection from discrimination" according to *Seattle*? *Cf. BAMN*,

701 F.3d at 510 ("Nor is it even clear which groups—men or women, this racial group or that one—[MCRI] helps or hurts, or when each group will be affected.") (Sutton, J., dissenting)

Other courts and commentators have highlighted the difficulty of reconciling *Seattle* and *Hunter* with current Equal Protection Clause jurisprudence and requested that this Court provide clarification. *Wilson*, 12 F.3d at 705 n.13 (describing the conflict between *Seattle and Hunter's* political restructuring doctrine and the *Adarand* line of case recognizing equal protection as a personal right as "seemingly irreconcilable"); *Coral Construction. Inc.*, 50 Cal. 4th at 341 (describing "the difficulty of squaring the 'political structure doctrine' with modern equal protection jurisprudence" and stating that it would be "helpful" for this Court to "clarify matters by directly addressing the continued viability of the 'political structure doctrine' in the appropriate case") (Corrigan, J, concurring); *BAMN*, 701 F.3d at 513 (collecting sources critical of the political restructuring doctrine as inconsistent with accepted equal protection principles) (Griffin, J, dissenting). This Court should provide that clarification by overruling *Seattle* and *Hunter*.

II. The Michigan Civil Rights Initiative is Distinguishable from the Challenged Laws in *Seattle* and *Hunter*.

Assuming the political restructuring doctrine of *Seattle* and *Hunter* is still good law, this case is easily distinguishable from both *Seattle* and *Hunter* and the doctrine has no applicability here.

A. There is no discriminatory intent, "racial classification" or "racial focus" to the MCRI.

Even if the political restructuring theory is itself valid, a challenged law can only violate the Equal Protection Clause when there is a "racial classification," 458 U.S. at 485, or evidence of purposeful racial discrimination. *Seattle Sch. Dist.*, 458 U.S. at 484-85 ("[P]urposeful discrimination is the condition that offends the Constitution. . . . Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislature in some sense was designed to accord separate treatment on the basis of racial considerations.") (citations and internal quotation marks omitted). But the whole purpose of the MCRI is to *remove* any "racial classifications" or discrimination from governmental decision-making in Michigan, and, thus, the political restructuring doctrine is inapplicable.

Amicus XIV Foundation has a unique perspective to comment on motivations behind the MCRI because its CEO, Jennifer Gratz, was the Executive Director of the MCRI (the organization that undertook the ballot initiative that led to the amendment of the Michigan Constitution), as well as the plaintiff in *Gratz v. Bollinger* 539 U.S. 244 (2003). As this Court found, Gratz herself was the *victim* of the State of Michigan's unconstitutional race preferences. *Id.* at 539 U.S. at 274 (finding that the admissions system used to consider Ms. Gratz's application to the University of Michigan violated the Equal Protection Clause). Thus, it makes sense that she and other interested parties sought to eliminate the practice of racial classification by Michigan in hiring, contract-

ing and education. It is hard to imagine someone less likely to possess discriminatory intent than a victim of discrimination who sought only equal treatment under the law, persevered all the way to this Court to achieve it, and then sought to eliminate, for all citizens of her state, the presumptively unconstitutional practice that she challenged. See *Parents Involved*, 551 U.S. at 720 (2007) (race-conscious admissions plans are presumptively unconstitutional except when necessary to remedy past discrimination).

And yet for the political restructuring doctrine to be applicable to the MCRI, the elimination of racial and gender classifications must either itself be declared a "racial classification"—which makes no sense—or this Court must find that enacting MCRI was in some sense "purposeful discrimination"—which requires a contortion of the MCRI itself.

While the text of the MCRI itself eliminates any question about its discriminatory intent, the record below bolsters the argument. The district court recognized that Ms. Gratz and other proponents of the MCRI offered nondiscriminatory purposes for its adoption and, thus, the district court could not say "that the only purpose of [§ 26] is to discriminate against minorities." *BAMN*, 701 F.3d at 504 (Gibbons, J. dissenting). This is not a difficult conclusion to reach with respect to an amendment *prohibiting* racial classifications. The Sixth Circuit's reasoning—that the political restructuring doctrine applies because MCRI's mandate of equal treatment itself has a "racial focus," which in turn triggers application of *Seattle* and *Hunter*—would make nearly every broad civil rights statute subject to a political restructuring attack, because nearly all civil rights statutes require equal treatment. *See, e.g.*, Fair Housing Act

of 1968, 42 U.S.C. § 3604(b) (prohibiting discrimination in housing transactions "because of race, color, religion, sex, familial status, or national origin") and Equal Credit Act, Pub. L. 94-239, 90 Stat. 251 (1974). Thus all broad civil rights statutes impede the ability of *any* particular racial group to seek preferential treatment from a lower level of government. The reason such statutes are not subject to political structure challenges is because, as the Ninth Circuit recognized, "[i]t is one thing to say individuals have equal protection rights against impediments to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment on its own terms." *Wilson*, 122 F.3d at 708.

B. MCRI is a broad antidiscrimination amendment that does not target a particular local law and thus does not restructure a political process.

The instant case is distinguishable from both *Hunter* and *Seattle* because both cases were challenges to state actions that removed a single issue (in *Hunter*, housing anti-discrimination policy, and in *Seattle*, bussing for purposes of racial balance) from the local political structure (in *Hunter*, a City Council, in *Seattle*, a local school board), where it had been previously addressed, and granted future authority on the narrow topic to a more remote level of government. Even if such transfers of decision-making authority with respect to a particular issue were, under the circumstances of *Hunter* and *Seattle*, improper, those facts bear no resemblance to the Michigan's challenged action here.

The MCRI does not address only racial preferences in higher education. Rather, it is a sweeping prohibition against racial and gender discrimination in public contracting, public education, and public employment – in short, precisely the type of legislation one would expect to be passed at the state level and a far cry from the challenged actions in *Seattle* and *Hunter*. *See* Mich. Const. art 1, § 26 (commanding that the state, and its institutions of higher education, "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.") The fact that the plaintiffs below, proponents of racial preferences in higher education, did not challenge the bulk of the MCRI, does not transform the amendment from the sweeping prohibition of discrimination in state government that it is into the narrow removal of a controversial topic from local control that occurred in *Seattle* and *Hunter*.

Perhaps more importantly, the passage of the MCRI did not "restructure" Michigan's lawmaking structure or impair the ability of minority interests by reallocating decision-making authority from a local legislative body to a "more complex governmental structure," *Seattle* 458 U.S. at 477. In contrast with *Seattle* and *Hunter*, the racial preference policy that plaintiffs below seek to preserve here was not a democratically-adopted ordinance or law specifically tailored to a particular locality, but was crafted within the administrative bowels of the state-wide university systems. *See BAMN*, 701 F.3d at 499 (Gibbons, J., dissenting). As Judge Gibbons pointed out in dissent below, "the people of Michigan have not restructured the state's lawmaking process in the

manner prohibited by *Seattle* and *Hunter*. Instead, their vote removed admissions policy from the hands of decision-makers who are unelected and unaccountable . . . and placed it squarely in an electoral process." *Id.*

Whatever *Seattle* and *Hunter* stand for today, those decisions cannot stand for the proposition that the administrative apparatus of one state-wide political body (the university systems, whose Board of Governors run in state-wide elections) cannot have its policies altered by a state-wide voter referendum adopting a broad policy that contradicts its preferred policy.

C. Proponents of racial preferences are not a politically powerless group similar to the plaintiffs in *Seattle* and *Hunter*.

In addition, *Seattle* and *Hunter* are distinguishable to the extent the Court's rulings in those cases sought to protect a political and racial minority (black families in Seattle and Akron) in a particular locality from hostile political majorities seeking to place political hurdles in place to thwart a popularly-adopted local law passed for the benefit of that minority group. As this Court stated in *Seattle*, placing unusual burdens on racial groups to enact legislation "implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Seattle Sch. Dist.*, 458 U.S. at 486 (citing *San Antonio Independent School District*, 411 U.S. at 28.

Even presuming *Seattle* is still good law, it strains credulity to cast proponents of racial preferences in higher education today as a powerless political minority requiring this Court's protection and as the political equivalent of black families seeking integration through bussing in Seattle in 1982 or black families seeking the benefit of anti-discrimination housing ordinances in Akron in 1969. Racial preference policies in higher education today are hardly without broad political support beyond a particular locality or racial group, especially among political, academic, and business elites. Whatever terms might define proponents of racial preferences in 2013, "powerless" is not among them. Proponents of racial preferences can certainly be expected to compete on equal footing in the political process with advocates of racial neutrality.

When this Court last reviewed the University of Michigan's racial preference policies, for example, the Governor of Michigan, General Motors Corporation, a consortium of other Fortune 500 companies, the American Bar Association, United States Senators, Presidents and Deans of virtually every prominent University and College in the nation, retired military leaders, and numerous other political, business and cultural leaders all filed *amicus* briefs supporting Michigan's policy of racial preferences in higher education. *See Grutter*, 539 U.S. at 333-34 (citing briefs filed by various *amici* in support of continued use of racial preferences). This support has not waned. This past term, 73 *amici* filed briefs in support of racial preferences in *Fisher v. Univ. of Texas at Austin*, 570 U.S., slip op. at __ (2013) (Thomas, J, concurring). Moreover, the Michigan Civil Rights Initiative itself was opposed by both the Republican and Democratic candidates for Governor

running at the time it passed, as well as a litany of powerful individuals and community groups.[4]

The MCRI did, however, gather impressive support from the citizens of Michigan, who apparently saw value in a broad pronouncement of non-discrimination by the state government even though many of their state political, business, and academic leaders disagreed with the proposed constitutional amendment. It would be strange indeed if this Court, relying on *Hunter* and *Seattle*, invalidated a state constitutional ban on discrimination because it found the array of CEOs, university presidents, bar associations, and federal and state leaders lined up in

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[4] A press release from "One United Michigan," a group opposed to MCRI, listed the following people among its co-chairs for its campaign opposing the MCRI: AT&T Michigan President Gail Torreano; Teamsters General President James P. Hoffa; Walbridge Aldinger Chairman and CEO John Rakolta Jr.; DTE Energy CEO and Chairman Tony Earley; Blue Cross-Blue Shield of Michigan CEO-Designee Daniel Loepp; United Auto Workers President Ron Gettelfinger; Bing Steel Chairman & CEO Dave Bing; Shirley Stancato, President & CEO of New Detroit; Doug Rothwell, President and CEO of Detroit Renaissance; Henry Ford Health System President and CEO Nancy Schlichting; Strategic Staffing Solutions President, CEO and Founder Cynthia Pasky; Tom Gottschalk, Executive Vice President, Public Policy and General Counsel of General Motors Corporation; Tim O'Brien, Deputy Chief of Staff, Ford Motor Company; Frank Fountain, Senior Vice President, External Affairs/Public Policy, DaimlerChrysler Corporation; Archbishop of Detroit and Chairman of the Michigan Catholic Conference Adam Cardinal Maida; and Dennis Archer, Chairman of the Board of Dickinson Wright. One United Michigan, *Coalition Supporting Equal Opportunity Affirmative Action Continues to Grow* (Press Release, April 6, 2006) *available at* http://www.prnewswire.com/news-releases/coalition-supporting-equal-opportunity-affirmative-action-programs-continues-to-grow-56058502.html (last visited June 28, 2013).

support of racial preferences in higher education insufficiently "powerful" to compete politically with a grass-roots non-discrimination movement.

D. Because racial preferences policies in higher education are constitutional only when their benefits flow to all people and if a racial preference program was not designed for the purpose of benefitting "the minority," the "political restructuring" doctrine cannot apply.

Finally, because "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause," *Grutter*, 539 U.S. at 327, this case is distinguishable from *Seattle* and *Hunter* for still one more reason: the racial preference programs plaintiffs below sought to preserve cannot be characterized as programs that "inure primarily to the benefit of the minority, and [are] designed for that purpose." *Seattle*, 458 U.S. at 472. Nor can the MCRI be characterized as a facially-neutral law for which "the reality is that the law's impact falls on the minority." *Hunter*, 393 U.S. at 391. Indeed, it is clear from this Court's decision in *Grutter* that it is racial preference's perceived benefits to all students, and indeed to society itself, that is the key reason these programs are, in some circumstances, constitutional at all. *Grutter* 539 at 333 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' That would amount to outright racial balancing, which is patently unconstitutional." *Id.* (quoting *Bakke*, 438 U.S., at 307 (opinion of Powell, J.)).

The Court in *Grutter* relied extensively (if not exclusively) on the benefits of racial preferences beyond those to any particular minority group in finding that the benefits that flow from educational diversity were a compelling state interest. "Access to legal education (and, thus, the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that *all members* of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America." *Grutter* at 332 (emphasis added). Given that racial preferences remain constitutional in limited circumstances only because their purpose is not to benefit a particular minority group, but to provide society at large with "the benefits that flow from educational diversity" *id.* at 343, the "political restructuring" analysis undertaken by the Sixth Circuit is not appropriate.

As the Sixth Circuit acknowledged, in order to trigger "political restructuring" analysis rather than "traditional" Equal Protection analysis, the challenged enactment must "ha[ve] a racial focus, targeting a policy or program that 'inured primarily to the benefit of the minority.'" *BAMN*, 701 F.3d at 477 (quoting *Seattle*, 458 U.S. at 467). But, notwithstanding the Sixth Circuit's contrary conclusion, this standard could not be met here, because if it were, the racial preference programs at Michigan's institutions of higher education would be unconstitutional.

At bottom, proponents of racial preferences cannot have it both ways. The practice of using racial preferences in higher education is constitutional on a limited basis precisely because (its proponents argued successfully to this Court in *Grutter)* its

purpose was not merely to benefit "the minority" but to provide all students, and society itself, the benefits of "educational diversity." Today's proponents of racial preferences (many of whom argued for adoption of the diversity rationale in *Grutter*) now, for the purpose of shoe-horning their attack on a broad nondiscrimination amendment into the "political restructuring" doctrine established by *Seattle* and *Hunter*, claim that racial preference programs "inure primarily for the benefit of minorities" – a claim that, if true, likely would have been fatal to the challenged racial preference program in *Grutter*. But because racial preferences are constitutional only when *not* designed primarily to benefit "the minority," the "political restructuring" doctrine of *Seattle* and *Hunter*, to the extent it remains viable at all, cannot be triggered here.

CONCLUSION

Because the decision below relies on the continued viability of *Seattle* and *Hunter*, which should be overruled, and because, in the alternative, the "political restructuring" doctrine is inapplicable to a challenge to the MCRI, the Sixth Court should be reversed.

Respectfully submitted,

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